

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 329 of 2015

[CRIMINAL JURISDICTION]

STATE

V

1. PETERO TAITUSI
2. LOATA VITALINA

Counsel : Ms. S. Serukai for State  
Mr. L. Qetaki with Ms. L. Manulevu for 1<sup>st</sup> accused  
Mr. T. Lee for with Ms. A. Prakash for 2<sup>nd</sup> accused

Hearing on : 03<sup>rd</sup> - 06<sup>th</sup> July 2017

Summing up on : 07<sup>th</sup> July 2017

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused are guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.
2. Evidence in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. As I have told you in

my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.

3. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
4. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and

decide how much of it you believe. You may believe all, part or none of any witness' evidence.

7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.

11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his/her favour based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him/her guilty. You must be sure of the accused person's guilt.
14. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against a particular accused, then you must find that accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters

that will enable you to decide whether or not the charge is proved against each accused.

16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused persons for the following offence;

*Statement of Offence*

**MANSLAUGHTER ARISING FROM BREACH OF DUTY:** contrary to section 240(a)(b) and (c)(i) and (ii) and 241(2) of the Crimes Decree No. 44 of 2009.

*Particulars of Offence*

**PETERO TAITUSI** and **LOATA VITALINA** on the 28<sup>th</sup> day of February 2013 at Sawanikula village, Vunidawa in the Central Division, failed to ensure the safety of Iosefo Gabriele Muria who is under their charge and that such failure caused the death of the said Iosefo Gabriele Muria.

18. Though there are two accused persons in this case, you should remember to consider the evidence against each accused separately. In the event you find one accused guilty of the charge, you must not simply assume that the other accused must be guilty as well.
19. To prove the above offence against each accused, the prosecution should prove the following elements beyond reasonable doubt against each accused;
  - (i) the accused;
  - (ii) made an omission;
  - (iii) the accused owed a duty towards the deceased in accordance with section 241 of the Crimes Act;
  - (iv) the omission caused the death of the deceased; and
  - (v) the omission amounts to a negligent breach of that duty.

20. The first element involves the identity of the offender. In this case there is no dispute over the identity.
21. To prove the second element the prosecution must prove beyond reasonable doubt that the accused made an omission. According to the prosecution the omission made by each accused is the failure to take the deceased to a hospital for treatment. Please remember that, in order to satisfy this element, the omission should be made consciously, voluntarily and deliberately.
22. To prove the third element the prosecution should prove beyond reasonable doubt that the accused owed a duty towards the deceased in accordance with section 241 of the Crimes Act.
23. Under section 241 of the Crimes Act, every person having the charge of another who is unable to provide himself/herself with the necessaries of life by reason of age, to provide for that other person necessaries of life; shall be deemed to have caused any consequences which adversely affects the life or health of the other person by reason of any omission to perform that duty.
24. Further, it is the duty of the head of the family who has charge of a child under the age of 14 years, being a member of his or her household, to provide the necessaries of life for that child; and he or she shall be deemed to have caused any consequences which adversely affect the life or health of the child by reason of any omission to perform that duty, whether the child is helpless or not.
25. In this case the 1<sup>st</sup> accused admits that he is the father of the deceased and the deceased was around 1 year and 10 months old by the time he died. The 2<sup>nd</sup> accused admits that she is the deceased's mother and she also admits that the deceased was around 1 year and 10 months old by the time he died. Further, each accused had admitted that they have a de facto relationship with each other.

26. Therefore, it is open for you to conclude that, as parents of the deceased who was less than 2 years old by the time of death, each accused had the duty to provide the necessities of life to the deceased.
27. To establish the fourth element the prosecution should prove beyond reasonable doubt that the omission caused the death of the deceased. In this case, the fact that the Iosefo Muria, the deceased died on the 28<sup>th</sup> of February 2013 is admitted by both accused persons. Therefore, if you are satisfied that an accused made an omission, you have to consider whether that omission caused the death of the deceased. It is not necessary that the omission is the sole or principal cause. It is sufficient that the omission substantially contributed to the death.
28. The fifth element the prosecution must prove beyond reasonable doubt is that, that omission amounts to a negligent breach of the duty he or she owed towards the deceased.
29. As you know, an omission is the failure to perform an act. This element requires that the omission to be such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk of death or really serious injury that the omission merits criminal punishment. Please bear in mind that it is not sufficient to simply prove that an accused fell short of the standard of care that would have been taken by a reasonable person in the circumstances, to establish the offence of manslaughter. The prosecution should establish that the omission amounts to such a high degree of negligence involving disregard of life and the safety of the deceased that deserves criminal punishment.
30. In order for you to decide the degree of negligence, you are required to compare the omission of the accused against the standard of care of a hypothetical reasonable person with the same personal attributes as the accused would exercise given the same circumstances. When I say same personal attributes, that means; the same age, having the same experience and knowledge, and the circumstances faced by the accused. However, this reasonable person should

not be considered to have any of the accused's deficiencies in reasoning capabilities. The reasonable person also does not share the accused's beliefs, values or attitudes.

