

R. v. HUTTY.

BARRY J.

MARCH 24, 25, 1953.

Criminal law—Infanticide—Nature of offence—Charge to jury—Evidence of accused's good character—Use to which such evidence should be put—Time at which a child is fully born—Crimes Act 1949 (No. 5379), sec. 4.

An unmarried mother, aged nineteen years, was charged with the murder of her newly-born child. The child died from injuries to the head sustained within twenty minutes of delivery. There was evidence that the accused, who was alone at the time of the birth, was within twenty minutes of the birth crying and very upset and did not seem to know what she was doing.

The learned trial judge (Barry J.) advised the jury to acquit the prisoner of murder, and consider whether she was guilty of manslaughter or infanticide. His Honour expressed the opinion that in circumstances similar to those revealed by the evidence, the Crown should not present an accused person upon a charge of murder, but should charge her with the offence of infanticide, created by the *Crimes Act 1949*, sec. 4 (1).

Direction to the jury as to (i) when a child is fully born and (ii) the manner in which evidence of good character should be used.

TRIAL.

Dorothy Janet Merle Hutton was charged with the murder of an infant child born of her body. The accused was tried before Barry J. and a jury. The evidence showed that the accused, who was nineteen years old and unmarried, gave birth to a female child on the 13th January 1953. She was living on a farm at Woodside with her mother and step-father, from whom she concealed her pregnancy. On the 12th January 1953 at about 5.30 p.m. she developed labour pains, and about midnight went to the outside convenience and whilst there alone at about 12.30 a.m. on the 13th January gave birth to a female child. About twenty minutes after she went outside she returned to the house and told her mother that she had given birth to a baby. Her mother deposed that the accused was then crying and very upset and did not seem to know what she was doing. The accused's mother and her husband went to the convenience and found the body of a newly-born female baby. According to medical evidence the baby was normally formed and had been completely born and had had an independent existence. In a written statement to the police, made whilst in hospital, the accused said the baby was born whilst she was standing up, and that it fell on to the ground, and that she lost control of herself and whilst the baby was on the ground she struck it a couple of times on the head and face with her shoe. The Government pathologist deposed that the cause of the child's death was the injuries to the head. The accused gave evidence on oath. She denied that she had struck the child with her shoe, and said that she did not appreciate the contents of the statement when she signed it while in hospital. She deposed that the baby fell to the ground on its head as it was born. Evidence of the accused's good character was given by witnesses called on her behalf.

F. Galbally, for the accused.

L. Little, for the Crown.

BARRY J. charged the jury as follows: Gentlemen of the jury, your function in this case is to determine what are the facts and to draw the conclusions from those facts which you think proper, and to apply to

those conclusions the legal directions that I shall give you. When you have done that you will be in a position to return a verdict. You have been told with complete accuracy that the burden of proving this case rests upon the Crown. The Crown alleges that the prisoner has committed a crime and it devolves upon the Crown to establish to your satisfaction beyond all reasonable doubt every element that is necessary to be proved in order that the crime may be shown to have been committed. If on a consideration of the evidence you are left in reasonable doubt upon any relevant matter, then it is your obligation to give the benefit of that doubt to the prisoner, and unless the Crown has brought home to your minds a complete and satisfactory persuasion beyond all reasonable doubt that the prisoner is guilty of an offence against the criminal law, it is your duty to acquit the prisoner. The first charge you will have to consider is whether the Crown has established to your satisfaction beyond reasonable doubt that the prisoner murdered her child. Murder can only be committed on a person who is in being, and legally a person is not in being until he or she is fully born in a living state. A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord; that does not prevent it from having a separate existence. But it is required, before the child can be the victim of murder or of manslaughter or of infanticide, that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs. I imagine you will have little difficulty in deciding that this child was fully born in the sense I have explained to you; it seems clear that at the time the child met its death it had a separate and independent existence; the medical evidence which I shall mention to you later seems to point to no other reasonable conclusion. But you will observe, in accordance with what I said when I began my observations to you, that the decision of all matters of fact is for you, and if I offer a view on questions of fact you are not bound by that view; if it runs contrary to your experience, or if you feel it is a view which you are not prepared to accept, do not act upon it merely because it comes from me as presiding Judge of this trial. I have no right to usurp your functions and I have no desire to do so.

