

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 174 OF 2011

STATE

-v-

SUSANA CAGIMAIRA

Counsels : **Mr. S. Babitu for the State**
: **Ms. C. Choy for the accused**

Date of Trial : **03 November 2014 – 06 November 2014**
Date of Summing Up : **07 November 2014**

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial – to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the defence counsel made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the defence counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused is innocent until she is proved guilty. The burden of proving her guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find accused guilty, you must be satisfied so that you are sure of her guilt. If you have any reasonable doubt as to her guilt, you must find her not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. You must judge the case solely on the evidence that you heard in this Court room. There will be no more evidence and you are not to speculate on what evidence there might have been or should have been. You Judge the case solely on what you have heard and seen here.
11. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
12. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
13. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she

evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

14. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

15. The agreed facts of this case are:

IT IS AGREED that the accused is Susana Cagimaira.

IT IS AGREED that Susana Cagimaira has two children.

IT IS AGREED that Susana Cagimaira was working as a receptionist at the Bounty Island Resort in 2010.

IT IS AGREED that sometimes in August 2010, Losana Bola massaged the accused, Susana Cagimaira and she felt something on the left side of Susana Cagimaira's stomach.

IT IS AGREED that the accused, Susana Cagimaira, was on afternoon shift when she had labour pain. The accused then went to the hostel and rested for a while.

IT IS AGREED that Salanieta Nasilasila went to the Hostel to check on the accused, Susana Cagimaira, and she told Salanieta Nasilasila that she was having stomach ache.

IT IS AGREED that Laniana Vulakoro talked to the accused, Susana Cagimaira and she pointed to the place where she was keeping the baby's body.

IT IS AGREED that the baby was taken to Lautoka Hospital on the same night.

IT IS AGREED that Susana Cagimaira was interviewed at Lautoka Police Station.

16. The charge against the accused is as follows:

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Decree No. 44 of 2009.

Particulars of Offence

SUSANA CAGIMAIRA between the 30th day of November 2010 and 1st December, 2010 at Lautoka in the Western Division, murdered her child.

17. I will now deal with the elements of the offence. The offence of murder is defined under Section 237 of the Crimes Decree. "Murder", has three essential elements. For accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) That accused engages in a conduct
- (ii) That the conduct caused the death of the deceased;

- (iii) That accused person intended to cause, or reckless as to causing, the death of other person by the conduct.

18. The alleged conduct in this case is that the accused stepped on her new born baby.
19. That conduct must “cause the death of the deceased”. This is the second element of murder. The law requires a link between the unlawful act and the death. You must be sure that the conduct caused the death of the deceased. In other words the stepping on the face caused the death of the baby.
20. The third element of murder is the accused intended to cause, or reckless as to causing, the death of other person by the conduct.
21. The first element is called the physical element of the offence, while the second element indicates the causal link. The third is called the mental element. You have to always bear in mind that all three elements should be established by the prosecution at all times together for it to succeed in the charge of murder. It must be absolutely clear in your mind that the act or the conduct of the accused was accompanied by intention to cause, or reckless as to causing, the death of other person by the conduct, which is the necessary mental state or the faulty intention to complete the offence of murder.
22. You must also bear in mind that a person’s intentions are locked up in mind. They are not often spoken out. The intent, therefore, cannot be physically observed. However, this intent can be proved by what one tells others, or can be inferred from one’s conduct prior to, during and subsequent to the act or conduct in question. The question you have to decide in this element is if the accused stepped on the face of the baby was it intentional to cause the death of the baby as the prosecution claims or is it an accident as claimed by the accused.
23. If, on the other hand, the prosecution failed to prove beyond reasonable doubt, the mental element required, but have only proved beyond reasonable doubt that-
 - (i) an act was done
 - (ii) it resulted in the death
 - (iii) Person intends that the conduct will cause serious harm or is reckless as to a risk that the conduct will cause serious harm to the other person

then you are entitled to find the accused guilty of manslaughter.

