RONIKA DEVI v STATE (AAU0008 of 2009)

SUPREME COURT — CRIMINAL JURISDICTION

GATES P, HETTIGE and MARSHALL JJ

9 November 2010, 30 January 2012

Criminal law — appeals — appeal against conviction and sentence — murder conviction — manslaughter — infanticide — legal framework — psychiatric evidence — suicidal depression — causes of depression — sentencing range — diminished responsibility — errors in summing up — defective trial — Criminal Procedure Code ss 156, 157, 171, 192A, 299 — Criminal Procedure Decree s 162(1)(a) — Criminal Procedure Ordinance ss 246, 306 — Crimes Decree s 243 — Homicide Act s 2 — Infanticide Act 1922 (UK) — Infanticide Act 1938 (UK) ss 1(1), (2).

The appellant drowned her two daughters, aged 58 days and one year and eight months, and attempted suicide. The information contained two counts of murder, and she pleaded not guilty to murder and guilty to manslaughter on both counts. The opinion of the assessors was that she was guilty of murder on both counts. She was sentenced to life imprisonment on both counts, with a minimum term of 20 years' imprisonment for each count of murder. The appellant sought leave to appeal against conviction and sentence.

Held –

(1) If the correct legal framework had been used and the evidence relevant to infanticide investigated, the tribunal of fact's only rational decision upon the count of murdering her recently born daughter would be that the appellant was guilty of infanticide rather than murder. In that case, she would be sentenced on the basis of manslaughter in respect of that count.

(2) The intention to kill and the act of murder is the starting point for the real enquiry in a 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. If there is clinical depression triggered by the causes set out in the statute, and it results in the killing of the recently born child, it is infanticide.

(3) The evidence relevant to abusive behaviour, suicidal depression relevant to sentence and possibly relevant to conviction for manslaughter in place of murder should have been before the assessors in respect of the killing of the older daughter. Also the summing up should have properly dealt with the suicidal depression in relation to 'disease of the mind'.

(4) There is no evidence on the record to show that the judge had convicted the appellant by reducing his decision to convict into writing and orally delivering this conviction in Court.

Leave to appeal against conviction and sentence granted. Convictions and sentences set aside.

Case referred to

Byrne [1960] 2 QB 396; *Maria Asumita Babakobau v The State* Crim App No AAU0005 of 2001S (Judgment 22nd November 2001); *M'Naghten* [1843] 10 Cl and F 200; *Seers* (1984) 79 Crim App R 261; *Steven Francis Chambers* [1983] 5 Crim App R (S); *The State v Litia Leba* , High Court Criminal Case No. HAC 21/03, considered.

Emmanuel Joseph v The King [1948] AC 215; *Rose v The Queen* [1961] AC 496, cited.

The State v Lebobo [2004] FJHC 518, distinguished.

S. Vaniqi for the Appellant.

S. Qica for the Respondent.

[1] William Marshall JA. The events took place at the Rewa river at Nausori on the evening of 21st January 2008. Mrs Ronika Devi who was born on 20th May 1985 and was about 22 years old at the time of the incident drowned her unnamed daughter born on 24th November 2007 and aged 58 days on 21st January 2008 and also her daughter Tanika born on 4th June 2006 and aged approximately 1 year and 8 ½ months on 21st January 2008 and then attempted suicide herself. A trial before Justice Mataitoga and assessors in the High Court at Suva commenced on 9th February 2009. The information contained two counts of murder. When arraigned she pleaded *"not guilty"* to murder and *"guilty"* to manslaughter in respect of both counts. On 20th February 2009 the opinion of the assessors was that she was guilty of murder in both counts. She was sentenced to life imprisonment on both counts and Justice Mataitoga fixed a minimum term at 20 years imprisonment for each count of murder.

[2] The DPP under the common law is entitled to bring any charges applicable to the disclosed facts and the High Court must proceed to trial on the information. But where the law provides that the tribunal of fact may convict of an alternative offence there are consequences for High Court trial by a Justice of the High Court assisted by the opinion of assessors. First of all, the summing up must, where it arises on the evidence in the trial, correctly leave the issue of the alternative offence to the assessors. Secondly where the Judge of the High Court convicts where the assessors opinion was *"not guilty"* the reasons for conviction must self direct correctly on fact and law. A question arises as to what happens when the opinions of the assessors agree with that of the judge who convicts, and the matter of the alternative verdict is not dealt with correctly in the summing up or in the judgment on conviction.

[3] Another issue may arise on the statutory requirement for the High Court to convict before proceeding to sentence.

[4] A third issue raised is the provenance in Fiji law of diminished responsibility as applied to murder and infanticide both in respect of conviction and sentence.

The Evidence of 21st January 2007

[5] In her statement under caution of 22nd January 2008 Mrs Ronika Devi told of the immediate events leading to an intention of killing herself and her daughters.

"Today you made statement to police in which you said that on Sunday, 20/01/2008 you had some argument with your husband, can you tell me what else happened on this day?

At about 10.00 am my husband went to his cousin sister's house and he returned home at about 10.00 pm and was drunk. He asked what I had cooked and I told him that I had cooked goat meat. He does not eat goat meat and he started swearing at me. I told him there was nothing else to cook that why I have cooked goat meat.

What happened then?

He did not eat and went off to bed.

Did you two have any other argument on Monday, 21/01/2008?

No.

Can you tell me what had happened on Monday, 21/01/2008?

At about 9.00 am on Monday, 21/01/2008 my husband told me that he was going to Valelevu to get the diaper for our daughter, myself and my two daughters were at home.

What happened then?

It was about 2.00pm and my husband did not return home with the diaper. I then took my two daughters and left for Suva City.

When I left home I had made up my mind that I will go and drown myself together with my two daughters in Rewa River".

[6] Later in the statement she described killing her two daughters.

What was the time like when you left for Rewa River?

I did not have a watch but it was about 7.00 pm

What did you do after you had left for the river?

I was carrying my younger daughter in one arm and with the other hand I held the hand of the elder daughter. I took both of them and walked straight into the water.

What place in the water did you go to?

Straight down the bus station where there are sheds for resting. Today I have shown this place to police.

What did you do when you arrived in the river?

I dropped the younger daughter in the water and I walked into the deeper water with my elder daughter.

What did you do then?

I jumped into the deep water with my elder daughter. I was in the water for a while and then I came out. I had left my both daughters in the water.

In how deep water did you drop your younger daughter?

Knee deep water.

In how deep water did you leave your elder daughter?

Chest deep water.

After you left both your daughters in the water and came out, do you know what had happened to your daughters?

I had pressed my elder daughter in the water for about three minutes, when I knew that she was dead I then left her and came out of the water.

How did you come to know that both your daughters were dead?

When I could not hear anything from them I knew they were dead....

... Why did you drown and kill your two daughters?

Every time my husband use to create trouble with me and tell me to go away from home. He use to say that I had given birth to problems. When I could not bear the sufferings, I then decided to die with my two daughters.

Why was your husband treating you and your children like this?

I think he did not want me".

[7] Mrs Ronika Devi gave sworn evidence at her trial on 13th February 2009. About the drowning and an attempt to commit suicide she said:

"On 21/1/08 I told him the day before that there were no diapers. He did not say anything. He did not talk to me. Before he left the house he did not say anything – it was in the morning. I was thinking that I will leave the house and not return. I cried a lot. I had the children with me. I thought a lot about what I should do. I waited for him for long time. He did not come back. At 2.00 pm I took my two children and went to Suva Bus Station. I sat there with my two children and thought whether I should return or not. I then took the children and went to Nausori. …

… We went to Nausori Bus Station. I sat there and thought about a lot of things – whether I should go back home or not. My mind was really bad – tension in my mind.

