

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 113 of 2014

STATE

V

DISIOLA KASEVU

Counsel : Mr. T. Qalinauci for the State.
: Ms. V. Diroiroid [LAC] for the Accused.

Dates of Hearing : 16, 17, 18 April, 2018
Closing Speeches : 19 April, 2018
Date of Summing Up : 20 April, 2018

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I

do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. During the closing speeches the learned Defence Counsel told you that the State had not called the Psychiatrist and the Investigating Officer as part of their case. I direct you to disregard this submission. It is not for the defence or anyone to suggest how the State should present its case.
7. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove her innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that she is guilty. If you have any reasonable doubt about her guilt, then you must express an opinion that she is not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy to either the accused or the deceased. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. At this point in time I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinion. This case involves a loss of life of an infant who was just born. This certainly shocks the conscience and feelings of our hearts.
13. It is quite natural given the inherent compassion and sympathy with which human beings are blessed. You may perhaps have your own personal, cultural, spiritual and moral thoughts about such an

incident. You must not, however, be swayed by such emotions and/or emotive thinking. You act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to in the present day society that we live in.

14. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

15. The accused is charged with the following offence: (a copy of the information is with you).

Statement of Offence

MURDER: contrary to section 237 of the Crimes Act No. 44 of 2009.

Particulars of Offence

DISIOLA KASEVU, on the 13th day of August, 2014 at Sigatoka in the Western Division murdered her new born baby – an unnamed infant.

16. In order to prove the offence of Murder the prosecution must prove beyond reasonable doubt the following:
 - (a) the accused
 - (b) engaged in a conduct; and
 - (c) the conduct caused the death of her newborn baby; and
 - (d) the accused intended to cause the death of her newborn baby;or

- (e) was reckless as to causing the death of her newborn baby by the conduct. The accused is reckless with respect to causing the death of the newborn baby if;
 - (i) she was aware of a substantial risk that death will occur due to her conduct; and
 - (ii) having regard to the circumstances known to her, it was unjustifiable for her to take that risk.
- 17. What you will have to consider with regard to this particular state of mind is whether the accused did foresee or realized that death was a probable consequence or the likely result of her conduct and yet she decided to go ahead and engage in the conduct regardless of that consequence.
- 18. The accused must foresee that death was a probable consequence or the likely result of her conduct and after realizing that, if she decided to go ahead and engage in that conduct regardless of the likelihood of death resulting then she was reckless as to causing the death of the newborn baby.
- 19. In order to constitute the offence of Murder by recklessness actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
- 20. The first element is concerned with the identity of the person who committed the offence. This element of the offence is not in dispute the defence agrees that it was the accused and no one else. This element is therefore proven beyond reasonable doubt.
- 21. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is a voluntary act by the accused or is a product of the will of the accused. Like the first element the defence agrees that it was the accused who had engaged in a

conduct. This element of the offence is also proven beyond reasonable doubt.

22. The third element is the conduct of the accused that caused the death of the newborn child. Conduct means an act done by the accused. The law requires a link between the conduct of the accused and death of the newborn baby. You must be sure that the conduct caused the death of the newborn baby. In other words whether abandoning the newborn baby beside the creek in the bush after giving birth caused the death of the newborn baby. You should remember that the act of the accused need not be the sole cause but the act of the accused should substantially contribute to the death of the deceased.
23. Like the other two elements the defence does not dispute this element of the offence as well so you are to accept this element of the offence as proven beyond reasonable doubt as well.
24. With regards to the final two elements of the offence which concerns the state of mind of the accused the prosecution must prove beyond reasonable doubt either that the accused intended to cause the death of the newborn baby or that the accused was reckless as to causing the death of the newborn baby by her conduct.
25. The prosecution has to prove only one of the two limbs of this element. In this case the prosecution is alleging that the accused intended to cause the death of the deceased.
26. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what a person does. The law says a person has intention with respect to a result if he or she means to

bring it about or is aware that it will occur in the ordinary cause of events.