24. I will now explain what manslaughter is. Manslaughter is a lesser offence that stands very close to the offence of murder. It is the killing of someone by an unlawful act or omission without necessary intention or recklessness. If you consider that the accused did not have the necessary intention of committing the death of the deceased or reckless in her action, but she had only the knowledge that the death would be caused by her act or conduct, then

you must find the accused guilty of not of murder but of manslaughter only. Whether the accused had knowledge only or whether she was reckless as to the causing the death of the deceased is a matter entirely for you to decide on the basis of facts and circumstances of the case.

25. I must also explain to you what infanticide is.

(1) A woman commits the indictable offence of infanticide if-

(a) She, by any willful act or omission, causes the death of her child: and

(b) The child is under the age of 12 months; and

(c) At the time of the act or omission the balance of her mind was disturbed by reason of-

(i) Her not having fully recovered from the effect of giving birth to the child; or

(ii) The effect of lactation consequent upon the birth of the child; or

(iii) Any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state that is proved to the satisfaction of the Court.

(2) The onus of proving the existence of any matter referred to in sub-section (1) (c) lies on the accused person and the standard or proof of such matter shall be on the balance of probabilities.

(3) In circumstances provided for in sub-section (1), notwithstanding that they were such that but for the provisions of this section the offence would have amounted to murder, the woman shall be guilty of infanticide, and may be dealt with and punished as if he she had been guilty of manslaughter of the child.

26. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-person and connect her to the offence that she alleged to have been committed.

27. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed.

28. As a matter of law, I must direct you on circumstantial evidence. In this case, the prosecution relies on certain circumstantial evidence. In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime being

committed, but give evidence of other circumstances and the events that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.

29. I cite the following situation as an example for circumstantial evidence. In a silent night, you hear cries of a man from a neighboring house. You come out to see that a man named 'A' is running away from that house with an object in his hand. Out of curiosity you go inside the house to see what really had happened. You see your neighbor 'B' lying fallen on pool of blood with injuries. Here you don't see 'A' committing any act on 'B'. The two independent things you saw were the circumstances of a given situation. You can connect the two things that you saw, and draw certain inferences. An inference you may draw would be that 'A' caused the injury on 'B'. In drawing that inference you must make sure that it is the only inference that could be drawn, and no other inferences could have been possibly drawn from said circumstances. That should be the inescapable inference that could be drawn against 'A' in the circumstances. Further in evidence one witness may prove one thing, and another witness may prove another thing. None of those things separately alone may be sufficient to establish guilt, but taken together may lead to the conclusion that the accused committed the crime.
30. You must consider all direct evidence-that what witnesses saw, heard or perceived by their senses, as well as circumstantial evidence.
31. Circumstances are not made by mere speculation or guesswork. They must be established beyond reasonable doubt and the proved circumstances must only be consistent with the accused having committed the crime. To find her guilty, you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the circumstances proved. It must be inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable on the evidence. Before you can draw any reasonable inference, you must first be satisfied beyond reasonable doubt, that the evidence given by each witness relating to the circumstances giving rise to the issues of fact to be proved is credible and truthful.
32. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, coronial autopsy report of the deceased is an example.
33. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinions. They are allowed to give evidence on what they have seen, heard or felt by their physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expresses on a particular fact to aid court and you to decide the issue/s before court on the basis of their learning, skill and experience.

34. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a Contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such

omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

35. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
36. I will now deal with the summary of evidence in this case.
37. The first witness for the prosecution was Salanieta Nasilasila. She had worked at Bounty Island from 2009 to 2012. She was working in the restaurant and the accused was working at the reception. She knew the accused since 2009. On 30.11.2010 she had met the accused at her room. She had gone there to ask her to come and distribute club money. When she knocked, there was no response. She peeped over the curtains and saw the toilet light was on. The accused was standing on the bed and walked towards the toilet. She went to the toilet came out and opened the door. The accused said that her stomach was paining. She had boiled some water for her to drink. The accused was lying on the bed and she was lying on floor. Then she fall asleep.
38. When she woke up accused had told her that blood came out of her. She had also told that child is lying there. The accused tried to stand up holding the umbilical code with scissors and trying to cut the umbilical code with scissors. A child was crying on the bed. She had told the accused that she will go out and look for help. Accused had told her that accused don't want help and want to kill the baby. She had run out of room looking for help. Then she met her husband. She had told him that the accused had given birth and she wants to kill the baby. Then she had gone straight down to the office. She had told Titilia about what happened.
39. Under cross examination she stated that the accused was wearing her uniform that evening. She denied handing over the scissors to the accused. She also denied that she

wrapped the baby with bed sheet. She denied taking the baby to the bath room. She ran out of the room as the accused told her that she wanted to kill the baby.

40. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? What is the relationship between her and the accused. Was there any reason for her to make a false accusation. Is there any evidence confirming her evidence. Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of Sala beyond reasonable doubt then you have to decide whether that evidence is sufficient to establish elements of the charge.
41. The next witness for the prosecution was the first witness's husband Timoci Nasilasila. He had worked in the Bounty Island for 10 years. He had finished work at 5.30 p.m. on 30.11.2010. Then he had gone in search of his wife to accused's room. He told the wife to spend some time with the accused as she had a stomach pain. He had gone and watch TV at TV room. After that he had gone again to the accused's room. When he was near the door his wife came running out of the room. His wife had told him that accused had given birth and she wanted to kill the baby. She was confused and scared. When he looked through the door the accused was in the bath room wearing a towel. He heard the baby crying inside the bathroom. He had told the accused not to kill the baby and accompanied his wife to the office. They informed the Manager and PRO about what happened. They went to accused's room.
42. Under cross examination he stated that when he came to the door of the accused's room the baby was not on the bed.
43. You watched him giving evidence in Court. You have to decide whether this witness is telling the truth. If you believe this witness's evidence beyond reasonable doubt you have to decide whether this witness's evidence is confirming the evidence of his wife and therefore the prosecution case or this evidence is raising any doubt in the prosecution case and supports the accused's version.
44. The third witness for the prosecution was Titalia Rogo. She was the assistant manager of Bounty Island resort. Around 10.00 - 11.00 p.m. on 30.11.2010 Sala had informed her that accused had given birth. She knew the accused for 7 - 8 years. She had asked the accused earlier whether she was pregnant. The accused had replied in negative. She had called over-all Manager and informed him what happened. He called the nurse who went to see the accused. She went to the accused's room and talked to the accused and waited for the nurse. The accused had told that baby is in the bath room and dead.

45. Under cross examination she stated that Sala came alone. She was asked about her police statement where she had stated that accused called her and informed this. She said that accused called earlier to inform her that she is sick. She went to the room and talked to the accused.
46. You watched her giving evidence in Court. You have to decide whether this witness is telling the truth. If you believe this witness's evidence beyond reasonable doubt you have to decide whether this witness's evidence confirms the evidence of other prosecution witnesses or this evidence is raising any doubt in the prosecution case and supports the accused's version.
47. The fourth witness for the prosecution was Luisa Namua. She was also working in the Bounty Island resort at the time of the incident. She had gone to watch a movie at assistant Manager's room. Losana came and told her that she has to go to accused's room to see her. She had received information that accused had given birth. The accused was sitting down. The room was clean but there were some blood stains on the bed and floor. When asked, the accused had told her that blood came out from her. It was large amount of thick blood. When she was talking to her, nurse came. When they were talking she came to know that accused had given birth to baby. Nurse asked her to go and bring the bag inside the bath room. She gave the bag to the nurse. The nurse was removing things from the bag. Some sheet and uniform were taken out. Then she saw the baby inside the bag. Baby was wrapped in a cloth. She felt sorry and went out of the room.
48. Under cross examination she said that she was aware that accused had given birth before she went to accused's room. She did not believe it. Every time she asked the accused whether she is pregnant she replied no. Titilia also came to the room.
49. You watched her giving evidence in Court. You have to decide whether this witness is telling the truth. If you believe this witness's evidence beyond reasonable doubt you have to decide whether this witness's evidence confirms the evidence of other prosecution witnesses or this evidence is raising any doubt in the prosecution case and supports the accused's version.
50. The fifth witness for the prosecution was Lani Vulakoro. She is a nurse for 38 years. She was working in this resort since May 2010. She was informed around 10.00 - 11.00 p.m. that there is a delivery in the Island. When she went to the room the accused and Luisa were there. She saw the accused dressed up nicely sitting on the bed. When asked the accused initially said that she did not deliver a baby. The accused had said that she delivered clots in the toilet. She had kept on questioning the accused. Then the accused had told that baby is in the bathroom. She had asked Luisa to get the bag. The baby was wrapped in accused's working clothes. She opened the bag. There was a bed sheet covered with blood. The baby was wrapped in a sulu. There was cut between eye brow and eye. The accused had said that she stood up, dropped the baby and stepped on the baby by accident. She saw the scissors in the laundry basket covered with blood. She

wrapped the baby again and told the manager that this is a police case. The boat and ambulance were arranged and they were brought to Lautoka.

51. Under cross examination she said that the accused was looking normal. She said that when they went to hospital the baby was wrapped in a bed sheet.
52. You watched her giving evidence in Court. You have to decide whether this witness is telling the truth. If you believe this witness's evidence beyond reasonable doubt you have to decide whether this witness's evidence confirms the evidence of other prosecution witnesses or this evidence is raising any doubt in the prosecution case and supports the accused's version.
53. The next witness for the prosecution was Losana Bola. She was the public relations officer at the Bounty Island resort. She knew the accused for 5 years. The accused wanted her to cover the night shift as accused was having a stomach ache. She was at the front office. Sala had come running and informed that accused had given birth and baby is crying. Sala looked scared and confused. She was crying. Earlier in August the accused had asked her to massage her stomach. After massaging her, she had told the accused that accused is pregnant. The accused had told her that she will not keep the baby and she will have an abortion and kill the baby. Thereafter the accused was avoiding her. The accused was taking Fijian medicine which was already mixed and was at the office.
54. Under cross examination she stated that she saw a vision before massaging the accused. The accused told her that she will have an abortion. The Fijian medicine is for cold and consumed by all staff. When Sala came she was accompanied by her husband.
55. You watched her giving evidence in Court. You have to decide whether this witness is telling the truth. If you believe this witness's evidence beyond reasonable doubt you have to decide whether this witness's evidence confirms the evidence of other prosecution witnesses or this evidence is raising any doubt in the prosecution case and supports the accused's version.
56. The next witness for the prosecution was Constable Josateki. On 1.12.2010 he had taken the photographs of the scene. He tendered a booklet of 8 photographs of the scene marked P1 and described those photos in Court. He also tendered a sketch plan prepared by him marked P2.
57. Under cross examination he stated that when you stand at the door of the bure you could see the bath room area clearly. Apart from blood stains marked 1 & 2 in the plan there were blood stains near the pan in the toilet.
58. This is an independent witness. You have to consider the photographs and sketch plan and decide whether it confirms the prosecution version or supports the accused's version creates a doubt in the prosecution case.

