

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 71 of 2022

STATE

V

ASENACA BAULAWAMAFI

Counsel: Ms. Rukalesi Uce for the State
Ms. Keli Vulimainadave for the Accused

Sentence Hearing: 13 April 2023

Sentence: 7 June 2023

SENTENCE

[1] Asenaca Baulawamafi, as per the Information filed by the Director of Public Prosecutions (DPP), you were charged with the following offence:

FIRST COUNT

Statement of Offence (a)

MANSLAUGHTER ARISING FROM BREACH OF DUTY: Contrary to Section 240 and 241 (2) of the Crimes Act 2009.

Particulars of Offence (b)

ASENACA BAULAWAMAFI, on the 31st day of July 2020, at Nadi, in the Western Division, made an omission which amounted to a negligent breach of duty, by not supervising **SITIVENI MAYA**, a 1 year 7 months old child, which resulted in the death of the said **SITIVENI MAYA**.

- [2] On 8 July 2022, the DPP filed the Information in Court, while the Disclosures relevant to the case had been filed in Court on 29 June 2022.
- [3] Asenaca, on 2 August 2022, you were ready to take your plea. On that day you pleaded guilty to the charge against you in the Information. This Court was satisfied that you pleaded guilty on your own free will and free from any influence. Court found that you fully understood the nature of the charge against you and the consequences of your guilty plea.
- [4] Thereafter, the State filed the Summary of Facts. On 23 November 2022, the Summary of Facts were read out and explained to you and you understood and agreed to the same. Accordingly, Court found your guilty plea to be unequivocal. I found that the facts support all elements of the count of Manslaughter Arising from a Breach of Duty in the Information, and found the said count proved on the Summary of Facts agreed by you. Accordingly, I found you guilty on your own plea and I convicted you of the charge of Manslaughter Arising from a Breach of Duty.
- [5] Asenaca, I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:

“1. **BACKGROUND**

- 1.1 *The accused is Asenaca Baulawamafi (hereinafter referred to as the “accused”). The accused was 31 years of age and unemployed at the material time.*
- 1.2 *The deceased is Sitiveni Maya (hereinafter referred to as the “deceased”) and was 1 year 7 months old at the material time.*
- 1.3 *The accused is the mother of the deceased. The accused and the deceased were residing at Utelei Settlement, Korovuto, Nadi at the material time.*

2. **INCIDENT**

- 2.1 *On the 31st of July 2020, the deceased and his brother accompanied their mother, the accused to the house of one Premila at Matavouvou Settlement, Korovuto in Nadi. They went to Premila’s house as the accused was going to help out with cooking for their church service which was scheduled in the afternoon.*
- 2.2 *At about 3.00 p.m., Justin Timothy Bibi (PW1), 14 years of age, a school student, was playing with his friends at Matavouvou Settlement, Korovuto in Nadi when he heard something fell into the nearby river. PW 1 then informed his friends, but they didn’t bother much about it. After 5 minutes, PW 1 went to check the river side which is about 4 – 5 metres away from where they were playing. Upon checking, PW1 saw the deceased’s body floating in the river. PW 1 then went*

to the house of Maria Maya (PW2), 30 years of age, domestic duties, of Matavouvou Settlement, Korovuto, and informed her of what he had seen.

- 2.3 PW2 went with PW1 to the river side and saw the deceased's body floating in the river. His body was faced upwards and she could see white bubbles like liquid coming out of his nose. PW2 jumped into the river and swam to the deceased's body. She saw white bubble like liquid coming out of the deceased's nose and mouth. PW2 then took the deceased's body to the accused.
- 2.4 Rebeka Lasaqa (PW3), Jeshika Prasad (PW5), Manjeeta Devi (PW6), Rakesh Mudaliar (PW7) and Akesh Mudaliar (PW8) were with the accused helping out with the cooking for their church service. According to PW3, the accused had informed her older son, Viliame to look after the deceased whilst she was helping out with the cooking. According to PW5, the accused came with the deceased and after sometimes, the deceased went with some children, but she did not know where they then went to. PW3, PW5, PW6, PW7 and PW8 confirmed that while they were cooking, PW2 brought the deceased to the accused. PW8 then conveyed the accused and the deceased to the Nadi Hospital. The deceased was pronounced dead at the Nadi Hospital.
- 2.5 Joeli Mavou (PW4) is the husband of the accused and father of the deceased. PW4 was at work when he received a phone call from one of his work mates to go to the Nadi Hospital. When he arrived at the hospital, he saw the deceased was wrapped in white sheets. He was informed by the accused that the deceased had drowned. According to PW4, he had always informed the accused to look after their son since he was at work and she was always engaged with church activities.
- 2.6 The matter was reported to the police and investigation was carried out.
- 2.7 The deceased's body was conveyed to the Lautoka Morgue. A post mortem examination was conducted on the 2nd of August 2020, at the Lautoka Hospital by Doctor Avikali Mate, the Government pathologist.
- 2.8 As per the post mortem report dated 2nd of August 2020, the cause of death of the deceased was asphyxiation as a result of drowning.