31. You have to be careful to avoid the thought that the accused as a person who had a duty towards the deceased must be criminally negligent because otherwise the deceased would not have died.
32. Please remember that it is not required for the prosecution to prove that the accused intended to cause death or really serious injury, or that the accused knew that his or her conduct would likely cause death or really serious injury. Intention is not an element of the offence in this case.
33. The third prosecution witness gave his medical opinion based on what he had observed and his experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the third prosecution witness. Evaluating his evidence will therefore include a consideration of his expertise, his findings and the quality of the analysis which supports his opinion.
34. Now let me direct you on how to deal with the cautioned interview statements that were tendered as exhibits. It is a matter for you to decide whether each accused made the admissions in their respective statements and whether those admissions are true. The accused persons did not dispute their cautioned interview statements, but only highlighted certain issues regarding the translation. If you are sure that the admissions were made by the accused, then you should consider whether those admissions are true and what weight you should give to those admissions.



## *Evidence*

35. First prosecution witness was Taina Marisela. She said that;

- a) *She is a staff nurse at the Samabula Health Centre. On 19/02/13 around 10am she assessed the deceased who was 1 year and 10 months old. The deceased was brought by the mother and the grandmother. The mother asked for hookworm tablets for the deceased. Even though the mother said that nothing is wrong with the deceased and only wanted hookworm tablets, she insisted to see the deceased. When the baby was brought to her, she did a full assessment where she observed that the baby has swollen eyes and swollen legs and also fast breathing. She said the deceased was nebulised. She tendered the deceased's assessment form as PE 1.*
- b) *She assessed the deceased again at 10.30am. The breathing rate was 56 beats per minute and it was not normal. There was a harsh sound from the heart. Deceased was well hydrated.*
- c) *She discussed with Dr. Mili who was the paediatric registrar on call that day where she was instructed to give the deceased certain medicine. She was also asked to test the urine. Since the child did not pass urine even by midday she informed Dr. Mili again. Then she was informed to refer the patient to the Children's Outpatient at CWM. By 12.30 she repeated counting the respiration rate and it was 40 beats per minute. The child looked stable to her. The saturation level was 96% in room air. She also noted that the child was active.*
- d) *She arranged for an ambulance but the mother preferred to go in a taxi. By that time though she still noted puffy eyes and swollen legs, the respiratory rate had become normal. She called the St. Johns ambulance and they said they are coming.*
- e) *During the period she was arranging the ambulance, she came back to the mother to explain that the baby needed to be taken to the CWM hospital for further examination. Then the mother told her that they can go by taxi. When she asked the mother whether she had enough money, the mother said 'yes'. Then she agreed. She went back and called the ambulance to check whether it is coming.*
- f) *She said she had seen the deceased at the health centre six times. He was brought for diarrhea, cough and fever. She said it is not normal for a child of such an age to get sick that many times.*
- g) *During cross examination on behalf of the 1<sup>st</sup> accused she said that she did not allow them to go in a taxi. When she was still in the process of explaining the nature of the illness, they wanted to go and then they left. She said that when she was checking out on the ambulance they left the hospital. She said the father brought the baby on the previous five occasions.*
- h) *During cross examination on behalf of the 2<sup>nd</sup> accused she agreed that after her first assessment, she classified the breathing as pneumonia. She agreed that she knew this by just assessing the breathing pattern and that she advised Dr. Mili that the deceased had pneumonia. She agreed that she made the request for the ambulance 2 1/2 hours after she first assessed the deceased.*
- i) *When she was asked whether in that 2 1/2 hours she explained to the 2<sup>nd</sup> accused about the condition of the deceased, she said she explained that the baby needs*

hospitalization. When it was suggested that she never explained about the condition of the deceased to the mother, she said she explained to the mother before she did the full assessment. When she heard the name of the deceased, it came to her mind that that it was a sickly baby and that is why she did a full assessment without giving the hookworm tablets.