59. The next witness for the prosecution was Woman Corporal Ana Navunisinu. She is an officer with 22 years' experience. On 30.11.2010 a report was received from Bounty Island about lady who had given birth to a child. She was instructed to be the investigating officer. She went to the Island with group of police officers. They recorded the statements of witnesses. She attended the post mortem and also interviewed the suspect. She had taken clothes, a towel and scissors as exhibits. It was given by staff nurse. She identified and tendered pair of scissors marked as P3.
60. Under cross examination she stated that when the scissors were handed over she was told that those were used by the accused. When interviewed the accused told that after giving birth she went to the bathroom to clean herself when she accidentally stepped on the baby's face.
61. The next witness for the prosecution was Doctor Ponnu Swamy Goundar. He is an experienced doctor.
62. He had conducted the post mortem on 10.12.2010 at 10.45 hours. The post mortem report was tendered marked P4. The deceased was a child with height of 47 cm. There was a cut injury on left side of the nose. Lungs were expanded and pink in appearance. It meant child had breathed after birth and taken air. There is extensive haemorrhage between the skull and the subcutaneous tissues. There is extensive subarachnoid haemorrhage over all parts of the brain. There is extensive fracture of the base of the skull. The cause of death was subarachnoid haemorrhage due to crush injury. The head should be between two hard surfaces to cause this injury. The injury could be caused by person stepping on the baby with quite severe force.
63. Under cross examination doctor stated that the child was full term baby. The post mortem was after 9 days of the death. The skull bones of a baby are not fused and malleable and can be brought to any shape. That is why the fracture is in the base of the skull. The cut injury was not the cause of death. If a person accidentally steps on infants head, injury will depend on the force of stepping on to the head. If adult applies full body weight, infant still have the same injuries.
64. Doctor is an independent witness. It is up to you to decide whether you could accept this evidence beyond reasonable doubt with all other evidence in this case. If you accept this evidence then you have to decide whether this evidence supports and confirms the prosecution version or supports the defence version and raises a doubt in the prosecution case.
65. After the prosecution case was closed you heard me explaining the accused her rights in defence. The Accused elected to give evidence.
66. She said that she is a single woman with two children aged 7 years and 5 years. She worked as a receptionist at the Bounty Island resort from 2004 to 2010. She was residing in

staff quarters. On 30.11.2010 she was taking night shift. As her stomach started to pain she asked Losana to cover for her. She went to her room to rest. She called her assistant manager and told her that she is sick. She was lying down in the room. She was massaging her stomach with oil. Sala came to meet her in her room. She boiled water and gave her. Sala came regarding club. She was lying on the bed and Sala was lying on the floor. Then blood started to come out. Then she felt something big came out from her. When she touched it, it was a head of a human being. She informed Sala, may be my child had come out. She tried to stand up to give space to the child to breath. Sala was shocked and confused. She tried to remove her sulu and asked for help from Sala. Sala opened the door and ran out.

67. She was still on the bed. Sala came back. She asked her to give the scissors to cut the umbilical cord. Sala brought the scissors. All she knows was that there was spirit inside her and she just cut anywhere of the umbilical code. She was scared, confused and shocked when she saw the child. When she was cutting the umbilical cord, Sala ran out of the room.
68. Then she tried to go to the bath room to wash her. While she was sitting in the bathroom Sala came back. She asked Sala to bring the baby to clean together as blood keep coming and she could not stand. Sala was a bit scared but brought the baby wrapped in her sulu. Sala put the baby right beside where she was sitting. Then Sala went out. She wanted Sala to come back. Blood was coming out of her and shower was on. She was worried water might come to the baby. After that she heard Sala's husband talking to her. She asked him about Sala. He told she had run. Then she tried to stand up. Baby was just lying next to her. When she stand up the bath room was slippery. She was trying to come to the side of the baby. All of a sudden she felt that she accidently step on head of the baby. Then she tried to sit down beside baby slowly as the bathroom was slippery.
69. She was shocked and blood was still coming out of her. She slowly tried to sit down beside the baby. She was sitting beside the baby for 30 minutes. No one came to help. Then she crawled on the floor to the inside of the room. She removed her clothes to the stripe bag. She brought the bag inside the bathroom. She did not know whether the baby was alive or dead. She could not hear the baby crying. When it was quite long that baby did not cry she told herself may be baby has died. She was scared, confused and didn't know what to do. She just brought the bag and put the baby inside the bag.
70. She was not aware that she was pregnant. Her previous two kids she came to know when she was 5-6 months pregnant. Then she wore her bra and grabbed the towel and was wearing the towel. She left the bag at the bath room and came and sat on the bed. After a while Luisa came. She was telling a story and then assistant manager came. Then the nurse arrived. The nurse asked 'where is the baby?' She pointed towards the bathroom. Luisa went and brought the bag. The nurse took the baby out and examined the baby. She was also examined. Then they were brought to Lautoka. She faced a lot of difficulties and her work was really important and she did not have an idea that she was pregnant.

