

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,)	FC. CR. NO. 03-1-0036
)	
Plaintiff,)	MANSLAUGHTER
)	
vs.)	HONORABLE MICHAEL A. TOWN
)	NINETEENTH DIVISION
TAYSHEA AIWOHI,)	
)	DECISION ON DEFENDANT TAYSHEA
Defendant.)	AIWOHI'S MOTIONS TO DISMISS
_____)	

DECISION

I. Posture of the Case

This matter comes before this Court on Defendant Tayshea Aiwahi's motions to dismiss her indictment for manslaughter.

On October 9, 2003 Defendant was indicted for the offense of manslaughter after a grand jury heard the state's evidence that same day. The indictment alleges as follows:

On or about the 12th day of July, 2001, to and including the 17th day of July, 2001, in the City and County of Honolulu, State of Hawai'i, TAYSHEA AIWOHI, being the parent of Treyson Aiwahi, did recklessly cause the death of Treyson Aiwahi, a person less than 18 years of age, thereby committing the offense of Manslaughter, in violation of Section 707-702(1)(a) of the Hawaii Revised Statutes.

The grand jury heard the testimony of the following witnesses in the following order:

First Deputy Medical Examiner William Goodhue M.D., Detective Kevin Wong of the Honolulu

Police Department, and Chief Investigator for the Department of the Medical Examiner, Susan Siu. A copy of the Grand Jury transcript has been provided to this court by both sides and has been filed in the legal record.

Dr. Goodhue testified to the grand jury that the minor child Treyson Aiwohi was pronounced dead the morning of July 17, 2001 and he conducted an autopsy that same day. He testified the level of methamphetamine in Treyson's blood was at least four times the reported minimum toxic level and that the level of amphetamine in his blood was at least two times the reported minimum toxic level. He testified that amphetamine is a byproduct of the body breaking down methamphetamine. Dr. Goodhue testified further that he ruled out other causes of death such as external and internal trauma, disease or disorder, and accidental suffocation. He testified that the cause of Treyson's death was due to the toxic effects of methamphetamine. He also testified that the level of methamphetamine and amphetamine found in Treyson's body at autopsy were consistent with exposure to methamphetamine through his mother.

Detective Wong testified to the grand jury that he interviewed Defendant on July 17, 2001. She told him that she and her husband brought the baby home from the hospital the evening of July 16, 2001, at about 7:00 p.m., and breast fed the baby that night at about 1:00 a.m. or 1:30 a.m. They all then went to sleep in the same bed. Defendant told Detective Wong that the next morning the baby's father awakened Defendant and told her the child was not breathing. Treyson was then transported to the hospital by ambulance.

Chief Investigator Siu testified to the grand jury that on August 29, 2001, Defendant told her she smoked methamphetamine on July 12, 13, 14 and 15, 2001. Defendant then gave birth to Treyson on July 15, 2001.

On March 2, 2004, Defendant filed the following motions: (1) Motion to Dismiss Indictment Based on Insufficient and/or Impermissible Evidence Presented at the Grand Jury Proceedings; (2) Motion to Dismiss Based on the Unconstitutionally Vague and/or Overbroad Nature of the Prosecution as Applied to the Defendant and/or the Unconstitutional Failure to Provide Fair Notice to the Defendant; and (3) Motion to Dismiss Indictment Based on Violation of the Defendant's Constitutional Right to Privacy. The State of Hawai'i filed its memorandum in opposition on May 20, 2004. Defendant filed its reply memorandum on May 24, 2004. This Court heard extensive arguments on the motions on May 26, 2004 and took the matter under advisement until today to consider the briefs and arguments presented.

Defendant argues that dismissal is warranted because the manslaughter statute is misapplied to the facts of this case, as any harm to Treyson occurred while he was *in utero*. Defendant argues the statute is unconstitutionally vague and overbroad, as applied, in that a reading of the Hawai'i Penal Code (1) provided no fair notice to the public that such conduct was potentially criminal and (2) provided no proper guidance to law enforcement. She argues that, as applied, the prosecution interferes with Defendant's fundamental right to privacy under the Hawai'i Constitution.¹ At the hearing on these motions, defense counsel also argued that there exists common law immunity for a mother that harms her fetus that is later born alive and dies, citing precedent in other states.

¹ Article I, Section 6 of the Hawai'i Constitution provides:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

The State of Hawai'i argues that the allegations of the indictment, if proved at trial, would fulfill the plain language requirements of the manslaughter statute and the Hawaii Penal Code and this case should proceed to trial.

II. The Law

At the outset it is important to note that with respect to criminal law in this state, Hawai'i is a code state and no common law crimes or defenses exist. See Hawaii Revised Statutes (HRS) sections 1-1, and 701-102.²

A brief recitation of the key statutory provisions is instructive in understanding this case. HRS section 707-702(1)(a) defines manslaughter (commonly known as “reckless manslaughter”), in pertinent part, as follows:

A person commits the offense of manslaughter if : (1) he recklessly causes the death of another person.

HRS section 707-700 defines a “person” as “a human being who has been born and is alive.”