Murder is the crime which is committed when one human being intentionally kills another human being in circumstances which the law does not regard as constituting just cause or excuse; it may also be committed when one human being brings about the death of another human being by inflicting intentionally upon that human being serious bodily harm of a kind reasonably likely to cause death in circumstances which the law does not regard as constituting just cause or excuse. In this case I advise you to acquit the prisoner of murder because I consider that the evidence that is before you is a kind which, having regard to the present state of law, should not lead to your recording a verdict of guilty of murder against the prisoner. Indeed, I hope that in future where the facts are of the kind that have been revealed by the evidence here, the Crown will not present a woman upon the charge of having murdered her child. In Victoria before 1949 it was all the Crown could do, but in 1949 an Act of Parliament was passed which created the offence of infanticide. So far as I know this is the first case of its kind since the passing of that Act, and I do not offer any criticism of the Crown law authorities for presenting this prisoner upon a charge of murder; it may well have been desirable to do so in order to obtain the

opinion of the Judge presiding at the trial as to whether it was the proper course to follow. Having regard to the existence of the statutory crime of infanticide, however, it seems to me it is now the intention of the Legislature that in a case such as this the prisoner should be presented, not upon a charge of murder, but upon a charge of infanticide. I shall assume that you will accept the advice I have given you and will find the prisoner not guilty of murder. If you do that, because the charge is murder you will have to consider two other crimes of which you may convict the prisoner. The first is the crime of manslaughter. Whenever a prisoner is charged with murder it is open to a jury to convict that prisoner of manslaughter, because if it is shown that the prisoner did the killing, and if that killing was unintentional but done in the course of an unlawful activity, it may amount to the crime of manslaughter. You will see from what I have said that the outstanding distinction between murder and manslaughter is that murder is an intentional killing, or a killing resulting from an intentional infliction of serious bodily injury, while manslaughter is an unintentional killing. If you were satisfied that this young woman killed this baby after it had been fully born and had developed a separate existence, but that she did so with no intention to kill it, at a stage when she was so distraught by her harrowing experiences that she was incapable of forming such an intention, but that she was still aware that what she was doing was wrongful, you would be justified in convicting her of manslaughter. Similarly if you came to the conclusion that without any intention of killing the child, but being aware of what she was doing, she struck the child some blows upon the head, you could come to the conclusion that her conduct was unlawful, and that that unlawful conduct brought about the death of the child, and that therefore she was guilty of manslaughter. Do not for a moment understand me as saying that you are bound to come to these conclusions; I merely point out to you that within the law it is open to you, if you are satisfied of the facts I have indicated, to come to the conclusion that the prisoner was guilty of manslaughter. You may, however, not be disposed to convict the prisoner of manslaughter, and for that reason I bring to your notice the legislation which relates to the offence of infanticide. It is provided by sec. 4 of the *Crimes Act 1949* that 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 satisfied 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 . . . then the jury may, notwithstanding that the circumstances were such that but for the provisions of this section they might have returned a verdict of murder, return *in lieu* thereof a verdict of infanticide.

The legislation also deals with the killing by a mother of her child when the balance of her mind was disturbed by reason of the effects of lactation consequent upon the birth of the child, but that matter does not arise in this case and there is no need for me to discuss it with you.

The provisions of sub-sec. (2) of sec. 4 of the *Crimes Act 1949* are substantially the same as sub-sec. (1), but sub-sec. (1) contemplates that the prisoner may be charged with infanticide in the first place. Sub-section (2) contemplates that where the prisoner has been charged with murder the jury may convict her of infanticide even though she has not been charged with that crime, and, of course, in convicting her of infanticide they necessarily acquit her of murder. If you were disposed to convict this girl of infanticide then, when the Associate asks you "Do you find the prisoner guilty of murder?" you would say "Not guilty of

murder but guilty of infanticide". You will observe, gentlemen, that the first requirement, before a woman may claim the benefit of this sub-section, is that the child that is killed must be under the age of twelve months. Here you have no difficulty about that because undoubtedly this child was under the age of twelve months; it met its death very soon after birth. You will next observe that the section speaks of the death of the child being caused by a wilful act or omission. "Wilful" in that context means "intentional", and before you could convict the prisoner of infanticide you would have to be satisfied that she intentionally did some act or intentionally made some omission which brought about the death of the child. If you were satisfied that the death of the child had been brought about by an intentional act or omission on the part of the prisoner, then it would be for you to consider whether at the time she did that act or made that 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. I suppose where you have circumstances established before you such as you have here, and with the death of the child occurring within a very brief time of its being born, you would have very little doubt that the conduct of the mother—if you found it amounted to a wilful act or omission causing the death of the child—was the product of the ordeal that she had undergone and you would have very little doubt, I imagine, that at that stage the balance of her mind was disturbed by reason of her not having fully recovered from the birth of the child. If you were satisfied of those matters it would be open to you to return a verdict of infanticide.

