Wyoming Law Journal

Volume 17 | Number 3 | Article 6

December 2019

Proving Life Birth in Infanticide

Sam T. Ishmael

Follow this and additional works at: https://scholarship.law.uwyo.edu/wlj

Recommended Citation
Sam T. Ishmael, *Proving Life Birth in Infanticide*, 17 WYO. L.J. 237 (1963)
Available at: https://scholarship.law.uwyo.edu/wlj/vol17/iss3/6

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

There is a well-substantiated legal proposition which is applicable to every criminal prosecution for infanticide (the killing of an infant soon after its birth). The corpus delicti must be established, which entails proof of two concurrent facts, namely, (a) birth of the child alive; and (b) death of the child caused by criminal agency of the accused.[1] In addition, our own Wyoming homicide statutes refer to the killing of a human being.[2] This paper is wholly concerned with the first of the above elements.

Nearly all cases of infanticide involve the birth of the child without the benefit of witnesses, either professional or lay, other than the mother. Thus, the evidence concerning the child's live or still birth is almost always circumstantial. Further, in most cases of infanticide the mother is unwed and there is generally a "distasteful" element such as the body of the infant being found partially burnt in the city dump;[3] or found abandoned along a country road;[4] or found decapitated.[5] The attending circumstances of such cases are no doubt such as to confuse impartial minds with the revulsion. This is not a mere abstraction, but a concrete factor in almost every infanticide case. Common sense cannot deny that jurors are influenced by such revolting factors. But legal reasoning cannot accept that such conduct rationally proves beyond a reasonable doubt the unlawful killing of a live infant.

Relatively early English infanticide cases stressed the importance of proving a live birth and establishing standards for such proof. So, as in *Rex v. Richard Enoch and Mary Bully* decided in 1833, Justice Parke stated:

> The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder. . . . There must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose.[6]

In *Rex v. Sellis*[7] the court considered the importance of affirmative proof that the child breathed and held that the fact of its having breathed was not decisive proof that it was born alive inasmuch as it may have breathed and yet died before birth, because the whole body of the child might not have been born when the lung inflation occurred. Thus the early English cases stressed breathing, but more especially independent circulation.

This problem of proving a live birth was not of course restricted to

1. 30 Corpus Juris, Homicide, § 534 at p. 290, 159 A.L.R. 523, Annotation, "Corpus Delicti in prosecution for killing of new born child"; 2 Wharton's Criminal Evidence, Infanticide, 11th Ed., § 874, at p. 1511.
2. Wyo. Stat. §§ 6-54, 6-55, 6-57 (1957).
3. Bennett v. State, 377 P.2d 634 (Wyo. 1963).
4. State v. Osmus, 73 Wyo. 183, 276 P.2d 469 (1954).
5. Hubbard v. State, 72 Ala. 164 (1882).
6. 3 English Reports 172 (1833).
7. 173 Eng. Reprint 370 (1837).

England. The American courts have long struggled with it. A leading case is that of *Morgan v. State*,[8] where the defendant had been convicted of the second degree murder of her infant child. The hydrostatic test[9] had been made and the child's lungs foated in water. Three doctors testified, two of whom declined to express an opinion as to whether the baby had been born alive, and the third doctor thought that it had. The Supreme Court of Tennessee reversed the conviction on the ground that there was no satisfactory proof that the child was born alive, and explained:

> In order to become a "reasonable creature in being," a child must be born alive. It cannot be the subject of a homicide until it has an existence independent of its mother. It is usually said that the umbilical cord must have been severed, and an independent circulation established. Ordinarily, if the child has breathed, this would show independent life. But this test is not infallible. Sometimes infants breathe before they are fully delivered, and sometimes they do not breathe for a quite a perceptible period after they are delivered. Generally, however, if respiration is established, that also establishes an independent circulation and independent existence.

This case seems to require proof of severance of the umbilical cord.

In *Shedd v. State*,[10] where, as usual, there was no direct evidence that the child had been born alive, the Supreme Court of Georgia reversed the judgment of guilty entered in the trial court on the ground that the State had failed to establish the corpus delicti beyond a reasonable doubt. Yet in that case, a doctor, who had examined the decomposed body of the baby and had given the hydrostatic test, testified, "My opinion as a physician and surgeon, from my observation and experience of medical science, is that this child breathed after it came into the world." The court pointed out that this was not an unqualified statement of opinion that the child was born alive, nor that it had acquired a circulation and existence independent of its mother. Further, with respect to the quantum of proof, the court stated, "Testimony by a physician as to his opinion based on a post mortem examination, standing unsupported, does not come up to the requirements of the rule that guilt must be established beyond a reasonable doubt."