We got there it was day time. After a long time – when it became dark, I took both kids to the river. I just left the younger child in the water – then I moved more and left Tanisa – chest level. I left Tanisa there. I also tried to drown myself. My mind was not working. I then thought what I should do or not do. My mind changes. How did it change – I can't recall.

I came out by pulling on trees. I was standing there thinking what to do. I was the time. I could not recall more. I got into a taxi and went to my brother's place.

At the time of placing the 2 children in the water – I cannot remember what I was doing. …

… I cannot get them back.

In cross-examination she said:

"My husband abused me. I was disturbed. Husband always late. Mistreated me a lot. Husband did not assist at home. Result of mistreatment I was not thinking right. Husband was late coming back from buying diapers. I was thinking – why he is mistreating me all the time.

[I] left home at 2.00 pm on 21/1/08 – At Suva bus stand we sat there for about 1 hour. [I was] thinking of what [I was] going to do. I was reasoning things in my mind. I knew the bus I took to Nausori bus station.

At Nausori Bus station, I sat there for 1 hour. I was thinking about what I am going to do. The right or the wrong thing. I was going to do the right thing. When it was dark I took the children towards the Rewa River. In knee deep waters I dropped the (younger) daughter and then I moved to chest deep waters where I dropped Tanisa. The younger daughter – 2 months old. Tanisa was 1 year 9 months.

My daughters did not know how to swim. I knew that when I left them in the water they would drown and die. I had wanted the children to die. I waited until dark because I did not want anyone to see".

In re-examination she said:

"When I put the 2 children in the water I had no evil intention. I thought I was doing the right thing. I did tell the police I also tried to drown myself".

[8] With respect to her abusive arranged marriage she said:

"I am 24 years old. Born in Labasa. Father is Bijan Chand – Mother – Prakash. Two brothers – Vikash and Nitin. Class 7 standard of education. Married in 2004 in Labasa. Daughter Tanisa born in Suva. Lived in Narere and moved to Khalsa Road. Tanisa born in 2006. Younger daughter born in 2007.

At Khalsa Road, my husband, myself and husband's brother (Sanjay) lived there. At that time we had no children. Sanjay lived with us for 6 months. After daughter's born we were the only one in the house.

My marriage was not good. We fight most of the time. He did not tell me what was the problem. First time he beat me up was for money … I was hurt in my back and the chest. I do not recall the number but many times. Beat me up because of the money that was lost. Beat me up for different (reasons). I felt bad about it. I was suffering and I cannot tell anyone about it.

Dharmendra hardly stay at home, never he comes home. He visits other people after dinner and bath. I do the house work – cooking, cleaning and looking after the children. He does not help at all at home. I feel bad about it. I asked him many times. He told me he did not like staying home. Gave me no reason. My marriage was arranged. He goes out most of the time. During weekend he used to go out. We went out too. I take the 2 children to husband's relative. In the weekend he would take me there. Our fights was physical. I would ask him about something and he would not answer. When I ask where he went to, he would beat me up. He would hit me with a wooden handle of rake.

It started in Narere before the two children were born. The beating did not stop after birth of children. He would swear at me – bitch! Mother fucker! I just keep quiet. He told me he did not want the daughters – I did not like it.

After Tanisa was born, I took a saree with me to hang myself at Khalsa Road. Dharmendra saw me and told me not to do this. I stood for a while and thought about it. I thought of my daughter. I tried again at the time of death of grandmother. He came back and I told him not to go back at 7.00 pm. I want him home. Only Tanisa was born then. After that he started to fight with me. Tanisa wanted to go with her dad. He did not ask me to go with him. I felt bad.

After second daughter was born – the beating continued. He now punches me and still live at home. I never went to the doctor. I did not seek help. This was a domestic problem.

Vikash came to our home because of the fights. He came three times because of the fights. First time Vikash came, my husband swore at him (Vikash) and said take your sister away. My husband told Vikash to come. I cannot remember. My neighbour was also present. It was 2005 at Khalsa Road. Vikash told me to go with him. Neighbours spoke to us to settle matter within – not to take it outside. I cannot recall what Dharmendra did. My mind was bad. At my place I am right.

The second time Vikash came it was a long time after the first. I cannot recall the year. He came to find out why Dharmendra and I were fighting all the time. I called Vikash to come – from neighbours. I wanted Vikash to take me away. I was pregnant and husband was beating me – pregnant for first child. I was not feeling good. I was upset. Vikash explain that we should stay together nicely. I stayed on with Dharmendra. The third time Vikash came – I cannot recall. I thought I was married to the wrong man. He never stay with me in good way. Dharmendra bought the food – he did the shopping".

[9] In respect of the events leading up to her leaving home with her daughters at 2.00 pm on Monday 21st January 2008 she said:

"Dharmendra went to relatives for a wedding. He came home at 11.00pm I got angry when he arrived home – why he was away a long time. I told him not worried about your children. We were quiet. He drinks alcohol sometime. He come home drunk sometime. He would fight with me for nothing. We would verbal each other. He fights with me to sleep with me. I cannot recall all the facts of fights.

Dharmendra told me the food he buys, I was to cook but not eat. I cook for him and not for me. I did not eat anything. I drink water and whatever is there.

On 20/1/08 I cooked goat curry. My grandmother sent it over. My family do not send me food. First time my grandmother send goat meat. Dharmendra does not eat goat meat. I cooked goat meat because it's the one that is there. When Dharmendra came home I told him that I have cooked goat meat. He was quiet for a while and then started quarrelling with me that I was stubborn. He was swearing at me loudly. More swear words – since that time I was (menstruating) I was ashamed of myself.

On that day 20/1/08 he put Tanisa outside in verandah and closed the door. Tanisa cried. I was inside. I opened the door and brought Tanisa inside. He told me that I should go somewhere and die. He said he will cut me.

(My husband) tore the marriage certificate, which was on the bed. He did not discuss the marriage certificate. We now have no relationship and all is over. He said that when he was angry. I felt bad about it, that he is always chasing me from the house. I believed what he said".

Psychiatric Evidence

[10] On 23rd January 2008, two days after these tragic events, Ronika Devi was referred to Dr Korrai for medication examination. His professional opinion of 23rd January 2008 was: *"This lady needs full psychiatric treatment"*.

[11] Ronika Devi was not referred to Saint Giles Hospital until 7th February 2008. There she was seen and initially assessed after a lengthy interview by the Medical Superintendent Dr Y. Narayan. With Dr Narayan was another psychiatrist Dr P. Biukoto. Dr Biukoto's written report dated 23rd February 2008 was admitted into evidence by consent by reason of s 192A of the Criminal Procedure Code Cap 21. It was *"agreed fact"* number 12 of a document headed "Amended Agreed Facts" dated 6th February 2009 and signed by Prosecuting Counsel, Defence Counsel and Justice Mataitoga. This was controversial. Agreed facts are about *"agreed facts"* and not about admitting written statements into evidence. In a trial in which the only factual issue was the mental state on 21st January 2008 of Ronika Devi, the expert psychiatric report should have been the subject of oral evidence and clarification by way of cross-examination.