- j) When it was suggested to her that she never explained to the 2<sup>nd</sup> accused about pneumonia she said she explained that the baby had fast breathing and that means pneumonia. She said she explained to the mother that pneumonia could kill her baby.
- k) The immunization record of the deceased was tendered as 2DE 1. She agreed that in the said card the entry 'well and healthy' is noted on 29/08/12 and on 01/11/2012. She said she can't recall, when it was suggested to her that Dr. Mili told her to follow up on the child on the following day because the child had not arrived at the CWM hospital. She agreed that Muslim League settlement is just down the road from the Health Centre. She said the Samabula Health Centre does not have a database on the details of the patients.
- l) During re-examination she said 2DE 1 had been filled by maternal child health clinic.

36. Second witness for the prosecution Dr. Miliakere Dewavakali Baleilevuka. She gave evidence from Marshall Islands via Skype. She said that;

- a) On 19/02/13 she was based at the CWM hospital in the Paediatric Department. She recalled receiving a referral from Samabula Health Centre. Staff Nurse Taina Marisela referred a 22month old male who had come to the Samabula Health Centre with the grandmother and the mother of the child. Nurse Taina was concerned that the child had been brought several times before. She accepted the referral based on Staff Nurse Taina's concerns.
- b) She arranged for an ambulance to pick the child from the Samabula Health Centre. She liaised with the sister-in-charge regarding the ambulance. After she arranged the ambulance she informed the staff nurse that they were in the process of getting an ambulance. She said the staff nurse was liaising with their sister-in-charge.
- c) Thereafter Staff Nurse Taina informed her that the child's mother wants to come by taxi. She confirmed with Taina whether the child was clinically stable.
- d) The child did not show up that day. The next day she called Taina to inform that the child she referred did not arrive and asked Taina to follow up. She did not receive any feedback thereafter.
- e) During cross examination on behalf of the 1<sup>st</sup> accused when it was suggested that the Samabula Health Centre was not supposed to release the child that day considering the referral made to the main hospital, she said since the child had been accepted, they should wait for the ambulance. She agreed that when the child was accepted at the Health Centre the onus was on the medical staff to ensure his safety because the patient was still under their care.

- f) *During cross examination on behalf of the 2<sup>nd</sup> accused she said Staff Nurse Taina liaised with the sister-in-charge with regard to the arrangement for the ambulance.*

37. Third prosecution witness was Dr. James Kalougivaki. He said that;

- a) *He conducted the post mortem of the deceased on 04/03/13. He tendered the post mortem report as PE 2. He said the estimate time of death was 28/02/13. He said 640ml of greenish yellow pus was collected from the right pleural cavity. Pleural cavity houses the lungs. Left lung showed areas of pus. The right lung was noted to be very small. There was a blood clot in the blood vessel that takes blood to the left lung.*
- b) *In his opinion the cause of death was due to the blood clot that was noted in the blood vessel taking blood to the left lung. Next cause of death was left bronchopneumonia which is the presence of pus and boils in the left lung. Next cause of death was the massive collection of pus in the right pleural cavity.*
- c) *He said the time of accumulation of the pus can stretch from one week or even three weeks. He said the accumulation of pus in the cavity that houses the lungs is treatable. But as the pus builds up the mortality rate is very high. With the presence of pneumonia the mortality rate increases fourfold.*
- d) *He said if the deceased was treated much earlier, there was a high likelihood of the deceased surviving.*
- e) *During cross examination on behalf of the 1<sup>st</sup> accused he agreed that there was a lesser likelihood of the deceased not surviving even if previously treated.*
- f) *During cross examination on behalf of the 2<sup>nd</sup> accused he agreed that his observations indicated a severe infection. He agreed that in this case there will be coughing and shortness of breath. He agreed that when a patient suffers from the condition noted in the first cause of death, it is critical and such patients have less chance of survival even with different modes of treatment. He also agreed that the chances are further reduced for a 1 year and 10 months old child. He said it won't be possible for a lay person to detect the causes of death noted as (a) and (b) in his postmortem report.*

38. The fourth prosecution witness was CPL Josua Vosaki. He said that;

- a) *He interviewed the 1<sup>st</sup> accused under caution. He tendered the typed English translation of the caution interview as PE 3A and the itaukei version of the caution interview as PE 3B. He read out the caution interview of the 1<sup>st</sup> accused. He said it takes about 1 1/2 hours to drive from Sawanikula to Vunidawa hospital.*
- b) *During cross examination on behalf of the 1<sup>st</sup> accused he agreed that Sawanikula is a village in the interior in Naitasiri area. He also agreed that sometimes it is very difficult to reach Sawanikula Village. He agreed that when he interviewed the 1<sup>st</sup> accused he understood that the 1<sup>st</sup> accused was not well educated. He agreed that he did not ask the 1<sup>st</sup> accused's educational background during the interview and*

also agreed that it would be unfair on the 1<sup>st</sup> accused because he did not engage with the 1<sup>st</sup> accused in his level of education.

- c) He said the term 'katakata' means 'fever' but also he agreed that 'katakata' means 'hot'. On Question 22, the 1<sup>st</sup> accused's answer was 'katakata' and he translated that as 'fever'. He denied the suggestion that the 1<sup>st</sup> accused informed him that he went to present the yaqona to the chief of the clan with the 1<sup>st</sup> accused's father.

39. The fifth witness for the prosecution was DC Lasaro Qauqau. He said that;

- a) He was the witnessing officer when the 2<sup>nd</sup> accused was interviewed under caution. He tendered the itaukei version of the said caution interview as PE 4A and the typed English translation as PE 4B. He read the caution interview. He was the investigating officer in this case. He said this matter was reported by the 1<sup>st</sup> accused.
- b) During cross examination on behalf of the 1<sup>st</sup> accused he agreed that when he visited Sawanikula it had taken 1 hour and 50 minutes to reach Sawanikula. He said on their way they attended to some other reports as well. He agreed that the Sawanikula village is surrounded by hill tops and mountains and it is right at the bottom.
- c) During cross examination on behalf the 2<sup>nd</sup> accused he agreed that the answer given to Question 58 in the 2<sup>nd</sup> accused's caution interview should be 'both of us rode there and walked back'. He also agreed that the translation of the answer given to Question 75 would be 'I ask to be forgiven, I never expected Iosefo would die'. He also agreed that the proper translation of answer to Question 73 is 'I never dreamt that he would die in the village'.

40. That was the case for the prosecution. At the end of the prosecution case you heard me explain several options to the accused persons. They had those options because they do not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The 1<sup>st</sup> accused opted to remain silent. It is his right to do so. You must not draw any adverse inference against the 1<sup>st</sup> accused due to the fact that he exercised his right to remain silent. You should also note that the 1<sup>st</sup> accused had agreed to certain facts. The 2<sup>nd</sup> accused chose to give evidence on oath.

41. The 2<sup>nd</sup> accused said in her evidence that;

- a) She is originally from Naibita, Tailevu. She is living with the 1<sup>st</sup> accused at Muslim League, Nabua. She said when the deceased was born he was healthy and clean. On 19/02/13 the deceased was feeling hot in the morning. After the 1<sup>st</sup>

- accused left for work she took the deceased to the Samabula Health Centre with her aunty.
- b) Their number was called after about 30 minutes and then the deceased's temperature was taken. She asked for hookworm tablets. That is because that morning she noticed hookworms in the deceased's stools. Then the nurse gave hookworm tablets to the deceased. Thereafter they had to wait for the ambulance. The nurse did not tell her anything about the illness. The nurse just told her to sit and wait for the ambulance.
  - c) She said they waited for about one and a half hours. While waiting for the ambulance the deceased was crying and nagging because he was hungry. When she asked him whether he wants food he nodded. Then she decided to go home because she did not bring any food with her. She said that during the one and a half hours no nurse came to see them. They left the hospital and walked home because they had no money for the fare. She did not inform anyone apart from her aunt when they left the hospital. She was carrying the deceased half way and then when he woke up she let him down for him to walk.
  - d) She said no one explained to her about what is written in PE 1 when she was in the hospital. She said she is aware of what is noted in DE 1.
  - e) After they reached home, she prepared lunch for the deceased. After eating, the deceased started to play and then he fell off to sleep. The deceased woke up when the 1<sup>st</sup> accused arrived after work. When he woke up, he started nagging for her to carry him and then she carried him. That time the deceased was not hot.
  - f) From that day till they went to Sawanikula, she did not take the deceased to CWM. That was because the hotness had come down and he was feeling well. He was playing and eating well.
  - g) She went to Sawanikula for traditional yaqona presentation with the deceased and the 1<sup>st</sup> accused. That was because they had not taken the deceased to the village after he was one year old. Her aunt financed the trip to Sawanikula. At Sawanikula, the deceased was feeling good and he was eating well.
  - h) On 28/02/13, early morning, the deceased's health condition suddenly started changing. She said his eyes changed and he started breathing his last breath. She carried him up and massaged his back for him to retain his breath but he couldn't. She said she never dreamt that Iosefo would die.
  - i) During cross examination she agreed that the CWM hospital was not far away from Nabua. She agreed that the deceased's immunization card, 2DE 1 was always with her. She agreed that the deceased had a cough and the breathing was fast on 19/02/13. She agreed that it is written in 2DE 1 that 'seek medical advice immediately if child's breathing becomes fast'. She said on that day she went to the hospital to ask for hookworm tablets and did not read what is written in the card. She said 2DE 1 was given to her by the hospital for weighing of the child and they did not explain about the contents.
  - j) She said she used to take the deceased to the hospital on all review dates and the 1<sup>st</sup> accused had to take the child once because she was sick. When she was asked