71. She had menstruation till 5-6 months, it did not come. Some of the staff asked her whether she is pregnant. She told them I don't know and she will take a day off and buy the pregnancy test. Losana questioned her about pregnancy and informed about her vision. As it will be her third child she will look after if she knew that she was pregnant.
72. Answering Court she told that her two earlier child births were normal deliveries. She had called the assistant manager by using her mobile phone.
73. Under cross examination she stated that Sala went out just once and came back. She could not remember whether she told Sala that she will kill the baby. She doesn't know the reason why Sala ran out from the room. She admitted that Losana told her that she was pregnant in August. When she was asked whether her menstruation stopped in August she said it didn't stop and sometimes it comes a bit. She could not recall when her menstruation stopped. But she did not have it in November. She denied telling Losana in August that she will have an abortion but she wanted to take leave and buy a pregnancy test. She did not go to the nurse at the resort as she didn't feel any sign of pregnancy. It was put to her that she had told police that she told Losana that she will have an abortion. Her position was that she told only about a vision. She admitted that female staff were questioning her about her being pregnant.
74. She had no problem with Sala. There is no reason for Sala say something negative of her. She did not know that she was pregnant till this incident happened. She gave birth to the child on top of the bed. Although she called Titilia and informed about stomach pain she did not call her after giving birth as at that time she did not know what to do. It did not come to her mind. The 30 minutes after birth she was in the bath room and blood was coming. She was weak. She could not stand up and go out to make a call. She did not know where the phone was. Even after she sat on the bed she was weak. Nothing came to her mind to make a call or do anything. Luisa did not ask her anything about giving birth.
75. In re-examination she said that Sala went out and came back only once.
76. Then you wanted to clarify certain positions from the accused. Prosecution and the defence agreed for me to ask those questions. In answering those questions the accused stated that her roommate had gone to drink 'Grog' at this time. She said that Losana just touched her and told her about the vision. The baby was crying when Sala's husband was standing at the door. The baby was with her at the bathroom at that time. When Sala went out at that time she did not come back.
77. You watched the accused giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? She had told police that she told Losana that she wanted to have an abortion. She denied that in Court. In examination in chief she stated that Sala came to her several times that day. She explained what happened at each time. But in cross examination and in re-examination she said Sala went out and came back only once.

Her position is that she came to know that she was pregnant only at the time of giving birth to the baby. It is up to you to decide whether you could accept this evidence or this evidence creates a doubt in the prosecution case.

78. I must remind you that when an accused person has given evidence she assumes no onus of proof. That remains on the prosecution throughout. Her evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
79. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:
- (i) You may believe her and, if you believe her, then your opinion must be Not Guilty. She did not commit the offence.
 - (ii) Alternatively without necessarily believing her you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
 - (iii) The third possibility is that you reject her evidence as being untrue. That does not mean that she is automatically guilty of the offence. The situation then would be the same as if she had not given any evidence at all. She would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves beyond reasonable that she committed the offence then the proper opinion would be Guilty.
80. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should remind yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.
81. Remember, the burden to prove accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove her innocence, or prove anything at all. In fact, she is presumed innocent until proven guilty beyond reasonable doubt.
82. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt you must find her guilty for the charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of accused's guilt, you must find her not guilty as charged.

83. Your possible opinions are as follows:

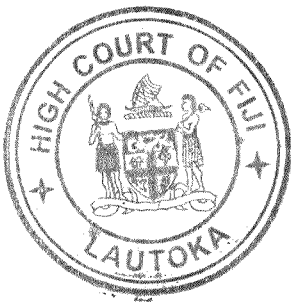
The charge of Murder Accused – Guilty or Not Guilty

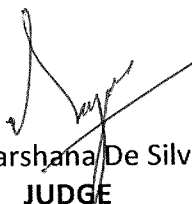
If Not Guilty for Murder

Manslaughter/Infanticide Accused-Guilty or Not Guilty

84. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

85. Any re-directions?




Sudharshana De Silva
JUDGE

At Lautoka
07th November 2014

Solicitors : Office of the Director of Public Prosecutions for State
Office of the Legal Aid Commission