[12] I set out the written assessment of Dr Peni M. Biukoto of 23 February 2008. Every word is important:

[13]

"Memorandum	
Date:	*23 February 2008*
To:	*The Officer in Charge, Magistrate Court, Nausori*
From:	*The Acting Medical Superintendent, Saint Giles Hospital, Suva*
***Re**:*	***Nausori Criminal Case No. 33/08 Statev Ronika Devi***

The Magistrate, Nausori referred the above named to Saint Giles Hospital for psychiatry assessment.

The sources of information for this report were (1) Police Summary of Facts (2) the Charge Sheet, (3) Vikash Praneel Chand, brother of Ronika Devi, and (4) Ms Ronika Devi, through interviews and observation.

According to Ms Ronika Devi, she experienced verbal, and physical abuse throughout the marriage. The verbal abuse involved derogatory comments, vulgarity, criticisms on her and her family, and exhortations for her to end her life. She complained to her parents, and finally advised to stay within the relationship. The physical abuse involved punches, kicks, and marital rape.

According to Ronika Devi, she began having thoughts of killing herself for the past two years. The thoughts were provoked by the alleged assaults of her husband and may last several days.

According to Ronika Devi, she has attempted suicide by hanging twice in the past two years.

On the night before the alleged offence, her husband tore the marriage certificate after abusing her.

On the day of the alleged offence, according to Ronika, she wanted to die. She thought her daughters would suffer after her death, so she took them with her. According to her, she did not want another to look after her children. She travelled to Suva by bus and then to Nausori. She planned to die by drowning, and she thought of Nausori. She also chose Nausori as a good place to avoid detection by her husband. She waited until it was dark, then she led her two children into the river. She chose the time, as according to her, in the daytime people would save her and the children. She placed the younger child in shallow water, and then led the older child by the hand into deeper water. According to her, she knew that the children were not alive. She claimed she also entered the water but returned to dry ground. After committing the alleged offence, she travelled to the residence of her brother, Vikash Chand. She said she was not thinking clearly.

On the day of the alleged offence, according to Vikash Chand, Ronika arrived in the early hours of the morning. She did not appear agitated or tearful or sad. Her clothes appeared dry, and only her hair appeared disheveled. She mentioned, on his enquires, that the children were with her husband.

According to Vikash Chand, Ronika mentioned to him she wanted to kill herself in 2007. She did not mention it to him again. After the birth of her second child, she spent two weeks recuperating at his home. He noticed that she was 'less jovial' and 'more quiet' around the family. She had refused to return to her husband, but eventually returned to him.

Ronika Devi does not have a personal history of psychiatric disorder.

The interviews in hospital were conducted in the Hindi language.

On mental state examination, she appeared alert. She was orientated to time, place and person. She appeared relax. Her facial expression appeared happy on greeting, but

showed sadness when asked about her feelings on the children. She expressed her mood as "concerned". She did not show agitated behaviour or tearfulness. She cooperated with the interviewer. Her speech was coherent and relevant. There was no delay with her responses. She denied having feelings of control by outside forces. She denied experiences suggestive of hallucinations and delusions. She did not show overt cognitive impairment. She did not express suicidal ideas or plans, on enquiries.

According to the ward report, she did not show odd or bizarre behaviour. She remained coherent and relevant in her interactions.

I cannot rule out the presence of depression, either during her marriage as a response to her marital conflicts, or after the birth of her second child. I need further information from significant others, such as her mother. The presence of depression and its severity can be significant especially with the expression of suicidal ideas. However, at present she does not show signs and symptoms of a psychiatric disorder.

In my opinion, it is likely she was aware of the nature and quality of her alleged offence, and its wrongness according to the law and community. This opinion is based on the following findings: (1) her choice of location (river town) (2) her choice of times (night time to avoid detection) (3) her attempt to conceal the alleged offence (by saying the children were with their father).

In my opinion, she can participate in court proceedings with the appropriate legal advice and translations into Hindi.

It is possible that the alleged abuse in the marriage associated with difficulties in leaving the marriage created in her a sense of hopelessness and despair that led to the alleged act.

Studies of mothers who kill their children indicate a strong association between the acts of the mothers and their traumatic psychosocial situation. Studies also showed that mothers who kill their children might do so out of a sense of altruism (i.e. they are saving the child from suffering in their absence) and these mothers usually show suicidal thoughts and suicidal behaviours.

At present, she does not need psychiatric treatment in the hospital. However, she can benefit from counselling.

Yours sincerely,
(Signed)
Dr Peni Biukoto
For Acting Medical Superintendent."

[13] Dr Narayan, who is senior to Dr Peni Biukoto gave expert evidence on behalf of Ronika Devi on 13th February 2009. This Court has to do its best with a typewritten version of the learned judge's notes of that evidence. Such notes are usually a summary. This matters where a few words may be of critical importance. The Record at page 188 reads:

"DW2 – Dr Narayan – Doctor/Specialist Psychiatric – Medicine
[Sworn on Bible in Ramayan]

I work at St Giles Hospital. A Psychiatric – assess/diagnose and treat people with mental disease. 1994 – Diploma Masters in 1998. I have been a Psychiatric since 1986 at St Giles. I am the Medical Superintendent at St Giles and Consultant Psychiatrist. 7/2/08 I was at work. I admitted Ronika Devi to St Giles Hospital. She was admitted for two weeks to be evaluated. I was the admitting doctor.

Accused was quiet and co-operative. Slowness to respond. Gave relevant expressed extreme guilt and sadness. She expressed suicidal thoughts. She was admitted and placed under close supervision. Accused was discharged on 25/2/08. She was under close observation.

Witness shown Exhibit 2 – I agree this was report prepared by Dr Biukoto on 25/2/08. The notes of the medical notes were taken contemporaneously. I have read Dr Biukoto's report. Report records that Accused relationship with husband was an abusive one. I cannot rule out depression after, no signs of psychiatric disorder. Depression is to do

with mood change. There were symptoms of depression accompanied with suicidal thoughts. It is highly possible that Accused was depressed. Suicidal thoughts not normal. Suicidal is sometimes as way out. Mood – Disorder which is depression vary and change – it can be heightened and therefore suicidal. The severity of depression may change. A depressed person has difficulty in making decision.

I saw Accused two weeks after the incident. She did show symptoms of depression.

Cross-Examination

The report does not say that Accused is not suffering from depression. Depression is about mood disorders. You can have depression without psychiatric disorders.

She had not lost logistic function – she knew her surroundings and that she knew the extent of doing.

Re-Examination

In her situation she did what she did because it was the only way to get out."

The Legal Framework Applicable for Trials Alleging Murder or Manslaughter or Infanticide in Fiji

[14] Although diminished responsibility in respect of persons accused of homicide, was established by the common law of Scotland by the nineteenth century it was not brought into English Law until 1957. It was brought in to English law by a statute the Homicide Act 1957. Section 2 reads:

"(1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

(3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it".

[15] It is clear from the leading case of *R v Byrne* [1960] 2 QB 396 that this is much wider than 'defect of reason' within the M'Naghten Rules (see paragraph 30 below). In the words of Lord Parker CJ (at p.403), abnormality of mind means:

"... a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise willpower to control physical acts in accordance with that rational judgment".

[16] In *Rose v R* [1961] AC 496 Lord Tucker for the Privy Council said: *"There may be causes in which the abnormality of mind relied upon cannot readily be related to any of the generally recognised types of insanity".*

This was cited in the later case of *R v Seers* (1984) 79 Cr App Rep 261 where the accused was clinically depressed by the breakup of his marriage and went to the hostel where his wife and children were residing, and killed his wife by stabbing. His defence on the ground of diminished responsibility was supported by the prison medical officer, Dr Rahman, whose evidence was that the appellant

was suffering from chronic reactive depression that amounted to a mental illness properly characterised as an abnormality of mind within the meaning of diminished responsibility.

At trial Dr Rahman was asked about a test of *"partial or borderline insanity"* in respect of reactive depression and said:

> *"(Q) There are, of course, certain recognised forms of mental illness like schizophrenia? (A) That is insanity. (Q) So far as reactive depression is concerned, how is that termed by the psychiatrist? (A) It is not described as insanity. (Q) Insanity, how is it described? (A) It is a mental state, a psychosis"*.

The trial judge had made a number of confusing directions to the jury including inviting them to consider whether Seers was partially insane or on the borderline of insanity.

Said Griffiths L J for the Court at pages 264 and 265:

> *"However, we do not think that in a case such as this dealing with a depressive illness it is appropriate to direct a jury solely in terms of partial or borderline insanity. Indeed, we doubt if it is a helpful test at all in such a case....*
>
> *… We think a jury would be likely to view the matter in the same way, and however seriously depressed they might have thought this appellant, with whatever effect that might have had on his mental state, they would not consider him to be partially insane or on the borderline of insanity. This being so they were bound on the judge's direction to find that the appellant had not made out the defence of diminished responsibility.*
>
> *There was in the view of this Court evidence in this case that would have justified a jury in returning a verdict of manslaughter on grounds of diminished responsibility if directed in accordance with Byrne (supra) but leaving out what we consider on the evidence in this case to be the inappropriate test of partial or borderline insanity. For the reasons we have given we are satisfied that the summing-up contained a material misdirection on the issue of diminished responsibility, and that the appeal should be allowed and a conviction of manslaughter substituted for that of murder"*.

Instead of life imprisonment Seers was sentenced to 8 years imprisonment.

[17] But in a restricted situation English law had brought in a statutory partial defence of diminished responsibility in respect of homicides long before 1957. It is relevant to the present case. Infanticide was first enacted in England by the Infanticide Act of 1922. It was replaced in England by the present law applicable in most common law jurisdictions which is the Infanticide Act 1938.

[18] Section 1(1) of the Infanticide Act 1938 reads:

> *"(1) Where a woman by any wilful act or omission, causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child"*.

This same statute law was introduced into Colonies and former Colonies in the years following 1938. We find it in s 205 of the Penal Code in Fiji. It is in exactly the same words.

[19] The legal policy of the 1938 Act was that in appropriate circumstances the DPP would charge Infanticide in place of murder. On the other hand the DPP was not to be prevented from charging murder. But if murder is charged the jury is to be empowered to return a verdict of guilty of infanticide in place of a verdict of guilty to murder.

[20] This legal policy was enacted in the 1938 Act s 1(2). It reads:

"(2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then the jury may, notwithstanding that the circumstances were such that but for the provisions of this Act they might have returned a verdict of murder, return in lieu thereof a verdict of infanticide".

This verdict in place of a conviction for murder is in addition to the alternative verdict of manslaughter. There is also the alternative verdict of *"guilty but insane"*.

[21] In Fiji the 1938 Act s 1(2) was enacted when Fiji decided to adopt the 1938 Act in England. It is word for word the same but when towards the end of the subsection the English statute reads:

"… but for the provisions of this Act [etc.]"

Section 171 of the Criminal Procedure Code Cap 21, in Fiji the wording reads:

"... but for the provisions of s 205 of the Penal Code she might be convicted of murder, be convicted of the offence of infanticide although she was not charged with it".

In my opinion this difference of wording is inconsequential. The English subsection and the Fiji s 171 bear the same meaning.

[22] The consequence of s 205 together with 171 is the same in Fiji as in England. Prosecutions for infanticide rather than for murder are encouraged by the legal framework. If the DPP prefers to charge murder then the statutory framework leaves it for the tribunal of fact, having decided it was murder because it was a wilful and intentional killing, to then consider whether by reason of giving birth or lactation the balance of her mind was disturbed. In Fiji the tribunal of fact is the High Court Judge who is assisted by the opinion of assessors.

[23] What happens if the only expert evidence called establishes the additional facts required to convict of infanticide in place of murder, but the tribunal of fact convicts of murder? I have no doubt then it is for the appeal Court as in *Seers* (supra) to replace the murder conviction with a conviction for infanticide. It is then a matter of sentencing for infanticide.

[24] What if the mother is charged in respect of the wilful killing of her recently born child and with an older child who has passed the age of twelve months? Paragraphs B1.84 and B1.87 of Blackstone (2011) are relevant:

"B1.84 The offence predates the introduction of the defence of diminished responsibility, and is designed to serve a similar role in relation to killings of very young children by their mothers in circumstances where the mothers are not fully responsible for their actions. It differs from diminished responsibility (and thus has survived the introduction of that defence) in that it can be charged from the outset and can be used to avoid charging a woman with the offence of murder (or now manslaughter) in relation to her own child. Under s.1(2) of the Infanticide Act 1938, it can also be returned as an alternative verdict to murder although s.1(3) makes it clear that that is without prejudice to the jury's power on an indictment for murder to return a verdict of manslaughter or not guilty by reason of insanity. The offence covers a narrower range of circumstances than diminished responsibility, as the disturbance of the mother's mind must be due to either to her not having fully recovered from the effect of giving birth or to the effect of lactation consequent upon the birth of the child, criteria now regarded as outdated and unduly narrow. However, a legal burden of proof is placed on the defence in a case of diminished responsibility whereas, if the prosecution are alleging the offence amounts to murder, the burden of proving that it is not a case of infanticide

remains on the prosecution. Nevertheless the narrowness of the criteria for infanticide moved the Court of Appeal to conclude in Kai-Whitewind [2005] 2 Cr App R 457, that the law relating to infanticide is unsatisfactory and outdated. 'The appeal in this sad case demonstrates the need for a thorough re-examination'.

B1.87 If the mother kills the child of another, even if it is in the course of killing her own child, then the killing of that other cannot amount to infanticide. If the mother intended to kill or cause grievous bodily harm, it would prima facie be murder but might be brought within the defence of diminished responsibility. Strictly speaking, the same principles apply if the mother kills, say, her own 11 month old child as a result of giving birth to another child later in the same year, since the disturbance of her mind has to be due to the effects of the birth of the child which is killed.

The offence cannot apply once the child has reached the age of 12 months, but again, diminished responsibility would be the appropriate defence to consider."

[25] The logic of diminished responsibility and infanticide are identical. So if Fiji decided to enact the limited form of diminished responsibility that is infanticide, it would be consistent to enact the 1957 Homicide Act as relevant to diminished responsibility, in Fiji shortly after 1957. Fiji's Penal Code follows that of Queensland which was enacted in 1899. The Queensland Criminal Code was amended in 1961 to enact s 304A and the 1957 English reform of diminished responsibility. For reasons that are unclear Fiji did not follow suit and enact diminished responsibility. In my opinion Sir Thomas Eichelbaum was correct when he said in *Maria Asumita Babakobau v The State* Criminal Appeal No. AAU0005 of 2001S (Judgment 22nd November 2001):

"Diminished responsibility is not part of the law of Fiji. English cases were cited, but diminished responsibility is open for consideration in England because of specific statute law. In New Zealand, for example, where there is no equivalent, the Courts have from time to time raised the subject as one that might well merit parliamentary consideration, but have not regarded the matter as one of the Courts were free to incorporate into law themselves."

