

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 167 OF 2013

STATE

-v-

KAMI NAMALO

Counsels : **Mr. F. Lacanivalu for the State**

: **Ms. S. Ratu for the accused**

Date of Sentence : **25 March 2014**

SENTENCE

1. The accused is before the Court for sentence, after being convicted to the following charge:

Statement of Offence

Manslaughter Arising From A Breach Of Duty: Contrary to Section 240 and 241 (1) (a) and (b) (iii) of the Crimes Decree 44 of 2009.

Particulars of Offence

KAMI NAMALO on the 20th of July 2013 at Sigatoka in the Western Division, in omitting to exercise due care and attention, caused the death of **JOSIVINI LESU BOLATAGICI**.

2. You pleaded guilty to above charge on 11.3.2014 and admitted the summary of facts on 14.3.2014.

3. The summary of facts are as follows:

The Accused in this matter is one Kami Namalo, 24 years old of Saru Village in Sigatoka. He is in a de-facto relationship with one Mauvu Lesugalisaya, 23 years old of Balenabelo in Sigatoka. They had a 4 month old daughter namely Josivini Lesu Bolatagici who is the deceased in this matter.

On the 20th of July 2013 at about 11pm, Mauvu was drinking kava at the home of her uncle Master Saqa at Koroinasau Primary School compound with two others when the Accused came home drunk. Josivini, the infant, was asleep at that time in the bedroom. The Accused went straight to the room where she was sleeping and lay on the floor. After sometime, the Accused felt like vomiting so he went outside and vomited. The Accused went straight into the bedroom and got onto the bed where Josivini was sleeping. Mauvu warned him again not to sleep on the same bed with her as he might lie on her but he insisted that everything will be okay.

Mauvu then went back to continue drinking kava but was worried about Josivini so she kept checking on her. Before midnight on her third check, she found the Accused laying sideways over half of Josifini's body blocking her nose and mouth. She pushed him away and carried Josivini away. She noticed that her body was white in colour and saliva was coming out of her mouth. They tried to revive her but it was too late. She was then taken to Sigatoka Hospital where she pronounced dead.

A post mortem was conducted on Josivini on 21/07/13 where it was confirmed that the cause of death was asphyxia due to compression.

The Accused was interviewed under caution on the same above date where at Question 57, he stated that he was told by Mauvu to sleep in the room where their baby was sleeping and after kissing her, he lay down beside her. He confirmed that while he was sleeping, he wanted to vomit so he ran outside and vomited. He added that after vomiting, he then went back to the room but he was not aware he had lain on top of his own daughter. He only came to realize it when a man named Nasoni Tuigaloa from his own village started punching him on the forehead and thighs.

The Accused was negligent in his duty as a parent and omitted to exercise due care and attention when he came home drunk on the 20th of July 2013 and lay beside the deceased. His lack of care and attention whilst drunk led him to lay on top of the deceased causing her death.

4. After carefully considering your Plea to be unequivocal, this Court found you guilty for Manslaughter arising from breach of duty contrary to Sections 240 and 241 (1) (a) and (b) (iii) of the Crimes Decree.

5. Kami Namalo you stand convicted for one count of Manslaughter arising from breach of duty.
6. According to the Crimes Decree the maximum punishment for Manslaughter arising from breach of duty is Imprisonment for 25 years. It is a serious offence.
7. The tariff for Manslaughter arising from breach of duty is discussed in several cases.
8. In **Bae v State** [1999] FJCA 21; AAU 0015u.98s (26 February 1999) it was held by the Fiji Court of Appeal that:

'The task of sentencing is not an exact science which is capable of mathematical calculation. This is particularly so with manslaughter where the circumstances and the offender's culpability can vary greatly from case to case. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence.'

The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts.'

