

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 148 of 2016

[CRIMINAL JURISDICTION]

STATE

V

SANGEETA DEVI

Counsel : Ms. W. Elo for State
Mr. M. Yunus for Accused

Hearing on : 20 - 21 September 2018

Summing up on : 21 September 2018

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 is 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. 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. No such emotion should influence your decision.
5. 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 behaviour 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.
6. 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. Sometimes we honestly forget things or make mistakes regarding what we remember.

7. 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.
8. 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 proven 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 proven facts. If there is a reasonable inference to draw against the accused as well as one in her favour based on the same set of proved facts, then you should not draw the adverse inference.
9. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
10. 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 the accused is guilty and the accused is not required to prove that she is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find her guilty: you must be sure of the accused person's guilt.

11. In order to prove that the accused is guilty of the offence, the prosecution should prove all the elements of the offence beyond reasonable doubt. If you have a reasonable doubt concerning any one of those elements, that is, if you are not sure that the prosecution had proven that element beyond reasonable doubt, then you must find the accused not guilty of the offence. 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.
12. 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 said charge has been proven by the prosecution.
13. Please remember that 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.
14. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

Murder: contrary to section 237 of the Crimes Decree 2009.

Particulars of Offence

SANGEETA DEVI on the 9th of January, 2016 at Nasinu in the Central Division murdered a new born baby boy.

15. To prove the offence of Murder, the following elements must be proved beyond reasonable doubt;
 - a) the accused
 - b) engaged in a conduct

- c) that conduct caused the death of a person
 - d) accused intended to cause the death of that person,
or
accused was reckless as to causing the death of that person by the conduct.
16. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
17. "Engage in a conduct" means –
- (a) do an act; or
 - (b) omit to perform an act.
18. However the conduct should be a product of the will of the accused. In order to prove the second element, the prosecution has to prove beyond reasonable doubt that the act of the accused in question or the omission of the accused to perform the act in question was deliberate and not accidental.
19. When you deal with the third element, that is, whether the conduct of the accused caused the death of a person, please remember that a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother whether or not it has breathed, whether or not it has an independent circulation, or whether or not the navel-string is severed.
20. Further, you should also remember that the act of the accused need not be the sole or principal cause, but the act should significantly contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct significantly contributed to the death of the deceased, that is sufficient to satisfy the third element above.

21. With regard to the fourth element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this fourth element. It is not possible to have direct evidence regarding a person's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
22. In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that she meant to bring about the death or that she was aware that death will occur in the ordinary course of events as a result of her conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
23. In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether she had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. The accused was reckless with respect of causing the death of the deceased, if;
 - a) She was aware of a substantial risk that the death will occur due to her conduct; and
 - b) Having regard to the circumstances known to her, it was unjustifiable for her to take the risk.
24. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death of the deceased was a probable consequence or the likely result of her conduct; and yet she decided to go ahead and engage in the conduct regardless of that consequence. Accused must foresee that death was a probable consequence or the likely result of her conduct and after

realising that, if she decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then she was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.

25. The offence of manslaughter has the same first three elements of murder. But it is an offence having a lesser culpability than murder. The distinction between the two offences is found in the fourth element which concerns the state of mind of the accused. When it comes to the offence of manslaughter, what is required to be proved is that the accused intended or was reckless as to the risk, that the conduct will cause serious harm.
26. When an accused is charged for murder as in this case, and when you consider the state of mind of the accused, you are not sure that the accused intended or was reckless as to causing the death, but you are sure that the accused intended or was reckless as to the risk that the conduct will cause serious harm, then it is open for you to find the accused not guilty of murder; but guilty of manslaughter even though the accused is not charged for manslaughter.
27. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
28. The first prosecution witness was Dr. Kitione Waqanisau ("PW 1"). He said;
 - a) *He graduated from the Fiji School of Medicine in 2007 and he had obtained a Diploma and thereafter Masters in Obstetrics and Gynecology. He is a principal medical officer of the Maternity Division at the Lautoka Hospital.*

- b) *He said he examined the accused on 09/02/16 at the CWM Hospital. He tendered the medical report prepared by him as PE 1. He also tendered the paper with the diagrams which he drew when he gave evidence to explain the medical terms as PE 2. Given what he observed his opinion was that the accused had delivered a baby that was nine months or closer to nine months old, weighing approximately 2.5kg. After the examination when he confronted the accused, the accused told him that she did not deliver a baby. Thereafter he confronted the accused's husband and the husband did not say anything. He told the husband, if there is a baby at home to bring the baby to the hospital. He said the husband told him that he will go and see.*
 - c) *He said labor pain is the worst pain and it is different from menstrual pain.*
 - d) *He said PE 1 is dated 05/02/16 because the police approached him on that date but he examined the accused on 09/02/16.*
 - e) *During cross examination he said that the accused came to the hospital with the history of miscarriage at home. He said he did not notice any umbilical cord hanging from the complainant's vagina. He said that after a lady becomes pregnant she cannot have menses but there can still be bleeding. He agreed with the suggestion that such bleeding can be something similar to menses but not menses.*
 - f) *During re-examination he said that the examination he conducted on 09/02/16 was not consistent with the history relayed to him by the complainant.*
29. The second prosecution witness was Dr. Marini Rokovunisei ("PW 2"). She said that;
- a) *She is a senior medical officer at the Obstetrics and Gynecology Unit at CWM Hospital. She graduated from Fiji School of Medicine in 2006. She had obtained Post Graduate Diploma and thereafter Masters in Obstetrics and Gynecology.*
 - b) *She said that when she reported for duty one morning in January 2016, her colleague Dr. Kitone Waqanisau who was on the previous night shift handed over the case involving the accused to her. She said she received a baby from the accused's husband and the baby was wrapped in a bed sheet and was inside a carton. Thereafter she examined the baby inside their procedure room.*

- c) *She said that looking at the size and the features, the baby was fully formed and was more than 37 weeks old. She also noted that the baby did not look like that it had died inside the womb. When the baby was presented to her there were no signs of life. She handed over the body to police.*
 - d) *During cross examination she agreed that when she spoke with the accused the accused denied that she was pregnant. She agreed that the accused told her that the accused did not feel any movement of the baby inside her stomach. She also agreed that the accused denied that she delivered a baby. She also agreed that the accused told her that the accused had some bleeding in the night and that that the accused had left a bed sheet soaked with blood in the bathroom. She also agreed that the accused had come to the hospital with her husband because the accused was having heavy bleeding.*
 - e) *She said that women with regular menstrual cycles would know that they are pregnant when they miss their menstrual cycle. But for those women with irregular menstrual cycles it might not be the first sign to note.*
 - f) *When she was asked whether it is possible for a lady to be pregnant and also to have menses at the same time, she said there are ladies that can bleed when they are pregnant but she will not call it menses. She said most women may not experience signs in early pregnancy but signs will be present during advanced pregnancy.*
 - g) *She said there is no need to cut the umbilical cord to separate it from the mother if everything is expelled with the baby during the delivery. She could not remember whether the umbilical cord was attached to the baby or not.*
 - h) *During re-examination she said given what was presented to her, the mother of the baby should have felt the signs of pregnancy for example the movement of the baby considering the size of the baby.*
30. The third prosecution witness was Dr. Daniella John ("PW 3"). She said that;
- a) *She graduated in 2009 from the Fiji School of Medicine and she had been a pathologist since 2013. She is currently the senior forensic pathologist registrar at the Forensic Pathology Unit at the Fiji Police Force.*

- b) *She said that on 12/01/16 she conducted a post-mortem examination on the accused's baby. She tendered her report as PE 3. She had noted that the accused had five pregnancies and she had delivered four times. She had noted that the deceased was a normal male infant very pale and appeared nine months. Given her findings in the lungs of the deceased, her conclusion was that the deceased had breathed. In her opinion the cause of death was excessive blood loss and the excessive blood loss could have been caused due to the umbilical cord not being clamped.*
- c) *In her opinion the deceased was alive after delivery and needed medical attention given that it was a home delivery.*
- d) *During cross examination she agreed that she was informed by the investigating officer that the estimated time of death was 10th January at about 7.00am. She agreed that she had conducted her examination after two days and two hours from the estimated time of death. She agreed that the lungs of the deceased were normal and the reason for her to observe bluish finger nails was the lack of blood cells.*
- e) *She agreed that the umbilical cord was attached to the deceased when she examined. She said that the other end of the umbilical cord looked torn. According to her report the placenta was intact and healthy and it was found separately beside the infant.*
- f) *During re-examination she said the torn umbilical cord was an indication of an unassisted delivery.*

31. All three prosecution witnesses were medical doctors. They gave their medical opinions based on what they observed and their experience. You are not bound to accept that evidence including the documents they tendered. You will need to evaluate the evidence of each witness 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 each witness. Evaluating their evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinion.

32. At the end of the prosecution case you heard me explain several options to the accused. She had those options because she does not have to prove anything. The burden of proving her guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent. You should not draw any adverse inference against the accused based on her decision to exercise her right to remain silent.
33. The admitted facts in this case are as follows;
1. *Praneel Singh (referred to hereinafter 'the complainant') is married to Sangeeta Devi (referred to hereinafter 'the accused') and they reside at Khalsa Road in Newtown. They have 4 children aged 11, 9, 6 and 5 years old respectively.*
 2. *On 9th January 2016 at about 10.00pm, the complainant was in the kitchen when his eldest son, Prashant (10 years old) told him that the accused was bleeding. The complainant checked the accused who was on the bed and he saw blood on the wooden floor near the bed.*
 3. *On 12th April 2016 the accused was arrested by Woman Police Officer Adi Salaseini Vatusevi from her residence.*
 4. *The accused was interviewed under caution on 1st February 2016 at the Valelevu Police Station and it commenced at 2.10pm. The interview was conducted by WDC 2364 Maraia Daurewa and witnessed by WDC 4089 Di Sala.*
 5. *The accused was charged for the offence of Murder contrary to section 237 of the Crimes Decree 2009.*

Analysis

34. The prosecution case is that the accused caused the death of her child due to recklessness where she did not seek medical attention for the delivery of the child.
35. The position taken by the accused during cross-examination of the prosecution witnesses is that she did not know that she was pregnant and did not know that she

gave birth to a baby. If you accept this version of the accused, that is, the accused was not aware that she delivered the baby or if you think it may have been the case, then you should find the accused not guilty of murder and not guilty of manslaughter.

36. In this case the evidence presented by the prosecution was that the accused came with her husband to the CWM hospital on 09/01/16 and had informed PW1 that she had a miscarriage. However, PW1 concluded that the accused had given birth. When he confronted the accused the accused denied giving birth and the accused's husband did not say anything. PW1 said that he examined the accused during his night shift in the early hours but did not specify the time. PW2 said that the accused's husband brought the baby wrapped in a bed sheet inside a carton and the baby was not alive. PW3 said that the cause of death of the baby was excessive bleeding and not clamping the umbilical cord would have caused the excessive bleeding. PW3 also said that the frayed end of the umbilical cord was an indication of an unassisted delivery.
37. You would note that the evidence presented in this case suggests that the accused gave birth to a child who was alive and breathed after its birth on 09/01/16 and that the said new born child was dead when it was brought to CWM Hospital on 10/01/16 in the morning. According to the post mortem report the umbilical cord looked torn which was indicative of an unassisted delivery. There is no direct evidence in this case as to what took place before the child was brought in to the hospital.
38. Circumstantial evidence is evidence of various circumstances that may lead to the conclusion that an accused committed a particular offence, when taken together. It must not be mere speculation or guesswork. It is not sufficient that the proven