Applying the Legal Framework to the Trial of Ronika Devi

[26] If the Court below had appreciated and understood s 171 of the Criminal Procedure Code Cap 21 as well as and in conjunction with s 205 of the Penal Code the trial would have been very different. They are in different Ordinances. So s 171 can easily be overlooked. The investigators, the prosecutors, the defence counsel and the trial Court all overlooked the existence of s 171.

[27] What happened was that the investigators did not investigate or ask questions in respect of the charge concerning Ronika Devi's recently born baby. Since applying s 171 correctly required them to be in a position to support or rebut a conviction for infanticide, they should have conducted a wider investigation into the state of mind of Ronika Devi including her attempt to commit suicide on 21st January 2008 as well as earlier attempts to commit suicide. If her clinical depression testified to by Dr Narayan had wholly or partly been caused by the effects of giving birth or the effects of lactation, that also should have been investigated. Instead the investigators although in her statement under caution she said on two occasions that her visit to the Rewa river was to kill herself as well as her infant children, the interrogators avoided asking her anything about her own attempted suicide on that day. As WPS Fawini Kado said:

"Murder is serious – next serious is manslaughter. Find enough evidence to bring people [before a Court]".

The police investigators were only concerned with evidence about murder. Perhaps they were unaware that s 171 of the Criminal Procedure Code together with s 205 of the Penal Code required them to investigate and prosecute murder and/or infanticide.

[28] The prosecutor seemed to take the same view as the investigators. The defence counsel was trying to obtain a verdict of manslaughter when she should have been adducing evidence with a view to the tribunal of fact, finding infanticide. To be fair the evidence she adduced was directed at infanticide but it was irrelevant to manslaughter. Manslaughter was the only possible alternative to murder entertained by the Court. According to the learned High Court Justice's record at page 18 the learned judge noted:

"Court: Warned defence counsel she has been combative. Focus on the evidence. You are very petty."

This was not a trial where the required legal framework was adhered to. Nor were the real issues canvassed. It was not a fair trial according to law.

[29] The learned High Court Judge's approach is demonstrated by the following passages. To him the issue was a simple one of whether *malice aforethought*, which is the requisite *mens rea* for murder was proved.

"The one element of the offence of Murder that is in dispute in this trial is: Malice Aforethought. I have referred above to what the law deems to be malice aforethought. I would paraphrase it as:

i) An intention to kill [i.e. cause death] or cause serious injury to the two children at the time of drowning them;

ii) Knowledge that the act of drowning the two children may cause death or serious injury; but indifferent to whether death or serious injury actually occur.

The Prosecution's case is that they have proven beyond reasonable doubt that Ronika Devi intended to kill her two daughters that day. The defence on the other hand argues that the evidence fell short of the required standard of proving that Ronika Devi had malice aforethought at the time of committing the unlawful act of drowning her two daughters."

It is quite true that the defence were in error. On any issue of fact on intention to kill it was an open and shut case against the accused. But the prosecution and the Court were unaware that 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.

[30] The approach of the learned judge to the psychiatric evidence was that if it did not amount to evidence of insanity it was irrelevant. By insanity is meant what Chief Justice Tindal said in England on behalf of all the High Court judges save Maule J in *M'Naghten's* Case (1843) 10 Cl and F 200 at 210:

"... the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

Justice Mataitoga in summing up said:

"The evidence directly relevant on the issue of malice aforethought in this trial, are the sworn evidence of the accused herself. Some of the answers to the questions put to

the accused Ronika Devi during her caution interview and the evidence of both Dr Peni Biukoto in Exhibit 2 and the evidence of DW2 Dr Narayan the consultant Psychologist in court.

The accused evidence is still clear in your mind. In particular the answers given by her to Q19; Q21; Q24; Q25; Q33; Q45, if you accept them truthfully given by the accused, you may consider them as relevant in determining the mental state of the accused person in this case. You must also consider Dr Peni Biukoto's Psychiatric assessment of the accused. His assessment of the accused and his opinion on whether the accused was aware of the wrongness of her acts, according to law and community standards is set out fully in Exhibit 2 and I ask that you read it. Dr Narayan's, the Medical Superintendent at St Giles Hospital gave sworn testimony in court. His evidence was that a person with the history of emotional and physical abuse which the accused suffered from, was likely to suffer from depression, which may be severe at times. He was never asked for his opinion on whether these mood swings of accused would make her unaware of the wrongness of her actions in drowning her two daughters on 21 January 2008. This may be understandable given that the cognitive functions of the accused were unimpaired and there was no evidence to the contrary."

Then the learned judge recounted the undenied intentional acts of the accused and continued:

"You may draw reasonable inferences from the above facts in reaching the answer to the question: did Ronika Devi intend to cause the death of her two daughters on that day? You may ask yourself: Are these the acts of someone who is depressed to the point she is unable to clearly understand her acts and their consequences? Or are these the acts of someone who knew what she wanted to do and then went about choosing how to do it, the time to do it and place to do it, to achieve her intention?

If having considered all the evidence in this trial and on the issue of malice aforethought, if you are satisfied on the evidence as to be sure that the accused Ronika Devi at the time of drowning her two children intended to kill them, you may find the accused guilty as charged."

As a matter of law it is infanticide if there is clinical depression triggered by the causes set out in the statutory section and it results in the killing of the recently born child. That has nothing to do with knowing that the act of killing is legally wrong. The law of insanity explained in *M'Naghten's* case with its special verdict of *"guilty but insane"* is not engaged.

[32] Depression and other volitional defects or disorders are not *"defects of reason from disease of the mind"*. The authority of *Seers* discussed above makes it clear that depression is an accepted cause of killing within diminished responsibility in law and within infanticide. So Dr Narayan giving expert evidence in this case was testifying that Ronika Devi killed her children and attempted suicide when the balance of her mind was disturbed. That is to say she was so affected by depression that it seemed right to kill her daughters and save them from inevitable unhappiness and to commit suicide herself to end her suffering. Not only did it seem right whilst rationally knowing that it was legally wrong to kill her daughters or to commit suicide, but knowing that could not prevent her doing what she believed to be right. So it is *"a state of mind so different from that of the ordinary human being"* as Lord Parker CJ said in *Byrne* (supra). Lord Parker CJ also pronounced in that case that those with this abnormality of mind do not possess *"the ability to exercise willpower to control physical acts"* in accordance with their simultaneous rational appreciation of what is lawful conduct and what is not.

[33] In 2nd Edition of Principles of Sentencing, D. A. Thomas, the leading authority on sentencing at page 76 describes the approach of the Court of Appeal in England to cases where severe depression causes the accused to kill and then to commit suicide. The appellant was one Davies. The Court transcript is 6041/A/71 with judgment on 9th March 1972.

> *"In Davies the appellant had developed severe depression of psychotic intensity as a result of long period of business anxiety and serious domestic problems arising from his wife's mental ill health. He decided to commit suicide but, concerned that his wife would be unable to fend for herself after his death, took her life before making a determined but unsuccessful attempt on his own. Hearing that the appellant's responsibility for his actions was not only diminished... but almost extinguished, but that in the changed circumstances there was no need for psychiatric treatment and no risk of future homicide, the Court reduced his sentence of two years imprisonment to allow his immediate release."*

[34] In the present case Dr Narayan said in evidence based on his expertise as an experienced psychiatrist that Ronika Devi was severely depressed and agreed that the causes of the depression were her recent giving birth and also the long term abusive treatment by her husband. In this he agreed with Dr P. Biukoto. Dr Narayan concluded *"In her situation she did what she did because it was the only way to get out"*.

[35] Can it be argued that two concomitant causes one of which is an abusive spouse who rejects her means that infanticide because of the effects of giving birth and the effects of lactation is not made out? That is to say must the effect of recently giving birth and/or lactation be the only cause of the depression?

[36] I am quite sure that Parliament in the United Kingdom intended that so long as the effects of giving birth or the effects of lactation or both was or were a substantial cause of the depression and mental disturbance, the offence of infanticide is made out. The presence of additional concomitant substantial causes such as abusive relationships replete with rejection of the accused cannot make any difference to this result.

[37] The opinions of the legislators in England in 1938 leaned heavily on the need to acknowledge that women generally and especially women who had recently given birth are subject to hormonal changes which the rest of humanity is mostly spared. So there is reason for the law to take into account these factors. In the present case the evidence was that Ronika Devi had recently given birth, was breast feeding her recently born daughter and was menstruating at the time of the events of 21st January 2008. Just as men such as Seers and Davies can suffer from severe reactional depression, so can women. But it seems that the law supports the view that hormonal imbalances make the lows that much worse for women.

[38] So I conclude that if the correct legal framework had been used and evidence relevant to infanticide investigated, the tribunal of fact's only rational decision upon the count of murdering her recently born daughter would be that Ronika Devi was guilty of infanticide rather than murder. In which case she would fall to be sentenced on the basis of manslaughter in respect of that count.

The Evidence and Verdict in Respect of the Killing of Daughter Tanisa

[39] The key here is that diminished responsibility at the time of the trial had not yet been enacted in Fiji. This means that Justice Mataitoga was applying the legal framework correctly in respect of the first count which charged Ronika Devi with the murder of Tanisa.

As Blackstone at B1.87 cited at paragraph 24 above states infanticide only applies to the killing of the newly born infant. Further that it cannot apply to a child over one year of age. Since the evidence of *malice aforethought* is so strong a conviction in respect of Tanisa would appear inevitable under the law of Fiji when tried in February 2009. However it must be noted that in Decree No. 44 of 2009 the Crimes Decree, made on 4th December 2009, which came into force on the 1st day of February 2010, for the first time the defence of diminished responsibility became part of the law of Fiji.

[40] However the tribunal of fact if the investigation had sought out evidence of abnormality of mind in the form of suicidal depression as well as taking account of the evidence of Ronika Devi and the psychiatrists, would have had to conclude that Ronika Devi killed Tanisa while suffering from an abnormality of mind (severe depression) and while the balance of her mind was disturbed. That does not impinge upon the matter of conviction in respect of Tanisa. It must, however, be extremely relevant to sentence. If Ronika Devi was suffering from suicidal depression and the balance of her mind was disturbed and her responsibility was much diminished in killing her recently born daughter then she was in the same sorry state when she killed Tanisa. The common law has embraced diminished responsibility in respect of sentences. It matters not what crime is committed. Murder does carry mandatory life imprisonment but effective sentences derive from the *"recommending"* or *"fixing"* powers bestowed by statute on the High Court Judges.

[41] I set out the *"Sentencing Guidelines"* for infanticide which are at B1.83 of the 2011 Edition of Blackstone.

> *"Sentencing Guidelines*
>
> *B1.83 The maximum sentence is life imprisonment (Infanticide Act 1938 s.1)*
>
> *The proper approach for sentencing in cases of infanticide was considered by the Court of Appeal in Sainsbury (1989) 11 Cr App R (S) 533. The offender had become pregnant at the age of 15. She did not tell anyone about this, and gave birth to the baby without medical assistance in the bathroom of her boyfriend's flat. The baby was then wrapped in a blanket, taken some distance away and drowned in a river. The sentencer accepted that the balance of the offender's mind was disturbed by the effect of giving birth and that she was very immature, but did not accept that her responsibility was removed altogether. He imposed a sentence of 12 months' detention in a young offender institution. The Court of Appeal, however, having regard to statistics which indicated that in 59 cases of infanticide dealt with between 1979 and 1988 there had been no custodial sentences, all offenders having been dealt with by way of probation, supervision or hospital orders, decided that although the offence was serious the mitigating factors were overwhelming, and varied the sentence to probation. See also Lewis (1989) 11 Cr App R (S) 457."*

[42] Infanticide in respect of sentencing may be at one end of the scale in respect of sentences where there is killing with *malice aforethought* but diminished responsibility is also established. I have cited the cases of *Seers* and *Davies* which show the low end and the medium to high end. But even before the Criminal Justice Act 2003 in England introduced imprisonment for life with minimum sentences to be served before release on parole, or imprisonment for public protection, the Court of Appeal in *Steven Francis Chambers* [1983] 5 Crim App R (S) had stated that in certain cases long imprisonment was required to protect the public. Therefore when a hospital order is not recommended, or is

not appropriate, and the Defendant constitutes a danger to the public for an unpredictable period of time, the right sentence will, in all probabilities, be one of life imprisonment.

[43] However Mr Justice Leonard for the Court at page 194 discussed also cases where a *"lenient course"* was appropriate as well as cases where the accused's degree of responsibility is not minimal. He said:

> *"In cases where the evidence indicates that the accused's responsibility for his acts was so grossly impaired that his degree of responsibility for them was minimal, then a lenient course will be open to the judge. Provided there is no danger of repetition of violence, it will usually be possible to make such an order as will give the accused his freedom, possibly with some supervision. There will however be cases in which there is no proper basis for a hospital order; but in which the accused's degree of responsibility is not minimal. In such cases the judge should pass a determinate sentence of imprisonment, the length of which will depend on two factors: his assessment of the degree of the accused's responsibility and his view as to the period of time, if any, for which the accused will continue to be a danger to the public."*

[44] The facts of *Chambers* were that his wife had left him, taking their child with her. Some time afterwards the appellant decided to kill her, and bought a knife for the purpose. He went to the house of his mother-in-law, where his wife was staying, got his mother-in-law out of the house by a stratagem, forced his way into the house and stabbed his wife twenty-three times in the chest and arms in the presence of their child. He then went immediately to a priest and confessed the killing. There was medical evidence that the appellant was suffering at the time of the killing from an anxiety depressive state which substantially impaired his mental responsibility for his actions, but was not suffering from any form of mental disorder within the meaning of the Mental Health Act 1959. Sentenced to 10 years imprisonment.