27. The prosecution says the accused intended to cause the death of her newborn baby by her conduct that is by abandoning the baby in the bush after giving birth. The defence on the other hand says that the accused did not intend to cause the death of her newborn baby since her balance of mind was disturbed by reason of not having fully recovered from the effect of child birth and her experience associated with her pregnancy.
28. If you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of Murder.
29. If on the other hand you are satisfied that the prosecution has established all the above elements beyond reasonable doubt then you must find the accused guilty of Murder.
30. If you accept that the accused did not have the intention to cause the death of the newborn baby or you are not sure whether she had that intention you should then consider the offence of Manslaughter which is a lesser charge than Murder.
31. Furthermore, if the prosecution has failed to prove beyond reasonable doubt the mental element of intention required for the offence of Murder but only proved beyond reasonable doubt that:
 - (a) the accused was engaged in a conduct; and
 - (b) the conduct caused the death of the newborn baby; and
 - (c) the accused-

- (i) intended that the conduct will cause serious harm; or
- (ii) is reckless as to a risk that the conduct will cause serious harm to the newborn baby;

Then you are entitled to find the accused guilty of Manslaughter.

- 32. Manslaughter is a lesser offence to Murder. It is the killing of someone by unlawful conduct or omission without necessary intention or recklessness. If you consider that the accused did not have the necessary intention of causing the death of the newborn baby or was reckless in her conduct but she had knowledge that death would be caused by her conduct then you must find the accused guilty of Manslaughter.
- 33. Whether the accused had knowledge or whether she was reckless as to causing the death of the newborn baby is a matter entirely for you to decide on the basis of the facts and circumstances of the case.
- 34. The defence in this case submits that on the evidence before the court the accused balance of mind was disturbed accordingly you should consider the offence of Infanticide as well.
- 35. The offence of Infanticide is defined in section 244 of the Crimes Act as follows:

“(1). A woman commits the offence of Infanticide if-

- (a) she, by any willful act or omission causes the death of her child; and*
- (b) the child is under the age of 12 months; and*
- (c) at the time of the act or omission the balance of her mind was disturbed by reason of –*
 - (i) her not having fully recovered from the effect of giving birth to the child; or*

- (ii) *the effect of lactation consequent upon the birth of the child;*
or
- (iii) *any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state that is proved to the satisfaction of the court.*

(2) The onus of proving the existence of any matter referred to in sub-section (1) (c) lies on the accused person and the standard 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."

36. The elements for the offence of Infanticide are as follows:

- (a) The accused;
- (b) caused the death of her newborn baby by any willful act or omission which caused the death of her baby;
- (c) the baby was under the age of 12 months at the time; and
- (d) the accused balance of mind was disturbed at the time of committing the offence.

37. The first element is concerned with the identity of the person who committed the offence. In this case the identity of the accused is not in dispute.

38. In respect of second and third elements the prosecution must prove beyond reasonable doubt that the accused caused the death of the deceased by willful act or omission and also the deceased was under the age of 12 months at that time. These elements are also not disputed by the defence.

39. In respect of the fourth element the defence says at the time the accused committed the offence her balance of mind was disturbed.
40. In view of the above the onus shifts to the accused to prove the existence of any matters referred in section 244 (1) (c) of the Crimes Act that the balance of her mind was disturbed by reason of –
- (i) her not having fully recovered from the effect of giving birth to the baby; or
 - (ii) the effect of lactation consequent upon the birth of the baby; 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.
41. The standard of proof in respect of the above is on the accused on balance of probabilities. This means the more probable should succeed.

Ladies and Gentleman Assessors

42. The defence has raised the issue that at the time of the commission of the offence of Infanticide the balance of the accused mind was disturbed for the reasons given above. Under the law it is for the prosecution to disprove beyond reasonable doubt that at the time the accused committed the offence of Infanticide her balance of her mind was disturbed.
43. The prosecution says that the offence of Infanticide does not apply because at the time of the act the balance of her mind was not disturbed. The prosecution relies on the caution interview of the accused dated 18 August, 2014 (prosecution exhibit no. 1) and the

evidence of the accused that it was highly likely that she would have been well at the time of the alleged offending.

44. You will have to weigh the evidence and decide which version to accept the prosecution version or the defence version. If you are satisfied that the accused has proven the existence of any of the above matters referred to in section 244 (1) (c) of the Crimes Act on balance of probabilities then you must find the accused guilty of the offence of Infanticide.
45. The purpose of the legislation creating the offence of Infanticide is to afford women mitigation from the consequences of Murder where the balance of their mind had been disturbed through childbirth or was associated with their pregnancy, delivery or post-natal state. The purpose of this offence is to reduce Murder to Infanticide.