circumstances are merely consistent with the accused person's guilt. To find an accused guilty on circumstantial evidence, you must be satisfied beyond reasonable doubt that the inference of guilt is the only rational conclusion to be drawn from the circumstances you consider as proven when taken together. Before you draw any inference you must first be satisfied beyond reasonable doubt that the evidence given by witnesses relating to the circumstances is credible and truthful.

39. It is important that you examine circumstantial evidence with care as with all evidence and consider whether the evidence upon which the prosecution relies on to prove its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand it reveals any other circumstances which cast doubt upon or destroy the prosecution case.
40. Therefore, you may conclude that the conduct of the accused in not seeking medical attention during the delivery does not necessarily mean that she had the intention or was reckless as to cause the death of the new born child and there would have been other reasons for her not to seek medical advice.
41. There is evidence in this case suggesting that the accused had lied to PW 1 and PW 2. According to PW 1 the accused had informed him that she had a miscarriage and he said that the said version is not consistent with his medical findings. He also said that the accused denied having given birth when he confronted her. He also said that labour pain is the worst pain which is different from menstrual pain suggesting that the accused should have known that she had given birth and she was lying when she denied that.
42. PW 2 admitted in her evidence that the accused told her that the accused did not know that she was pregnant and did not know that she delivered a baby. She also

agreed that the accused told her that the accused did not feel any movement of the baby in her stomach during cross-examination but she said during her re-examination that given the weight of the deceased child the mother should have felt the movements during pregnancy. This evidence of PW 2 also suggests that the accused had lied to PW 2 regarding her knowledge of being pregnant.

43. In the event you are satisfied beyond reasonable doubt that the accused lied to PW1 and PW 2, remember that lies alone cannot prove the case against the accused. Even if you are driven to the conclusion that the accused lied to PW 1 and PW 2 in an attempt to conceal the fact that she had delivered the child who was found to be dead by PW 2 on 10/01/16, you may consider that her lies will be of little or no help on the issue of intent.
44. If you are satisfied beyond reasonable doubt based on the evidence led in this case that the accused caused the death of her new born baby as a result of her conduct which is, not seeking medical attention for the delivery; and the accused had the intention to cause the death of the baby by that conduct or she was reckless as to causing the death of the baby by that conduct, you should find the accused guilty of murder; if you are not sure, you should find her not guilty.
45. You should remember that, to establish that the accused was reckless as to causing death, it should be proven that the accused did foresee or realise that death of her new born child was a probable consequence or the likely result of her not seeking medical attention; and yet she decided to go ahead and engage in the conduct regardless of that consequence.
46. If you are not satisfied beyond reasonable doubt that the elements of the offence of murder are established, then you should consider the offence of manslaughter. If you are satisfied beyond reasonable doubt based on the evidence led in this case that the accused caused the death of her new born baby as a result of her conduct which

is, not seeking medical attention for the delivery; and the accused had the intention to cause serious harm to the baby by that conduct or she was reckless as to causing serious harm to the baby by that conduct, you should find the accused guilty of manslaughter; if you are not sure, you should find her not guilty of manslaughter.

47. With regard to the offence of manslaughter, what should be established with regard to recklessness is that the accused did foresee or realise that serious harm to her new born child was a probable consequence or the likely result of her not seeking medical attention; and yet she decided to go ahead and engage in the conduct regardless of that consequence.

48. Any re-directions?

49. 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 the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

50. Your opinion should be as follows;

Murder - guilty or not guilty

If not guilty

Manslaughter - guilty or not guilty



Vinsent S. Perera

JUDGE

Solicitors;

Office of the Director of Public Prosecutions for State.

MY Law, Ba for Accused.