9. In **State v Toka** [2003] FJHC 183; HAC 0008J.2003S (23 September 2003) it was held by Hon. Madam Justice Nazhat Shameem that:

*'The range of sentences in other jurisdictions for offences of manslaughter by gross negligence appear to be from 12 months imprisonment to 5 years. In **Attorney General's References (Nos. 19, 20 and 21 of 2001, R v Byrne, Field and Cuthbert)** (2002) 1 Cr. App. R (s) 33, the English Court of Appeal said that in such cases the court should consider the following:*

- (i) *The conduct causing death. If the negligence was particularly reprehensible a long custodial term should be imposed.*
- (ii) *Public concern and the need for deterrence.*
- (iii) *Whether the offender had intended any violence.*
- (iv) *If violence had been intended, the risk involved of serious harm, and the extent to which it must have been apparent to those involved.*

10. In **State v Ashwin Kumar** HAC 037 of 2007 Hon. Mr. Justice Mataitoga reviewed sentencing tariffs for manslaughter with gross negligence. In that case, the accused drove a bicycle with defective brakes and hit the deceased causing death. He sentenced the

accused to 16 months imprisonment, suspended for 2 years.

In the course of his sentencing remarks, he referred to the following cases of manslaughter by gross negligence:

"A review of the relevant case law in the High Court of Fiji, with regard to sentences in manslaughter by gross negligence reveals the following:

*a) In **State v. Metuisela Toka HAC 008/2003** – the High Court sentenced the accused to 9 months imprisonment. This was a case where the father of an 11 year old child threw a spear at her in the early hours of the morning believing her to be a pig.*

*b) In **State v. Sitiveni Rokaria HAC 017/2003** – the High Court sentenced the accused to 12 months imprisonment suspended for 2 years. The accused was the driver of a boat taking some family friends from overseas, who wanted to go to an offshore island for a picnic. The boat was licensed to carry 10 passengers and the accused told the passengers that he can only take 10 but his father overruled him and he took 14 passengers instead. The boat capsized and two passengers died from drowning. Accused was charged with 2 counts of manslaughter by gross negligence.*

*c) In **State v. Apolosi Waqalaivi HAC 08/1995S** – The High Court sentenced the accused to 2 years imprisonment suspended for 3 years. This was a case involving the death of an 8 year old child due to the gross negligence of a boat driver who drove his boat close to where some children were swimming. The accused did not see the deceased and ran over the child causing him to die.*

*d) In **State v Josaia Boseiwaga & Anor HAC 032/07** – The High Court sentenced the two accused persons to 2 years imprisonment suspended for 3 years. This case involved the death by drowning of 2 persons who were passengers on boat travelling from Deuba to Beqa island. The boat was overloaded with passengers and the two accused persons were the drivers of the boat. They were not paid for their work."*

He found that the tariff for the offence was 2 to 3 years imprisonment but that the majority of the cases resulted in suspended sentences. In suspending the sentence in the case before him, he relied on the lack of any premeditation, the fact that the accused conveyed the deceased to the hospital, the accused's previous good character, youth and co-operation with the police.

11. Considering the above, I commence your sentence at 2 years imprisonment for the charge of Manslaughter arising from breach of duty.

12. The aggravating factors are:

- (i) The age of the deceased was only 4 months
- (ii) You are the father and you owed a duty of care
- (iii) You were voluntarily intoxicated.

I add 6 months for above aggravating factors. Now your sentence is 30 months.

13. The mitigating factors are:

- (i) You are first offender
- (ii) You have shown remorse
- (iii) Your partner is 6 months pregnant and you are the sole bread winner.

I deduct 6 months for the above mitigating factors. Now the sentence is 24 months.

14. Although you pleaded guilty late in this case, I deduct 6 months for your guilty plea. Now your sentence is 18 months.

15. You are pleading the Court that you be given another chance in your life. Turaga-ni-koro of your village had written a letter apologizing on behalf of you. You have stopped consumption of alcohol and attending counseling sessions according to your surety.

16. You are pleading the Court to impose a non custodial sentence.

17. Section 26 (1) of the Sentencing and Penalties Decree states as follows:

On sentencing an offender to a term of imprisonment a Court may make an order suspending, for a period specified by Court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.

18. After considering all circumstances, I act under Section 26 (1) of the Sentencing and Penalties Decree and suspend your sentence to a period of 3 years. The nature of the suspended sentence is explained to the accused.

Summary

19. You are sentenced to 18 months imprisonment suspended for 3 years.

20. 30 days to appeal to Court of Appeal.

Sudharshana De Silva

JUDGE

**At Lautoka
25th March 2014**

**Solicitors : Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused**