Dealing with incidents of feticide and infanticide in England and Wales

An American woman was recently sentenced to 20 years imprisonment by a court in Indiana for neglect of a dependent and feticide (Valenti, 2015). The 33-year-old woman attended an emergency department bleeding heavily and eventually admitted to miscarrying a stillborn baby then placing it in a bag then a bin. The prosecution argued that text messages on her mobile indicated she had bought abortion-inducing drugs on the internet. No trace of the drug was detected in blood tests taken when she attended hospital. The woman continues to argue that she miscarried (Cherry, 2015). The handling of the case has been widely criticised as the woman appears to have been convicted of both unlawfully aborting her pregnancy—feticide—and allowing her neonate to die—neglect of a dependent. In this article, Richard Griffith considers how such cases are dealt with in England and Wales.

The law in England and Wales

The feticide laws enacted by most states in the USA were justified on the grounds of protecting women from illegal abortion providers. The National Advocates for Pregnant Women argue that this type of prosecution is actually about making pregnant women subject to state surveillance, control and extreme punishment from the time of conception (Dyer, 2015).

In England and Wales there at two laws that make it an offence for a pregnant woman, and third parties, to terminate an unborn child. The Offences Against the Person Act (1861), section 58 provides that:

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'Every woman being with child who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing … or unlawfully use any instrument or other means … and whosoever, with intent to procure the miscarriage of any woman whether she be, or not be, with child shall unlawfully administer to her any poison or other noxious thing … or unlawfully use any instrument or other means … shall be guilty of a felony (a serious crime).'

Offences Against the Person Act (1861), section 58

It is therefore an offence for a pregnant woman to procure her own miscarriage. A person who unlawfully procures the miscarriage of any woman will be guilty of the offence whether or not the woman is pregnant. If the woman dies as a result of an unlawful termination of pregnancy then the charge becomes one of manslaughter. In R v Buck (1964), Olive Buck was found guilty of the manslaughter of a woman on whom she had performed an unlawful abortion.

A defence to this charge would be provided where the woman has a termination of pregnancy under the provisions of the Abortion Act (1967), section 1. A lawful termination of pregnancy can only proceed if two doctors, acting in good faith, agree that the woman meets one of the conditions authorising an abortion under the 1967 Act.

The Infant Life Preservation Act 1929 closed a loophole in the law where a child was killed in the course of being born and made it an offence to kill a child capable of being born alive before it had an existence independent of its mother. The 1929 Act creates a presumption that a fetus of 28 weeks gestation was capable of being born alive. This does not, however, lower the limit on a child capable of being born alive and the courts have considered the application of the Act to less mature fetuses. In Rance v Mid Downs Health Authority (1991), the court held that a 26-week-old fetus was a child capable of being born alive because after birth it existed as living breathing child. In C v S (Fetus: Unmarried Father) (1988), the court held that a fetus aged 18–21 weeks was not a child capable of being born alive. Under the provisions of the Infant Life Preservation Act (1929), the offence of child destruction is committed unless the act which caused the death was not done in good faith for the purpose only of preserving the life of the mother.

In May 2007, a jury convicted a woman of child destruction under the Infant Life Preservation Act (1929) when she had a backstreet abortion when she was seven-and-a-half months pregnant. The woman, who never explained to police what happened and who else was involved, received a suspended 12 month prison sentence (Britten, 2007). It is the only instance of the 1929 Act being used against a pregnant woman who was treated with compassion by the court and received a lenient sentence.

Infanticide

The law in England and Wales gives prosecutors and the courts the opportunity to show further compassion to mothers who kill their infant child when the balance of their mind is disturbed.

The Infanticide Act (1938) provides prosecutors with an alternative to a charge of murder where a mother has killed her child before the age of 12 months.

The 1938 Act, section 1 (1) provides that:

'Where a woman by any wilful act or omission causes the death of her child being a child under the age of 12 months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.'

Infanticide may also be used as a fall back offence where a woman, initially charged with murder, is found not guilty by the jury who then return a verdict of infanticide instead.

In response to a recent freedom of information request, the Crown Prosecution Service do not use infanticide as an alternative offence. In all six cases where women were found guilty of infanticide or attempted infanticide they were initially charged with murder and left to the jury to decide if infanticide occurred (Crown Prosecution Service, 2014).

A verdict of infanticide allows the court to deal with the case as if the woman had been guilty of manslaughter. This gives the courts a wider range of sentencing options than the mandatory life sentence imposed for murder. In practice, a custodial sentence is rare. In R v Sainsbury (1990), a 17-year-old woman pleaded guilty to infanticide. She had become pregnant at 14 and had not told anyone. She had given birth unaided in a bathroom and taken the baby, wrapped it in a blanket and placed it in a river. The judge sentencing her said that he accepted that she was very immature and greatly disturbed by the effect of giving birth, but said that her responsibility was not removed altogether so sentenced her to 12 months' detention in a young offenders' institution.

The Court of Appeal held that in the previous 10 years, not one of the 59 cases of infanticide had resulted in a custodial sentence. There was nothing to take this case out of the ordinary pattern of those offences. The judge had been wrong to say that the welfare of society demanded a custodial sentence; the mitigating factors were overwhelming and a probation order replaced the prison term.

Conclusion

While the law in England and Wales seeks to punish women who unlawfully terminate their pregnancy or kill their young infant child, the availability of the offences of child destruction under the Infant Life Preservation Act (1929) and infanticide under the Infanticide Act (1938) give the courts the opportunity to deal with such cases with compassion and provides judges with a range of sentencing options that rarely involve imprisonment. **BJM**

Britten N (2007) Jury convicts mother who destroyed foetus. www.telegraph.co.uk/news/uknews/1552651/Jury-convicts-mother-who-destroyed-foetus.html (accessed 20 April 2015)

C v S (Fetus: Unmarried Father) (1988) QB 135

Cherry A (2015) Shifting our focus from retribution to compassion: An alternative vision for the treatment of pregnant women who harm their fetuses. *Journal of Law and Health* **28**: 1

Crown Prosecution Service (2014) Disclosure Ref: 13/2014 Statistics Regarding Offences And Convictions Of Infanticide Freedom Of Information Act 2000 Requests. www.cps.gov.uk/publications/docs/foi_disclosures/2014/disclosure_13.pdf (accessed 20 April 2015)

Dyer O (2015) Woman is sentenced to 20 years in prison for feticide after death of baby. *BMJ* **350**: h1895. doi: 10.1136/bmj.h1895

R v Buck (1964) 44 Criminal Appeals Reports 213

R v Sainsbury (1990) Crim LR 348

Rance v Mid Downs Health Authority (1991) 1 QB 587

Valenti J (2015) It isn't justice for Purvi Patel to serve 20 years in prison for an abortion http://www.theguardian.com/commentisfree/2015/apr/02/it-isnt-justice-for-purvi-patel-to-serve-20-years-in-prison-for-an-abortion (accessed 20 April 2015)