AMENDED ADMITTED FACTS

46. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you.
47. The amended admitted facts are as follows:
 1. *Disiola Kasevu (hereinafter referred to as the accused) was 41 years old in 2014.*
 2. *The accused is a single mother and has two children of 21 years and 3 years respectively.*
 3. *The accused resides at Biausevu village in Sigatoka.*
 4. *The accused was taken to the Health Centre at Korolevu before being referred to the Sigatoka Hospital.*

5. *The accused was medically examined on the 18th of August, 2014 by Dr. Amos.*
48. From the agreed facts you will have no problems in accepting the above as proven beyond reasonable doubt and you can rely on it.
49. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds.
50. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

51. The Prosecution called three (3) witnesses to prove its case against the accused.
52. The first prosecution witness was WPC 3784 Kelera Ulumatua who had caution interviewed the accused on 18 August, 2014. The interview was conducted in the English language.
53. During the interview the rights of the accused was given to her including time to rest and meals. The witness also stated that the accused was given time to consult a lawyer as well and that during the caution interview the accused was not forced or threatened or induced to make a statement, the interview was given voluntarily without any complaints from the accused.

54. At the conclusion of the caution interview the accused was asked whether she wanted to add or alter anything in the caution interview after it was read to the accused. The caution interview was signed by the accused, the witnessing officer and the witness.
55. The witness read the caution interview which was marked and tendered as prosecution exhibit no. 1.
56. In cross examination the witness agreed that the accused had informed her during the caution interview that she was hiding her pregnancy from everyone including her mother. The witness also stated that when she had questioned the accused about some injuries on the neck and head of the baby she was told that the injuries may be due to her crossing the narrow fence and the route she had followed in the bush. The witness accepted this explanation given by the accused.
57. The witness agreed that her questioning of the accused in the caution interview was to ascertain whether the accused had caused the death of her baby by delivering him in the bush and leaving him unattended. According to the witness the accused had explained to her the reason why she left the baby in the bush which was that she was tired, feeling dizzy, her legs were heavy as a result of giving birth. The witness accepted in view of the above that the accused did not intend to kill her baby and during the interview the accused had also stated that she was in an unstable condition after giving birth.
58. Finally the accused had informed the witness that she was facing difficulties at home and if her mother had found out about her pregnancy she would have been chased from her home.

Ladies and Gentleman Assessors

59. The caution interview is before you, the answers in the caution interview is for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. There was no suggestion by the defence that the answers given by the accused were not given voluntarily.
60. Furthermore, you will see from the caution interview that it contains admissions and explanations or excuses commonly known as 'out of court mixed statements'. I will now direct you as to how you should approach the caution interview. The contents of the caution interview are admissible as evidence and you have to consider the answers given by the accused as a whole in deciding where the truth lies. Remember it is for you to decide what weight you give to the admissions, explanations or excuses contained in the record of interview.
61. The accused gave evidence you must then take into account what the accused adduced in evidence when considering the issues of fact you are determining. It is for you to decide whether you believe the evidence of the accused. If you consider that the account given by the accused through evidence is or may be true, then you must find the accused not guilty.
62. The second prosecution witness was Dr. Avikali Mate the Pathologist who had on 16 August, 2014 conducted the post mortem examination on the deceased baby.
63. Dr. Mate graduated with an MBBS degree from the Fiji School of Medicine in the year 2009, she also obtained a Post Graduate

Diploma in Pathology from the Fiji National University in the year 2014. The witness had conducted the post mortem examination in the presence of WDC 4217 Mereseini. According to the Doctor the deceased was a full term baby the external examination revealed the following.