*whether she is suggesting that the staff nurse is lying regarding the fact that hookworm tablets were given, she replied 'I can't tell Taina is lying. I only know that hookworm tablets were given to us'. She said she cannot ask food from anyone for her child when it was suggested that she did not bother to ask help from the nurse regarding her child being hungry.*

- k) She admitted that she had the knowledge that the deceased had to be taken to the CWM hospital in an ambulance. But she said that she did not know why he had to be taken to hospital. She said the main reason for her to leave the health centre was because she had no money to buy food. She said she did not bring food for the deceased because she just came to ask for hookworm tablets and to go back home.*
- l) She said there was no medical staff there for her to inform that they were leaving. She said none of the nurses came back and informed her after checking the deceased and she was only told to wait for the ambulance. She agreed that no one told her that the deceased is fit and well to leave the hospital.*
- m) When it was suggested that on the very next day she went to Sawanikula with the deceased and the 1<sup>st</sup> accused she said 'yes'. She said she did not take the deceased to Vunidawa hospital. She agreed that they went and sought traditional forgiveness because the deceased was sickly.*
- n) During re-examination she said she did not go to Sawanikula on the very next day after she went to the Samabula Health Centre. She said there was no need for the deceased to be taken to the Vunidawa Hospital because he was eating very well, the swelling had gone down and he was walking around.*

42. That is a brief summary of the evidence. You may have noticed that I have not reproduced the entire evidence that was led. I have reproduced the evidence which I consider necessary to explain the case and the applicable legal principles to you. If I did not refer to any evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those agreed facts. You should consider those facts as proven beyond reasonable doubt.

### *Analysis*

43. The prosecution case is that, being the parents of the 1 year and 10 months old deceased each accused failed to take the deceased to the hospital for medical treatment and that failure caused the death of the deceased. The prosecution

says that this failure amounts to a negligent breach of the duty owed by each accused towards the deceased.

44. According to the prosecution, on 19/02/13, the 2<sup>nd</sup> accused was informed by Staff Nurse Taina at the Samabula Health Centre that the deceased is having a serious medical condition which required the deceased to be taken to the CWM Hospital and knowing that the 2<sup>nd</sup> accused took the deceased home. Even after taking the deceased home that day, the 2<sup>nd</sup> accused failed to take the deceased to a hospital until the deceased died on 28/02/13.
45. According to the prosecution, the 1<sup>st</sup> accused was aware of the deceased's condition and he also failed to take the deceased to a hospital during the period from 19/02/13 to 28/02/13.
46. 1<sup>st</sup> accused does not challenge that he had a duty towards the deceased. It is pointed out on his behalf that he had acted based on his educational background and his capacity and he was not negligent in providing necessities of life to the deceased. It is pointed out that the third witness had said in his evidence that the first condition he noted as the cause of death was a critical condition and it was also not possible to take the deceased to a hospital urgently from Sawanikula village on 28/02/13.
47. The 2<sup>nd</sup> accused also does not dispute that she had a duty towards the deceased. The 2<sup>nd</sup> accused says that she brought the deceased home after waiting for about one and a half hours in the Samabula Health Centre because the deceased was hungry. She says that no one at the Samabula Health Centre explained to her that the deceased was having a serious medical condition. She says that the deceased was eating well and playing and therefore, there was no necessity for the deceased to be taken to the hospital.
48. What you have to ultimately decide in this case in respect of each accused is, considering the evidence before you, whether you are satisfied beyond reasonable doubt that there was such a high degree of negligence on the part of


the accused involving disregard of life of the deceased and his safety that deserves criminal punishment.

49. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against each accused beyond reasonable doubt.
50. I must again remind you that even though an accused person gives evidence, he/she does not assume any burden of proving his/her case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
51. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
  - (i) You may believe the explanation and, if you believe him/her, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing you may think, 'well what he/she says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
  - (iii) The third possibility is that you reject the accused's evidence. But if you disbelieve the accused, that itself does not make him/her guilty of the offence charged. The situation would then be the same as if the accused had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.
52. Any re-directions?



53. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against each accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
54. Your opinion should be as follows;
- 1<sup>st</sup> accused- guilty or not guilty
  - 2<sup>nd</sup> accused- guilty or not guilty



  
Vinsent S. Perera  
JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the Accused : Legal Aid Commission, Suva.