[45] On these facts the Court of Appeal supported the trial judge in principle but reduced to 10 years imprisonment to 8 years. They said:

> *"In the judgment of this Court the learned trial judge was right to conclude that the appellant retained a very substantial amount of responsibility for his acts. His view was not inconsistent with the medical evidence that the appellant's responsibility was substantially impaired by the anxiety-depressive state from which he was suffering at the time of the killing. In a further submission, which this Court found more acceptable, Mr Farrington points out that the medical evidence indicated that the appellant's mental state had existed before any of his acts of preparation were carried out. Therefore, he argued, his responsibility for those preparatory acts as well as for the acts which directly caused his wife's death should be regarded as diminished by his condition...*
>
> *... this Court has come to the conclusion that it is possible to reduce the sentence to one of eight years' imprisonment."*

[46] This review suggests that where suicidal depressives such as Davies are no threat at time of sentencing, such cases fall within the *"minimal responsibility"* category. This is supported by the sentencing of infanticide cases as reported and explained in 2011 Blackstone at B1-83 set out at paragraph 41 above. On the other hand the need for public protection can justify life imprisonment despite diminished responsibility. In situations where the facts and the psychiatric evidence merit the conclusion that the accused must bear a substantial amount of responsibility the cases support a view that sentences of eight to ten years as in *Seers* and *Chambers* are appropriate although the fact of diminished responsibility is accepted. While it is true that diminished responsibility results in

shorter sentences in all cases, the result in *Chambers* and in *Seers* show that long custodial sentences are available and appropriate if the sentencing court applies these principles.

[47] I note that in a closely analogous area of the law where abused wives eventually commit acts of violence against their husbands, Madam Justice Shameem in The State v Litia Leba, High Court Criminal Case No. HAC 21/03, said that if the court finds that *"characteristics usually present in cases of victims of abusive relationships are present"* the sentence should be substantially reduced. So if supported by psychiatric evidence there is *"minimal responsibility"* in the accused because of clinical depression caused by the effects of child birth and lactation, these circumstances should also support a substantially reduced sentence.

[48] It is clear there must be a new trial on the Second count of killing the recently born baby. What about the killing of Tanisa? In my opinion the evidence relevant to abusive behaviour, suicidal depression relevant to sentence and possibly relevant to conviction for manslaughter in place of murder should have been before the assessors in respect of Tanisa. Also the summing up should have properly dealt with the suicidal depression in relation to *"disease of the mind"*. While Ronika's brother was listed as a prosecution witness, he was not called. His factual evidence of the troubled marriage, his sister's depressive and distressed state and his attempts to intervene in the marriage should have been before the assessors. But there is an overriding matter that requires a new trial of all the issues. I turn to that below. But if that matter were not in existence, I would still be of the view that the whole matter must be retried.

[49] I note that Justice Mataitoga relied on the case of *The State v Lebobo* [2004] FJHC 518 to justify a fixing a minimum term of 20 years imprisonment for Ronika Devi. This was a case where there was no insanity, no abnormality of mind and no diminished responsibility for the crimes. Lebobo entered the private home of an elderly couple aged 82 and 76 at night. He then beat the husband until he lay unconscious and dying. He died as a result. Lebobo then beat up the wife and carried her small frail body to another room where he raped her. He then stole the equivalent of $500 and departed. Mr Justice Gates sentenced Lebobo to concurrent terms of 20 years (fixed minimum) for murder, 13 years for rape and 10 years for robbery with violence. To rely on this case to sentence Ronika Devi to life imprisonment with a fixed minimum sentence of 20 years is bizarre.

Justice Mataitoga Did Not Convict Ronika Devi At All or In Accordance with the Law

[50] From about the late 1870's until around 1973 sections 246 and 306 of the Criminal Procedure Ordinance regulated trial by assessors in Fiji. Under that regime by s 306 (2).

> *"The judge shall then give judgment, but in so doing shall not be bound to conform to the opinions of the assessors."*

[51] In addition the Criminal Procedure Code of Fiji contained the following provisions:

> *"156.-(I) The judgment in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates, if any: 'Provided that the whole judgment shall be read out by the presiding judge or magistrate if he is requested so to do either by the prosecution or the defence.'*

157.-(I) Every such judgment shall, except as otherwise expressly provided by this code, be written by the presiding officer of the court in English, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."

[52] On 4th February 1945 an eight month old boy was sleeping in the family store when it was attacked at night by three persons in some way aggrieved against the store owner who was the baby's father. Shots were fired and only the baby was hit. The accused were duly found by the assessors to be *"not guilty"* of murder but *"guilty"* of manslaughter. Only Emmanuel Joseph appealed having been sentenced to 5 years imprisonment. Whatever happened in the Court of Appeal is not known but one short point was successful in the Privy Council. The case is Joseph v R and it is reported in the Fiji Privy Council Reports 1936 – 1986 a copy of which is in the Appeal Court Library. It is also more accessibly reported in [1948] AC 215.

[53] Chief Justice Seton treated the decision of the five assessors as though it was the verdict of a jury. He finally passed sentence without delivering any judgment.

[54] Said Sir John Beaumont for the Privy Council at *Joseph v R* [1948] AC 215 at 220, having explained the summing up:

"Each of the assessors expressed the opinion that the accused were guilty of manslaughter. They then returned a verdict 'Guilty of manslaughter'. The learned Chief Justice did not pronounce judgment as required by ss.156 and 157 of the Procedure Code, nor did he specify under which section of the Penal Code the accused were convicted. In passing sentence, however, he expressed the opinion that the accused had been very properly convicted of an outrageous offence. In the result the appellant has been convicted by assessors who had no power to try or convict him, and sentenced by a judge who had not convicted him."

[55] Mr Gahan for the Crown argued that there had been no substantial miscarriage of justice. Sir John Beaumont responded to this at page 221.

"Mr Gahan, for the Crown, has argued that in this case there has been no such substantial miscarriage of justice as would justify this Board, acting in accordance with the principles on which the Board always acts in criminal cases, in advising His Majesty to interfere with the conviction. He points out that it is reasonably clear from the charge to the assessors that the learned Chief Justice thought that the accused were not guilty of murder, but were guilty of manslaughter, and that, in passing sentence, he expressed his approval of the conviction. It is no doubt possible, and even probable, that if the learned Chief Justice had tried the case in accordance with the provisions of the Procedure Code he would have reached the conclusion which the assessors reached, namely, that the accused were guilty of manslaughter. This, however, is matter of conjecture. The learned Chief Justice does not appear to have brought his own mind to bear on the question of the guilt or innocence of the accused. He left the appreciation of evidence to the assessors, and accepted their conclusion as the verdict of a jury which bound him, instead of regarding it merely as an opinion which might help him in arriving at his own conclusion. The appellant was entitled to be tried by the judge and he has not been so tried and, in the circumstances, the only course open to the Board was to advise His Majesty to allow the appeal and quash the conviction and sentence."

[56] Sections 156 and 157 were amended in about 1973 by s 299 of the Criminal Procedure Code. This in sub s (2) repeated as before the words:

"The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors."

[57] There then followed a long proviso which was new. Its principal purpose was to set out the procedure when the Judge does not agree with the opinion of the majority of the assessors. However where the Judge does agree with the assessors, the opportunity was taken to amend the requirement of a full judgment with reasons in the situation where there has been a written summing up which is on the Record. If that is the position there needs only be a decision of the Court in writing. It shall be necessary: *"for the decision of the Court, which shall be written down to be given"*. But a decision to convict has to be given as prescribed. Failure to comply with the procedural steps will result in an incomplete trial as in Emmanuel Joseph v The King and the accused will not have been tried. As in *Joseph* the Ronika Devi's conviction(s) and sentence(s) fall to be quashed. But the present criminal appeal legislation allows the Court of Appeal to order a retrial.

[58] The Record in this case shows the following for Monday 20th February 2008.

"MONDAY 20TH FEBRUARY 2008 AT 9.30AM

[59]

Mr S. Qica:	*For the State*
Ms R. Senikuraciri:	*For the Accused*

Court: Consult Counsel re: Closing Statements and if Accused – Sentence Assessors called in.