64. The examination of the baby did not show any abnormalities, generally the baby was pale, skin had come off muscle shown in the neck area, chest wall and the abdomen, and also it was noted in the arms and legs. The skin had come off in some areas whereby the muscle is seen and also to the extent that bones were seen.
65. The genital area of the deceased was absent because the structure and the skin was not there so the Doctor was unable to determine the gender of the deceased baby. Also noted some parts of the body for example the abdomen showed signs of decomposition.
66. The injuries externally were irregular at different areas showed different types of depths of injuries on the skin some areas showed muscle and some areas showed bone.
67. In the opinion of the Doctor the irregularity of the injuries and its depth could be attributed to animals biting the deceased body.
68. The baby was alive at the time of birth which was evident upon the examination of the lungs. The lungs were hyper inflated which means it was filled with air also it was crackling when pressed which gave a crackling sound indicating that air had entered the air sacs in the lung tissues.
69. The cause of death was the excessive loss of blood which was due to the partial tearing of the carotid artery on the right side of the baby's

neck. Once this artery is torn or cut death will occur within minutes. The possible cause of this injury and other injuries seen on the body of the deceased was due to predation which means any animal could have bitten or removed parts of the body that led to the excessive loss of blood.

70. The post mortem examination report conducted on 16 August, 2014 was tendered as prosecution exhibit no. 2.
71. In cross examination the witness stated that the partial transection noted was possibly due to predation which led to excessive blood loss and the death of the baby.
72. The final prosecution witness was Dr. Mohammed Amos Zibran who obtained his MBBS degree from the Fiji National University and also obtained a Post Graduate Diploma in Emergency Medicine.
73. The Doctor recalled examining the accused at the Sigatoka Hospital on 18 August, 2014. The Doctor narrated the history that was relayed to him by the accused at the time of the medical examination as per D(10) of the Medical Examination Form as:

“41 year old female transferred from Korolevu Health Centre her presenting complaint was per vaginal bleeding and lower abdominal pain. She said her last period was 3 months ago. She further stated she went fishing noted bleeding she delivered a fetus she cut the cord fetus fell into the river and disappeared.”

74. At D(11) the initial impression of the Doctor was:

“The placenta had been delivered at Korolevu Health Centre so this was a case of incomplete/septic abortion.”

75. According to the Doctor the accused had delivered a baby and there were some clots left in the baby bag which needed to be removed. Septic abortion means the process of child delivery was not sterile so this led to infection in the patient.
76. The specific medical findings at D(12) were:
- “(a) Slight pallor examination of eyes colour not pink means blood level was low in the body of the patient;*
 - (b) The uterus (baby bag) was firm and contracted;*
 - (c) Placenta was delivered in Korolevu Health Centre.”*
77. The professional opinion of the Doctor was that there had been an incomplete/septic abortion.
78. The Fiji Police Medical Examination Form of the accused was marked and tendered as prosecution exhibit no. 3.
79. In cross examination the Doctor stated that the accused was mentally stable not very critically sick but since she was bleeding she was not normal.

Ladies and Gentleman Assessors

80. You have heard the evidence of two Doctors who were called as expert witnesses on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called the Post Mortem Report of the deceased baby and the Medical Report of the accused is

before you and what the Doctors said in their evidence as a whole is to assist you.

81. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctors. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the experts you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the Doctors.
82. You should remember that the evidence of the Doctors relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
83. This was the prosecution's case.

DEFENCE CASE

Ladies and Gentleman Assessors

84. At the end of the prosecution case you heard me explain options to the accused. She has those options because she does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence under oath and be subjected to cross examination.

85. She has these options because she does not have to prove anything. The burden to prove the accused guilt beyond reasonable doubt remains with the prosecution at all times.
86. She could have remained silent but she chose to give sworn evidence and be subjected to cross-examination.

Ladies and Gentleman Assessors

87. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath in her defence. The accused is not obliged to give evidence. She is not obliged to call any witnesses. She does not have to prove her innocence in effect she does not have to prove anything.
88. You must take into account what the defence adduced in evidence when considering the issues of fact which you are determining.
89. The accused informed the court that she was from Biausevu Village in Nadroga which was about 45 minutes bus ride from Sigatoka Town, she was not married, however, she has two children from her two previous relationships.
90. At the age of 16 she got pregnant while in Form 5 when she told the father of the child that she was pregnant he was not concerned. In respect of her second child the accused was in a relationship for one year when she fell pregnant upon telling the father of the child he was not bothered or concerned as well.
91. After her family and her mother had accepted the two children the mother of the accused and her brothers had warned her against