HRS section 702-206 defines “recklessly” as follows:

² Section 1-1, HRS, provides as follows:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State. (emphasis added)

Section 701-102, HRS provides, in pertinent part, as follows:

- (1) No behavior constitutes an offense unless it is a crime or violation under this Code or another statute of this State.
- (2) The provisions of this Code govern the construction of and punishment for any offense set forth herein committed after the effective date, as well as the construction and application of any defense to a prosecution for such an offense.

- (a) A person acts recklessly with respect to his conduct when he consciously disregards a substantial and unjustifiable risk that the person's conduct is of the specified nature.
- (b) A person acts recklessly with respect to attendant circumstances when he consciously disregards a substantial and unjustifiable risk that such circumstances exist.
- (c) A person acts recklessly with respect to a result of his conduct when he consciously disregards a substantial and unjustifiable risk that his conduct will cause such a result.
- (d) A risk is substantial and unjustifiable within the meaning of this section if, considering the nature and purpose of the person's conduct and the circumstances known to him, the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation.

III. Court's Ruling

It is this court's considered decision after careful study of the law and arguments of counsel that the motions must be respectfully denied.

As discussed above, Hawai'i is a code state with respect to criminal law. Accordingly, in Hawai'i, there exists no common law immunity for a mother's actions allegedly harming her fetus which is later born alive and dies. The State candidly concedes that if Treyson were not born alive, no manslaughter charge would exist under Hawaii law. It must be noted that other states have ruled there is such common law immunity. *See, e.g., State v. Ashley*, 701 So.2d 338 at 341 (Fla. 1997). Even if Hawai'i were to embrace the common law, current and historical pronouncements on the common law are diametrically opposed.³ Finally, this court finds no privacy right or limitation exists requiring dismissal of the charge under the Hawaii Constitution.

³ *See Williams v. State*, 77 Md.App. 411, 550 A.2d 722 (1988); *affirmed* 316 Md. 677, 561 A.2d 216 (1989). In *Williams*, the court examined whether a child born alive but who dies as a result of an injury sustained *in utero* is a homicide victim. Given that manslaughter was a common law felony in Maryland and not defined by statute, the court looked to various authorities on the applicable common law; in particular, Lord Hale and Lord Coke. Lord Hale's position was that it did not constitute homicide:

If a woman be quick or great with child, if she take or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of

What is particularly convincing to this Court is that in other states, third parties have been charged criminally and found culpable for conduct resulting in the injury or death of a born alive infant, even though the conduct was prenatal.⁴ The State persuasively contends that the law should treat a mother's acts the same as a third party, given the lack of a mother's immunity for such acts in Hawai'i. This court finds that in either situation – mother or third-party – there are sufficient grounds to charge for reckless manslaughter for the actions set forth above.

Defendant, like anyone accused of any criminal offense, is presumed innocent. The burden of proof is upon the State at trial to prove her guilt beyond a reasonable doubt to twelve fair and impartial jurors with the right of appellate review, if necessary. In contrast, the charging of Defendant via indictment requires a threshold finding of probable cause and is not evidence to be considered at trial.

England, because it is not yet in *rerum natura*, tho it be a great crime, and by the judicial law of Moses was punishable by death, nor can it legally be made known whether it were killed or not, so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. 1 Hale, *Pleas of the Crown* 433 (1736).

Williams at 417, 550 A.2d at 724-725. The position of Lord Coke was the opposite:

If a woman be quick with childe, and by a potion or otherwise *killeth it in her wombe*; or if a man beat her, whereby the *childe dieth in her body*, and she is delivered of a *dead childe*, this is a great misprison, and no murder; but if the childe be *born alive* and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature *in rerum natura*, when it is born alive ... and so was the law holden in Bracton's time.... 3 Coke, *Institutes* *50 (1648) (emphasis supplied).

The Williams court sided with Lord Coke, holding that “when a child is born alive but subsequently dies as a result of injury sustained *in utero* the death of the child is homicide.” Id. at 420, 550 A.2d at 726.

⁴ See, e.g., Williams v. State, 316 Md. 677, 561 A.2d 216 (1989) (defendant shot passerby pregnant mother with bow and arrow; child born alive and died due to blood loss from injury; defendant charged with reckless manslaughter; Court of Appeals of Maryland affirmed); State v. Cotton, 197 Ariz. 584, 5 P.3d 918 (2000) (defendant accidentally shot his eight and one-half month pregnant girlfriend in the back of the head; child born alive and dies due to blood loss; defendant charged with reckless manslaughter; Court of Appeals of Arizona affirmed); Cuellar v. State, 957 S.W.2d 134 (Tex. 1997) (defendant drove his car into another car driven by seven and one-half month pregnant woman; child born alive but later died due to trauma; defendant charged with intoxication manslaughter; Court of Appeals of Texas, Corpus Christi, affirmed).

This is a case of first impression in Hawai`i and it understandably raises emotionally charged legal and social issues. Community concerns relating to the social policy issues raised are best directed to the legislative branch and other policy makers. The trial courts have specific and separate constitutional duties under the law, which do not include social policy concerns. Unless and until this court or another court rules otherwise, this case will go forward in the normal course.

Accordingly the motions are respectfully denied and the State will prepare the order within 10 days.

DATED: Honolulu, Hawaii, _____.

THE HONORABLE MICHAEL A. TOWN
JUDGE OF THE ABOVE-ENTITLED COURT