

Curbing the Problems of Baby Dumping and Infanticide: A Malaysian Legal Perspective

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Abstract

Baby dumping and infanticide are fast becoming a national issue, causing grave concern among the public and also the government. There are indeed some legal provisions under the Malaysian criminal law relating to both criminal acts. However, these provisions are seldom referred to due to their ambiguous interpretation and application. In fact, there is confusion in differentiating between baby dumping and infanticide. Henceforth this article aims to highlight and analyse the relevant existing Malaysian provisions, namely sections 317(Exposure and abandonment of a child under 12 by parents or person having care of it), 318(Concealment of birth by secret disposal of dead body), and 309A(Infanticide) of the Penal Code. This is essential in order to identify the distinct features between baby dumping and infanticide thereby giving clarity to the said legal provisions. It is submitted that there are some lacunas in those provisions that need to be addressed in order to curb the problems effectively.

Keywords: baby dumping, infanticide, abandonment, exposure.

Introduction

Baby dumping and infanticide are amongst the most heinous and inhumane crimes in any jurisdiction in this world. It is difficult to estimate the true extent of infanticide and baby dumping in Malaysia. This is due to the fact that such cases may occur in the society but they may be unreported. Indeed, police statistics (There is a total of 517 cases of baby dumping from 2005 till February 2011 - PDRM) and anecdotal information suggest that the problem is very significant. To what extent does the existing law in Malaysia address this issue? Is the existing law effective in curbing those criminal acts? This article highlights and identifies the relevant conducts which amount to baby dumping and infanticide. It also highlights the implications of the laws in Malaysia arising from those forbidden acts.

Legal Issues Arising From Baby Dumping and Infanticide

There are few relevant legal provisions pertaining to baby dumping and infanticide. These provisions give different implications in terms of *mens rea*, *actus reus* and also punishment, depending on the ways or methods of abandoning babies or causing the death of the babies. It is to be noted that cases of infanticide or baby dumping which cause the death of babies are significantly different from cases of baby dumping which do not cause the death of the baby. Each section is discussed separately in this article.

Section 317 of the Malaysian Penal Code

Section 317 provides for the punishment of an offence of parents or person responsible taking care of a child under the age of 12 years who exposed and abandoned the child. The provision reads:-

Exposure and abandonment of a child under twelve years by parent or person having care of it.

Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

Based on the above mentioned provision, any person shall be made criminally liable with this offence if it can be proved that they are the child's parents or person having care of the abandoned child. The *actus reus* is the act of exposure or abandonment in any place. This *actus reus* will lead to two possibilities. It either leads to the exposure or abandonment causing the death of the child OR the act does not cause the death of the child. The words 'exposure' and 'abandonment' are not defined in the Penal Code. 'Exposure' literally means to put someone physically outside which may have a risk of facing danger where the person, in this context a child would not be receiving the necessary protection it needs due to its tender age and inability to defend himself. (Penal Code (Act 574) (Revised – 1997), The Annotated Statutes of Malaysia, With Relevant Subsidiary Legislation, 2001). 'To expose' also denotes laying open to the danger or risk of some harm or injury of a bodily nature. (Suresh Narain Mulla,). The meaning of the term has also been decided by Blair J in the case of *Mirchia* ([1896] 18 All 364);

“Having reference to a child, 'expose' would mean putting it somewhere, where it cannot receive the protection necessary for its tender age; as for instance, putting it outside the house, whereby it would be exposed to the risk of climate, wild beast and the like. The exposure contemplated by the act was one by which danger to the child immediately ensue”.

The word 'abandonment' also has no definition in the Penal Code. It refers to an act of leaving a child with an intention of totally abandoning the child. In other words, the abandonment must be done with the intention of entirely leaving or exposing the child. (Penal Code (Act 574) (Revised – 1997), The Annotated Statutes of Malaysia, With Relevant Subsidiary Legislation, 2001).

A similar provision of law pertaining to the act of abandoning or exposing a child can also be found in section 31 of the Child Act 2001. Based on the provision, a person can be charged for ill treatment, neglect, abandonment or exposure of children if he has an intention to neglect, to abuse, to abandon or to expose the child in manner likely to cause him physical or emotional injuries. In cases of baby dumping, the common form of misconduct is neglect or abandonment, as well as exposure of babies to physical and emotional injury. Section 31(1) of the Child Act 2001 provides:

Any person who being a person having care of a child

- (a) Abuses, neglects, abandons or exposes the child in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected, abandoned or exposed or
- (b) Sexually abuses the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

This provision gives the same impact as section 317 of the Penal Code, where the act of abandonment needs to be proved. Nevertheless, the punishment for this offence in the Child Act 2001 is heavier than section 317 of the Penal Code.

The next legal issue is, can the doer be charged with the offence of murder if the child is found dead in consequence of the exposure or abandonment? The answer to this question is provided in the Illustration of Section 317 which states:

Explanation: This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be if the child dies in consequence of the exposure.

Referring to the Explanation of section 317, if the child dies in consequence of the exposure or abandonment, the perpetrator may be charged for murder under section 300, or culpable homicide under section 299 of the Penal Code, depending on the nature and circumstances of the case. Section 300 reads:-

Except in the cases hereinafter excepted, culpable homicide is murder –

- (a) If the act by which the death is caused is done with the intention of causing death;
- (b) If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
- (c) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;
- (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Culpable homicide on the other hand is provided in section 299:-

Whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. It is clearly seen that, the *mens rea* in murder and culpable homicide is intention or knowledge of causing the death of the baby. On the other hand, the *mens rea* in section 317 is the intention to abandon or expose the baby, not the intention to cause the death. The test to determine the *mens rea* in such cases is very subjective where the court will look at the facts and circumstances of the case as a whole. (R v Sheppard (1980) 3 WLR 961 (HL)).

In cases of baby dumping, an element of intent would be very difficult to prove, as the accused can claim that there was no intention to kill the baby but was left to be picked up by someone. If the perpetrator dumps or abandons the baby, probably because he or she is unable to provide adequate food, clothing, medical, lodging or care for the baby. The intention is to abandon or neglect or exposing the baby in a manner likely to cause him injury physically or emotionally, not to the extent of causing the death of the baby.

However, as the law stands now, if the child dies in consequence of the exposure, a person can be charged for murder or culpable homicide. The question remains unsolved due to the fact that there is a difficulty in determining the *mens rea* of causing death at the time of abandoning or exposing the child. The intention or knowledge to cause the death requires a high degree of *mens rea* on the part of the accused person. By virtue of section 300(d) even if the accused has no intention to cause the child's death, it must be proven that he has the knowledge that the act of abandoning or exposing the child is so imminently dangerous that it must in all probability cause death. Therefore the accused cannot simply be convicted for the offence of murder in cases of baby dumping due to the different degrees of *mens rea*. Furthermore, it is hard to prove that the death is caused by the abandonment or exposure.

The penalty provided in section 317 is very lenient and unreasonable and does not reflect the degree of seriousness of the offence. As opposed to the offences of murder or culpable homicide, if the prosecutor succeeds to prove the intention or knowledge to cause the death of the baby, the punishment will be death penalty for murder, or imprisonment which may extend to 30 years or ten years for culpable homicide; depending on the degree of probability of causing death. Section 304 of the Penal Code provides the punishment for culpable homicide not amounting to murder:-

Whoever commits culpable homicide not amounting to murder shall be punished –

- (a) With imprisonment for a term which may extend to thirty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or
- (b) With imprisonment for a term which may extend to ten years, or with fine, or with both if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Section 318 of the Malaysian Penal Code

Another relevant provision for the offence of baby dumping is section 318, which reads:

Concealment of birth by secret disposal of dead body.

Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child shall be punished with imprisonment for a term which may extend to two years, or with fine or with both.

This particular provision of law differs from section 317 because it relates to the act of dumping a newly born baby, by secretly burying or disposing the dead body of the baby. Either a baby dies before or after or during its birth, the offence is complete whenever there is an intention on the part of the perpetrator to conceal the birth by burying or disposing the baby. The application of the section is different with section 312 of the Penal Code relating to causing miscarriage whereby section 312 deals with the act of causing death of unborn child, whereas this section deals with babies who have been born but died on delivery either before, during or after birth. Section 312 provides:-

Causing miscarriage

Whoever voluntarily causes a woman with child to miscarry shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and if the woman be quick with child, shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

Meaning that the *actus reus* in section 318 is not causing the death of the baby but the concealment of a dead baby. Thus the main ingredient that has to be proved in the offence is at the time of dumping the baby, the baby has died. The phrase “concealment of birth by secret disposal of dead body” is very significant to show that the offence requires the baby to be dead, at the time of abandonment. The punishment for the offence is two years imprisonment or fine or both.

Section 318 will only be applicable when the accused conceals or endeavours to conceal the birth of a child, by secretly burying or disposing the dead body of the child. It means that the act which is penalised in accordance with this provision lies on concealment of birth; not the act causing the death of the baby. This is the reason why the penalty is only two years imprisonment or fine. Taking this into consideration, it can be concluded that the existing law does not regard the act of dumping the dead body as a serious crime. The act of concealment of birth by secret disposal of dead body is supposed to be considered as a very inhumane crime because it involves a person’s life and is tantamount to murder. It is unjustifiable that a cruel act will only be punished with imprisonment for two years or fine only.

Section 309A of the Penal Code

The offence of infanticide is not similar to the offence of baby dumping that causes the death of a newly-born baby. However in certain circumstances both offences may be overlapped. The Malaysian criminal law provides infanticide as a separate offence under section 309A as below:

When any woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this section the offence would have amounted to murder, be guilty of the offence of infanticide.

The section indicates that if at the time of the act or omission the balance of a woman’s mind was disturbed by reason of her not having fully recovered from the effect of giving birth, then what would appear at first sight to be murder, will be treated as infanticide. The punishment is as though she was found guilty of culpable homicide within the court’s discretion. Section 309B provides its punishment:

Whoever commits the offence of infanticide shall be punished at the discretion of the Court, with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

The limitations established by section 309A are:-

- a. The benefit of the offence is applicable only to the mother;
- b. It applies only if she causes the death of her own child. If it is caused by anyone else then the charge will be murder or culpable homicide depending on the intention. The section is so phrased to suggest that it is the child to whom the mother has given birth that must be the victim. Thus, if she kills another child of her family then infanticide would appear not to be a defence;

- c. The child in question must be a newly-born child. As to the definition of a newly-born child, the law is silent. But it must be associated with the facts that the mother while killing has not fully recovered from the effect of giving birth to the child. Under the English law, by virtue of section 1 of the Infanticide Act (IA) 1938, the child in question must be under the age of 12 months old, and apart from the requirement of not fully recovered from the effect of giving birth to the child, the section also stipulates that the balance of her mind may also be caused by reason of lactation consequent upon the birth.
- d. The balance of the mother's mind must be disturbed by reason of the effect of giving birth, if the balance of her mind is not disturbed and she kills, the charge will be murder, not infanticide.
- e. If the child is killed by someone other than the mother, sections 309A and 309B will not apply.

A number of reasons were advanced why infanticide should be considered less reprehensible than other killings (JC Smith, 1999). Some argued that the injury done to the child was less, for it was incapable of the kind of suffering which might be undergone by the adult victim of a murder; and the loss of its family was less great. More than that, the mental illness of the mother is considered to be a significant cause of this offence.

Nevertheless, the application of section 309A appears to be very subjective and ambiguous. What are the criterias or circumstances to determine "the balance of mind was disturbed by reason of the effect of giving birth"? (PP v Zamihyah [1987] 2 MLJ 649). Does the court take into consideration other circumstances consequent upon giving birth to the child? For example, overwhelming stress from the social environment being highlighted by the birth of a baby, with emphasis on the suitability of the accommodation etc; overwhelming stress from an additional member to a household struggling with poverty; psychological injury or pressures and stress from a husband or other member of the family etc. In most cases also, the balance of mind of a woman is disturbed upon delivering an illegitimate child, thus can this factor be considered for infanticide? (Anita Abdul Rahim, 2000).

The writers are of the opinion that the ambiguity in the said provision leads to the impracticality of its application. Though there may be many cases involving women killing their own children, they have not been charged with this offence. Even in cases of baby dumping by the mothers that causes the death of the babies, the charge is under section 318 of the Penal Code, which carries only two years imprisonment as a maximum penalty. Moreover, the nature of the offence under section 318 is concealment of birth, whereby the perpetrator is punished because of the act of concealment the dead baby. Whereas, the act of causing the death of the baby is not being made as an offence in that particular section.

Conclusion

It has already been observed in the above discussion that there are three relevant provisions in the Malaysian criminal law pertaining to the problems of baby dumping and infanticide. Section 317 of the Penal Code deals with an offence of exposure and abandonment of a child under 12 years by parent or person having care of it. This offence does not involve with the death of the child. Section 318 on the other hand deals with the offence of concealment of birth by secret disposal of dead body. Either the dead baby is secretly buried or disposed, the perpetrator will be punished for two years imprisonment. It is submitted that the punishment is very lenient and does not reflect the seriousness of the offence, thus obviously with the increasing rate of baby dumping cases in this country, the law needs to be reviewed to curb the problem. As for the offence under section 309A, the law indicates the act of causing death to a newly born child by the mother who gives birth to the child. The woman in this offence suffers from what is known as post natal depression and due to the disturbance of mind, she acts or omits to do something which causes the death of the child. The punishment is imprisonment for a term which may extend to twenty years.

As a conclusion, the phrase "baby dumping" per se does not exist in the context of the Malaysian criminal law. Nevertheless, the law is still applicable to punish the doer of baby dumping, either through section 317 or 318 of the Penal Code. As the law stands, the punishment for both crimes is still lenient. Thus it is recommended that our law provides for stiffer and severe punishment to curb with the problem of baby dumping. Besides, section 309A of infanticide is recommended to be extended and applied to cases of baby dumping if the act of dumping causes the death of the baby. It is also submitted that the phrase "at the time of the act or omission, she had not fully recovered from the effect of giving birth to such child and by reason thereof the balance of her mind was then disturbed" in section 309A must be clearly interpreted in order to give clarity in its application. With the rising number of cases, one of the ways to bring those responsible for the death of babies to justice is through the enforcement of the criminal laws.

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