- getting pregnant again and if she did get pregnant she will have to leave the family house.
92. There is no financial support given to the accused or her mother from her brothers who live in the same village. She lives with her elderly mother and her 2 children. The accused earns a living by selling handicrafts.
 93. As a result of her first pregnancy the accused could not further her education.
 94. When the accused got pregnant for the third time she had left employment and was staying home as a result she could not contact the father of the child she was carrying. She did not tell her mother or anyone else about her pregnancy since she was afraid of her mother and could clearly recall what she had been warned about.
 95. On 12 August, 2014 the accused was 9 months pregnant she was planning to go to the hospital but she was too late, that night at about 10pm she started getting labour pain at intervals, however, from 4am on 13 August, 2014 the accused started experiencing frequent pain. The accused did not wake her mother since she was fast asleep she went outside the house into the bush which was about 150 meters away from the village.
 96. When she reached the bush she sat down and gave birth after cutting the umbilical cord with the scissors she had brought from home. The accused wrapped the baby properly with the towel she had worn. She made the baby lie on the towel and wrapped him from the legs up to the chest.

97. When she delivered the baby she came to know it was a boy. The baby did not cry, at that time she did not know whether the baby was alive or not. The accused also stated that she held her child and she loved him.
98. After giving birth she was thinking that she would take the baby home to her mother and explain everything. She tried to hold the baby and take him with her to the village but could not because she was feeling weak all over, dizzy and unable to walk. She crawled for 40 meters leaving her baby behind.
99. The accused did not see anyone it was still dark she was lying down she did not call for help her body was weak and she could not do anything. The accused was lying there from 6am to 10am at about 8am a lady by the name of Salaseini saw her and asked her what had happened. The accused nodded and said she was okay.
100. After a while Salaseini and her sister in law came they helped the accused go slowly home by holding her from each side. The accused told them that she had given birth and also told her mother when she reached home. The mother of the accused did not say anything. The accused told her mother where she had left her baby, however she was not aware whether someone had gone to look for her baby because at that time she was rushed to the Korolevu Health Centre then transferred to Sigatoka Hospital where she was admitted for 4 or 5 days.
101. After being discharged from the Sigatoka Hospital the accused was interviewed by the Police. In respect of her answer to question 137 of the caution interview the accused stated that although she was quoted as saying "yes" she did not understand the question she was asked.

102. The accused said that her answer to Q. 136 in the caution interview was her explanation why she had left the baby in the bush. The accused maintained that no one had told her that she had killed her baby and that the Police Officer who had recorded her caution interview may have heard her wrongly that she had killed her baby.
103. In cross examination the accused stated that she did not seek any assistance from the other villagers who were her relatives during her pregnancy because she did not want any of the villagers to tell her mother. She did not go to the Church Minister because she did not know what to do. The accused agreed that she did not go to the Health Centre from the time she became pregnant, however, she wanted to go to the Health Centre when she started getting pain but it was too late.
104. The accused agreed that she had the choice of going to the hospital on 13 August, 2014 but she didn't, she chose to go near the river and give birth. The reason for going to the river was that no one would know that she was giving birth. The reason why she left her baby behind was because her legs and hands were feeling heavy and she was feeling dizzy. The accused disagreed that after giving birth she could have waited with her baby for someone to come along and she could have sought assistance because she wanted to go and tell her mother of what had happened.
105. The accused also agreed that she had the chance to tell Salaseini who could have assisted her and the baby. After she had told her mother about giving birth her mother did not chase her from home but felt sorry for her.

106. When the accused went to the Sigatoka Hospital she consented to be medically examined by the Doctor, however, she was not able to recall what she had told the Doctor.
107. The accused agreed that she had given one version of her history to Dr. Zibrán and one version to the Police Officer in her answer to question 109 in the caution interview. The accused stated that she told the truth about what had happened on 13 August, 2014 to the police which was that she had wrapped the baby in the towel and left him at the side of the creek and then tried to go home.
108. The accused denied any intention to kill her baby as alleged even though she had not taken him to the hospital.
109. In re-examination the accused clarified that all throughout her pregnancy she did not want to tell anyone due to the difficulties she was facing at home with her brothers and her mother.

ANALYSIS

Ladies and Gentleman Assessors

110. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
111. The prosecution alleges that in the early hours of 13 August, 2014 the accused gave birth to a full term baby boy in the bush about 150 meters away from her home. The baby was alive at the time he was born.