People v. Hayner[11] is perhaps the most revolting of all the infanticide cases. The defendant, Hayner, was the father of the child, which was the product of his incestuous relationship with his daughter; he had admitted to the sheriff that he had assisted in the birth and in so doing had pulled off the top of the child's head as it was born. He stated that the baby started to cry just after being born and that he strangled the baby with the umbilical cord until it stopped crying. He further confessed to his

8. 148 Tenn. 417, 256 S.W. 433 (1923).
9. This involves placing the lungs of the dead infant in water to see if they will float. If the lungs do float, it indicates that there is air in the lungs, which in turn indicates that the infant had breathed before death.
10. 178 Ga. 653, 173 S.S. 847 (1934).
11. 300 N.Y. 171, 90 N.E.2d 23 (1949).

secretive disposal of the body. Disregarding the revolting facts of the case, the Court of Appeals faithfully adhered to the fundamental criminal law doctrine requiring the corpus delicti to be properly established, stating in its opinion:

> For the People were bound to establish by proof outside the confessions that the child was born alive in the legal sense, that is, been wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of her own. The true test of separate existence in the theory of law (whatever it may be in medical science) is the answer to the question whether the child is carrying on its being without the help of the mother's circulation.
> The expansion of the lungs was of no great moment because the legal test of live birth—possession by the child of a separate circulation—made irrelevant the question whether the child had breathed or not (citing authority).
> The foregoing, we believe, is a sufficient analysis of the case for the People. The testimony of their medical experts was necessarily of slight or merely conjectural significance. For here no *one claiming to be an eye or ear witness came forth, and, where* that is the case evidence of live birth precedent to speedy death is of a nature practically impossible to medical science (see Atkinson, " Life, Birth and Live-Birth," 20 Law Quarterly Rev. 134, 146, 149). Hence we are ourselves wholly unconvinced that the jury were justified in finding the fact of live birth to have been established beyond a reasonable doubt, and, this being so, *the conviction of the defendant cannot be allowed to stand.*

We may note in this and the preceding opinion a second principle re quantum of proof: live birth cannot be established by the uncorrborated opinions of physicians, without more.

In 1954 an exhaustive study of the common law on this question was made by Chief Justice Blume in deciding the case of *State v. Osmus.*[12] In the trial court, the defendant had been convicted of manslaughter for killing her newborn child. The defendant testified that she had not known that she was pregnant and did not have the usual indications in that connection and had had regular menstrual periods. There was testimony by two doctors stating in effect that the defendant had told them otherwise. The defendant was unattended at the birth of the child. She testified that she had done all she could to save the child's life, but that it was born dead. Defendant then wrapped the body in newspapers and placed it under her cot where it remained for three days. Thereafter, she took the body along the highway out of town and placed it alongside the road. This action was observed by a game warden who, upon investigation, found the dead child.

A post-morten examination was performed, at which time a hydrostatic test was carried out and during the test the baby's lungs floated. In his testimony, a doctor stated that in his opinion the infant was born

12. *State v. Osmus, supra note 4.*

alive, and that the cause of death was a combination of asphiyxia and pneumonia. The doctor further testified:

> I feel, in my own mind, that this baby breathed and that it swallowed, because of certain findings. However, I cannot give an opinion as to whether or not this baby breathed or had circulation of the blood system after the umbilical cord was severed. We assume, from the knowledge we have in regard to the aeration of the lungs and the air in the stomach, that the child did breathe and did swallow. And, of course, that means that the baby did live.

After setting down these facts, Judge Blume observed at page 202 of the state report:

> V. *Sufficiency of Evidence of Live Birth.*
>
> The courts in England have struggled with the question such as before us for centuries. The author of an article in 20 Law Quarterly Review 134, 142, commenting on the undependable evidence obtainable when birth is given to a child secretly, stated: "Should the child soon die, someone (often it is not a medical man) must be present and observe both the birth and subsequent clear vital act; otherwise, there can be no reliable evidence of live-birth, for an expert here can certify few opinions." And the author states that out of fifty recorded charges during the preceding decade, acquittal of the charge of homicide most commonly resulted.
>
> It is stated in 2 Wharton's Criminal Evidence, 11th Ed., Section 874: "In infanticide, an independent circulation must be shown; the fact of the child having breathed is not conclusive proof that it was born alive. Such independent circulation and existence may be present, even though it is still attached to the mother by the umbilical cord. . . ."

Judge Blume then referred to the case of *People v. Hayner,*[13] pointing out that the New York Court of Appeals did not attach controlling importance to proof that the baby had breathed. Judge Blume continued:

> We have not had any satisfactory answer to the question, either out of medical books or in the cases that have been considered by the courts, as to when an independent circulation exists. Dr. Stuckenhoff (a witness for the state) testified that for a pulsation after the infant has left the body of the mother, there is a pulsation through the umbilical cord, and that the cord is usually not cut until such pulsation through it ceases. One accordingly would think that until such pulsation through the cord ceases, no independent circulation exists. And since the doctor was not able to tell when that happened, we seem to be in the same situation as the Court of Appeals in New York, compeltely unable to tell whether there was a live birth.