[His Honour then dealt with other matters and continued:] Gentlemen, those are the two crimes which I advise you to concentrate your attention upon. Do you think the prisoner was guilty of manslaughter? Do you think she was guilty of infanticide? If you decide to find her guilty, find her guilty of manslaughter or of infanticide; do not find her guilty of both. Indeed, it would rather appear that in the particular circumstances here the two verdicts may be said to be two ways of looking at the same set of facts; but I leave to you, seeing that the charge is one of murder, the question of whether you are satisfied that the prisoner was guilty of manslaughter. I leave to you also the question of whether you are satisfied that the prisoner was guilty of infanticide, but, as I have said to you, if you decide to convict her, convict her of either manslaughter or infanticide.

[His Honour then dealt with other matters and continued:] It has appeared by the evidence that the accused is a person of good character. One would rather expect that to be so. There are juvenile delinquents in this community, undoubtedly there are a great many of them, but it would be unusual for a girl growing up in the circumstances that she did in the country to come into conflict with the police, and I suppose you have not got any doubt that she is a girl of good character in the sense that she has been a law-abiding person during her comparatively brief lifetime. The evidence of her good character may be used by you in this way: you may say,

We are disposed to think that such-and-such may be the fact, or set of facts, and if we were not in possession of this evidence of good character we would arrive at a conclusion beyond all reasonable doubt that such was the fact, but now that we have the good character of the prisoner established before us that introduces a doubt which otherwise we may not have had, and as we now have that doubt and as we are not satisfied beyond reasonable doubt of this particular fact, we give the prisoner the benefit of the doubt,

and if the rejection of that fact is one that leads to an acquittal, you would record a verdict of not guilty.

[His Honour dealt with other matters and continued:] The Crown case may be put before you very briefly. There is no question that the accused gave birth to this child. Her step-father and her mother tell of the circumstances under which she did so. By the time the child was found the step-father says it was dead. A doctor was called and on examination he found the child was dead. The police witness removed the body from the home of the prisoner and it was later taken to the morgue. The useful evidence that you may think is available to you upon the condition of the child is that of Dr. Bowden. Dr. Bowden says the body was the body of a well-developed child and that the cause of death was injuries to the head of the child. He says that in his opinion the child was born alive and had an existence after birth. The substance of Dr. Bowden's evidence comes down to this, that the child was completely delivered of its mother and that it had a separate existence and that it met its death as a result of injuries to its head. It is a matter for you, gentlemen, whether you wish to say that that evidence is satisfactory or not; but I offer you my view which, as I have previously said, does not bind you, that the evidence given by Dr. Bowden is evidence upon which a sensible jury should act and that accordingly you should come to the conclusion that the child was born alive and did have a separate existence and did die as a result of injuries to its head sustained after birth. [His Honour then proceeded further to discuss the evidence for the prosecution and the defence.]

[The jury retired and on returning into Court announced as their verdict that the accused was not guilty of murder, not guilty of manslaughter, and not guilty of infanticide.]

Verdict, not guilty.

[Note: for an historical discussion of the legal position prior to the English *Infanticide Act 1938* (1 & 2 Geo. 6 c. 36), see "Child Killing in English Law", by D. Seaborne Davies, 1 *Modern Law Review* 203, 269, and *cf. Proceedings of Medico-Legal Society of Victoria*, vol. 3, p. 211. The relevant provisions of the *Crimes Act 1949* (No. 5379), sec. 4, adopted without material alteration the English *Infanticide Act 1938*; see *Victorian Parliamentary Debates*, vol. 229, p. 68.—J.V.B.]

Solicitor for the Crown: *F. G. Menzies*, Crown Solicitor.

Solicitor for the accused: *John W. Galbally*.

G.H.T.