112. After the baby was born the accused abandoned the baby by leaving him unattended which resulted in the death of the baby. The accused had intended to cause the death of the baby by what she had done. Furthermore, the prosecution states that the accused had the opportunity to go to the hospital but she chose not to.
113. The Pathologist Dr. Mate, who conducted the post mortem on the deceased confirmed that the cause of death was the excessive loss of blood due to the partial tearing of the carotid artery on the right side of the baby's neck.
114. Dr. Zibran who had examined the accused at the Sigatoka Hospital in his professional opinion stated that the accused had an incomplete/septic abortion.
115. The Defence says that the accused was an ordinary iTaukei villager who got pregnant out of wed lock. She did not tell anyone of her pregnancy due to the fear of being chased out of the family home by her mother. Her mother had warned her that she will not tolerate the accused getting pregnant again after she had fallen pregnant on two earlier occasions. Furthermore the accused was facing financial difficulties and she did not receive any ante natal or post natal advice or treatment. She wanted to go to the hospital but it was too late.
116. After giving birth the accused was feeling weak, dizzy and her legs were heavy. She could not walk so she had to crawl hence she could not have carried the baby with her. As a result of her bleeding the accused had presented herself at the Sigatoka Hospital with vaginal bleeding resulting in low level of blood in her body.
117. The defence further says the experience associated with the accused pregnancy and not having fully recovered from the effect of child

birth, her personal circumstances at home and lack of ante natal or post natal advice or treatment had led to the balance of her mind been disturbed.

118. The accused maintains that she did not intend to kill her baby as alleged.

Ladies and Gentleman Assessors

119. Experience tells us that many such cases arise not as a result of mental illness but of social and emotional failure. The failure to accept mothers who gave birth out of wedlock, failure to provide care for such mothers and babies, and failure to ensure that the fathers of such babies take equal responsibility for birth and upbringing of his child.
120. The accused is an unsophisticated ordinary villager who did not receive any social or emotional support during her pregnancy although this was her third child she did not receive any ante-natal advice or care during her pregnancy. At all times the accused was mindful of the warning given to her by her mother and her 5 brothers that if she fell pregnant for the third time she will have to leave the family house. You are also to consider the environment the accused has been living in which was an iTaukei village setting and the circumstances of the child delivery. The accused always carried the fear that if her mother found out that she was pregnant for the third time she will be chased out of the family home this also stopped the accused from seeking assistance from her other relatives or fellow villagers.
121. You are to consider all the evidence in its totality and consider the effect of child birth, lack of social or emotional support and the circumstances of the accused such as:

- (a) The lack of financial support;
- (b) She was a single mother who had never been married;
- (c) The warning by her mother and 5 brothers that if she gets pregnant for the third time then she will be chased out of the family home;
- (d) Not obtaining any ante-natal advice or treatment;
- (e) Giving birth to the baby without any support from anyone in an unfamiliar environment in the dark;
- (f) The effect of the delivery on the accused which was mentioned by Dr. Zibrán as incomplete and septic abortion including loss of blood by the accused.

Ladies and Gentleman Assessors

122. You have seen the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
123. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
124. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a

witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

125. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
126. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
127. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
128. The accused is not required to prove her innocence she is presumed innocent until proven guilty.
129. In this case the accused is charged with one count of Murder, however, you are to also consider the offences of Manslaughter and Infanticide in reaching your opinions.

130. Your possible opinions are:-

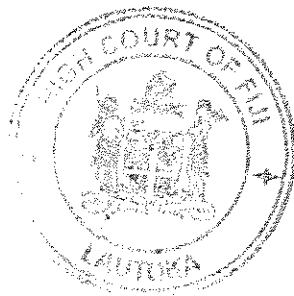
1. **MURDER - ACCUSED - GUILTY OR NOT GUILTY.**
2. If you find the accused not guilty of Murder then you are to consider whether the accused is guilty or not guilty of **MANSLAUGHTER**.
3. If you find the accused not guilty of Manslaughter then you are to consider the count of **INFANTICIDE** whether the accused is guilty or not guilty of Infanticide.
4. If you find the accused guilty of Murder then you are not to consider the offences of Manslaughter or Infanticide or if you find the accused guilty of Manslaughter then you are not consider the offence of Infanticide.

Ladies and Gentleman Assessors

131. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

132. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.

At Lautoka
20 April, 2018




Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.