[60]

Court:	*This am you will hear Closing Statements from parties. Defence first followed by Prosecutor.*
Court:	*Invites Ms Senikuraciri.*
Biukoto:	*No history of psychiatric disorder.*
	Page 2, paragraph 2.
	No sign of psychiatric disorder.
	Page 4 – Mentally sane.
	Cruel and act-very too innocent.
Court resumed at 2.30pm	
Court:	*Sum-Up to Assessors.*
	For Sentencing.
	Sentence read in Court.

(sgd) I. Mataitoga
Judge"

[59] This is factually incorrect. It was the year 2009 not 2008. 20th February 2009 was a Friday. The Monday was 16th February 2009. From the Court papers which I have called for and examined it is clear that the Court sat and received

the opinion of the assessors on Monday 16th February 2009. The proceedings were adjourned to Friday 20th February 2009 and that morning was used for hearing submissions on sentence and the delivery of the learned judge's written sentence.

[60] There is however no evidence on the Record to show that the learned judge had convicted Ronika Devi by reducing his decision to convict into writing and delivering orally this conviction in Court. There is no written conviction on the Record. To be sure I have asked the Registrar to check all files relating to this case and after examining them I confirm that there is nothing written about a decision to convict and there is no written document which is a decision to convict. I have had checks made with the DPP and Legal Aid asking if they have in their files a written decision to convict signed by the learned Judge. The answers are in the negative.

[61] I note that the learned Judges summing up ends with the words:

> *"I must now invite you to retire and to consider your verdicts. Your verdicts shall be...*
> *... When you have reached your verdicts inform the clerks and we will reconvene to receive them. You may now retire."*

It seems that as in *Joseph* the trial judge was unaware that assessors are not a jury and that the trial judge must decide as per the statutory procedure in s 299 to convict or not to convict and comply with these procedures.

[62] I conclude that for this reason as well as by reason of the errors with regard to the legal framework and the summing up as discussed above, the convictions and sentences of Ronika Devi should be quashed and a retrial ordered. Further I propose that pending the retrial Mrs Ronika Devi should be brought before a Justice of the High Court as is available so that she can be released on bail. I hope that she will be able to reside with her brother Vikash pending further disposition of this criminal case.

Section 162(1)(a) of the Criminal Procedure Decree 2009 Which came into effect on 1st February 2010

[63] Section 171 of the Criminal Procedure Code said, in *pari materia* with s 1(2) of Infanticide Act of 1938:

> *"Conviction of infanticide of woman charged with murder of child*
> *171. When a woman is charged with the murder of her child, being a child under the age of twelve months, and the court is of opinion that she by any wilful act or omission caused its death but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child and that by reason thereof or by reason of the effect of lactation consequent upon the birth of the child, the balance of her mind was then disturbed, she may, notwithstanding that the circumstances were such that but for the provisions of s 205 of the Penal Code she might be convicted of murder, be convicted of the offence of infanticide although she was not charged with it."*

[64] That is no longer the law. Section 162(1)(a) of the Criminal Procedure Decree 2009 came into effect on 1st February 2010. It reads:

> *"Conviction for lesser or alternative offences*
> *162.-(1) Where a person is charged with an offence but the court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the court may record a conviction made after the process for –*
> *(1) the lesser offence of infanticide where the charge has been for murder of a child under the age of 12 months."*

[65] This means that if in a case like the present one, the DPP charges murder and the learned High Court Judge doing his duty in good faith finds *malice aforethought* (being the *mens rea* for murder) and the *actus reus* of murder proved as a matter of fact he must convict of murder. If he goes further and finds that the mother's balance of mind was disturbed because of the statutory causes he must still convict of murder.

[66] The scheme of the 1938 Act in England followed in Fiji by s 205 of the Penal Code and s 171 of the Criminal Procedure Code is clear. If murder only is charged, after the tribunal of fact has found murder to be proved, the tribunal of fact must go on to consider the elements of the offence of infanticide. If they are found to be proved then the tribunal of fact must find a verdict of infanticide rather than murder. See further paragraphs 17 through 23 above.

[67] This kind of lesser verdict has never before been seen by the common law or statute law as what may be termed a *"true"* alternative offence. An example of *"true"* alternative offence arises when voluntary murder is charged. Then the tribunal of fact will either find the *mens rea* for murder proved or the *mens rea* for manslaughter proved. It is one or the other.

[68] What is now possible with infanticide is that the DPP will never elect to indict for infanticide and s 205 (or its 2009 decreed equivalent) will become a dead letter. The fact finder must and will find murder in every case. But consider two almost identical cases. The DPP decides in one case that it should be charged under s 205 as the legal policy encourages. The DPP simply indicts for infanticide which is found proved and a determinate sentence is given. Suppose that in the other case the DPP decides to indict murder, then the fact finder must find the second recent mother guilty of murder and sentence her to life imprisonment. Inconsistent results in cases so identical that the result must be the same, must raise serious questions about the criminal justice system.

[69] The logical way of sorting this and avoiding injustice which the High Court judges could not control is simply to repeal the offence of infanticide in s 205. Then since s 186(1)(a) would be redundant it could also be removed. This would mean that depressed and/or suicidally depressed mothers would be found guilty of murder and sentenced to life imprisonment in all cases. Infanticide as an offence has been available in Fiji probably since shortly after the first Infanticide Act in England which was in 1922. Medical and psychiatric knowledge has advanced since 1922 so that the objective case for infanticide and diminished responsibility is now overwhelming. Fiji would be likely to be the only common law jurisdiction to repeal infanticide. Yet human beings in Fiji are no different from those elsewhere in the world.

[70] A complication to the interaction of murder and infanticide is introduced by the decision in 2009 to enact by decree the statutory defence of diminished responsibility for the first time in Fiji. This was done by the Crimes Decree 2009 which came into force on 1st February 2010. The section is s 243 and the wording is in terms of the 1957 Homicide Act as explained in subsequent common law decision.

[71] These considerations and the new law in s 162(1)(a) of Criminal Procedure Decree 2009 cannot affect the retrial of Ronika Devi. Where the law is changed after the commission of the alleged offence, then the substantive procedural law at trial, remains the law in force at the time of the offence. However the retrial will have to apply diminished responsibility as enacted in

s 243 of the Crimes Decree and this will substantially change the issues in respect the charge relating to the murder of elder daughter Tanika.

[72] Daniel Goundar JA. I agree with the judgment, the reasons and the proposed orders of William Marshall JA.

[73] Salesi Temo JA. I agree with the judgment, the reasons and the proposed orders of William Marshall JA.

William Marshall JA.

ORDERS OF THE COURT

[74] The orders of the Court are:

(1) that leave be granted to Ronika Devi to appeal against conviction and sentence on two counts of murder.

(2) that the substantive hearing be merged in this leave hearing and the appeals against convictions and sentences on two counts of murder of Ronika Devi be allowed.

(3) that the convictions and sentences of Ronika Devi on two counts of murder be quashed and the convictions and sentences in the court below be withdrawn and annulled.

(4) that there be ordered a retrial of Ronika Devi on these two counts of murder.

(5) that as soon as can be arranged Ronika Devi be brought before Mr Justice Priyantha Fernando or such other High Court Judge as is available so that she may be remanded on bail pending retrial.

Appeal allowed.