For this and other reasons the Wyoming Supreme Court reversed the conviction which had been attained at the trial.

In *People v. Chavez*[14] there was no direct evidence of live birth, but

13. Supra note 11.
14. 77 Cal. App. 2d 621, 176 P.2d 92 (1947).

the court nonetheless held that the corpus delicti of live birth had been established. The autopsy surgeon expressed the firm opinion that the child was born alive, based upon his findings of aeration of the lungs and the fact that the blood was extravasated or pushed back into the tissues, indicating heart action. He did admit that these factors could have resulted from the child's breathing after presentation of the head, but before the birth was completed. The California court frankly rejected the majority holdings on the question of live birth, putting it that:

> There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an independent life as a separate being, and where in the natural course of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide stautes, whether or not the process has been fully completed. It should at least be considered a human being where it is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed. While the question of whether death by criminal means has resulted while the process of birth was being carried out, or shortly thereafter, may present difficult questions of fact, those questions should be met and decided on the basis of whether or not a living baby with the natural possibility and probability of growth and development was being born, rather than on any hard and fast technical rule establishing a legal fiction that the infant being born was not a human being because some part of the process of birth had not been fully completed.

The Court of Appeals of Alabama in *Singleton v. State*[15] followed the *Chavez* holding, though the conviction was reversed on other grounds.

In January of 1963 *Bennett v. State*[16] was decided by the Supreme Court of Wyoming. The defendant was convicted in the trial court of manslaughter in connection with the killing of her newborn infant. There was no testimony as to the circumstances of the birth and in fact there was only circumstantial evidence that the defendant had given birth to a child at all. The pathologist who testified as a witness for the State averred his opinion as being that the baby was born alive, and stated that the basic reason for his opinion was that the child had breathed. The defense, based upon Chief Justice Blume's expression in the *Osmus* case,[17] asked for the following instruction which was refused:

> The information charges the killing of a baby boy, a human being then and there in being. I instruct you that it is necessary for the state to prove beyond a reasonable doubt as part of the corpus delicti that the baby was born alive. It is the law that an independent circulation and existence of the baby must be proved, and the fact of the baby having breathed is not conclusive proof that it was born alive.

15. 33 Ala. 536, 35 So. 2d 375 (1948).
16. Bennett v. State, supra note 3.
17. State v. Osmus, supra note 4.

In affirming the conviction, the court determined that Chief Justice Blume's expressions in the *Osmus* case[18] were dicta even though one of the major issues in that case was whether or not the infant had been born alive. The Court further stated:

> The proposed instruction would be confusing to a jury because it gives no standard for determining when an independent circulation exists.

The court further stated that the question of live birth was a question of fact for the jury and the opinion of the autopsy physician was evidence which could be considered by the jury.

So it appears from the *Bennett* case that the Wyoming Supreme Court is quite willing to follow what is definitely the minority view which was principally established in *People v. Chavez.*[19] *Bennett* seems definitely to repudiate *Osmus.*

From a review of the cases it appears that two major tests have been developed for use in proving the live birth of an infant. That adopted by the minority in the "breathing" test and that used by the majority is the possession of an "independent circulation" by the child. There is no doubt but what the "breathing" test is the easiest of the two to administer as the hydrostatic test[20] is conclusive in proving whether or not the infant has breathed. But simplicity alone is not a sufficient reason for accepting one test over another. It must be ascertained beyond a reasonable doubt that the infant was in fact alive, for a murder cannot be committed upon a person already dead. As stated in *State v. Winthrop,*[21] "It may be asked why, if there is a *possibility* of independent life, the killing of such a child might not be murder?" (Emphasis supplied). The answer is that there is no way of proving that such possibility existed if *actual independence* was never established. Further, two points on the quantum of evidence necessary for a valid conviction must be kept in mind. First as stated in *Shedd v. State*[22] "Testimony by a physician as to his opinion based on a post mortem examination, standing unsupported, does not come up to the requirements of the rule that guilt must be established beyond a reasonable doubt." Secondly, live birth cannot be established by the uncorroborated confession of the defendant, without more.[23] The courts (such as Wyoming) which have adopted the "breathing" test of live birth are definitely holding contra to the principle set out first above.

It is submitted that proving the independence of the child from its mother is the only test which satisfies the requirement of due process. Without such proof the infant has never been proven to have been born alive. It is mere conjecture to say that it *might* have been born alive.

SAM T. ISHMAEL

---

18. Ibid.
19. Supra note 14.
20. Supra note 9.
21. 43 Iowa 519 (1876).
22. Supra note 10.
23. Supra note 11.