Annexed and marked as PE1 is the Post Mortem Report of Sitiveni Maya.

3. **ARREST, RECORD OF INTERVIEW AND CHARGE**

- 3.1 The accused was arrested and taken to the Nadi Police Station.
- 3.2 On the 18th of March 2021, the accused was interviewed under caution by PC 5523 Keleto Vodo at the Nadi Police Station. The accused said that she went with her two sons, Viliame and Sitiveni to Premila's house to help out with the cooking for their church function. At Premila's house, she told her children, particularly Viliame to go and play downstairs since Premila's house was a double story house (Q/A. 54, 56). Just after a while, PW2 brought the deceased

to her (Q/A. 62-64). She saw water was coming out of the deceased mouth and nose (Q/A. 65). She took the deceased to the hospital. The doctors tried to revive him but after 20 minutes, they came and told her that the deceased had died (Q/A. 71, 73). She saw her children whilst cooking (Q/A. 74). She checked on her children three times whilst cooking (Q/A. 75). The last time she saw the deceased was at about 3.00 p.m. when he was following the bicycle belonging to Premila's grandchild (Q/A. 77-78). The deceased was with Premila's grandchild who was in Class 6. She was at the double story when they were at the compound (Q/A. 79-80). According to the accused, Premila's house is about 100 – 150 meters away from the river where the deceased drowned (Q/A. 81). She told Viliame to look after the deceased because they were always staying together at home (Q/A. 82). She admits that it is her responsibility to look after the deceased (Q/A. 83). When asked why she never looked after the deceased since it is her responsibility, she said that she never thought that this thing would happen (Q/A. 84). She admits that PW4 (her husband) had always reminded her about the care of their children (Q/A. 85).

Annexed and marked PE2 is the Record of Interview of the accused dated 18th of March 2021.

3.3 *The accused was later charged with the offence of Manslaughter Arising from Breach of Duty contrary to Section 240 and Section 241 of the Crimes Act 2009."*

[7] Asenaca, you have admitted to the above Summary of Facts and taken full responsibility for your actions.

[8] Section 4(1) of the Sentencing and Penalties Act No. 42 of 2009 ("Sentencing and Penalties Act") stipulates the relevant factors that a Court should take into account during the sentencing process. The factors are as follows:

4. — (1) *The only purposes for which sentencing may be imposed by a court are —*

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

[9] Furthermore, Section 4(2) of the Sentencing and Penalties Act provides that a Court must consider the following factors when sentencing an offender:

(2) In sentencing offenders a court must have regard to —

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender’s culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender’s previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option.

[10] I have duly considered the above factors in determining the sentence to be imposed on you.

[11] In terms of Section 240 of the Crimes Act No. 44 of 2009 (“Crimes Act”):

A person commits an indictable offence if —

(a) the person makes an omission; and

(b) the omission causes the death of another person; and

(c) the first-mentioned person —

(i) has a duty to the other person in accordance with section 241;

(ii) the omission amounts to a negligent breach of the duty, such omission is or is not accompanied by an intention to cause death or bodily harm.

The offence of Manslaughter Arising from a Breach of Duty in terms of Section 240 of the Crimes Act carries a maximum penalty of 25 years imprisonment.

[12] Section 241 of the Crimes Act is re-produced below:

(1) Every person having charge of another who —

(a) is unable by reason of age, sickness, unsoundness of mind, detention or any other cause to withdraw from such charge; and

(b) who is unable to provide himself or herself with the necessaries of life —

whether the charge —

(i) is undertaken under a contract; or

(ii) is imposed by law; or

(iii) arises by reason of any act (whether lawful or unlawful) of the person who has such charge, to provide for that other person the 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.

(2) It is the duty of every person who, as head of a family, 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 the 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.

[Emphasis is mine]

(3) It is the duty of every person who as an employee has contracted to provide necessary food, clothing or lodging for any employee or apprentice under the age of 16 years to provide the same; and he or she shall be deemed to have caused any consequences which adversely affect the life or health of the servant or apprentice by reason of any omission to perform that duty.

(4) It is the duty of every person who, except in a case of necessity, undertakes —

(a) to administer surgical or medical treatment to any other person; or

(b) to do any other lawful act which is or may be dangerous to human life or health

—

to have reasonable skill and to use reasonable care in doing such act; and he or she shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to observe or perform that duty.

(5) It is the duty of every person who has in his or her charge or under his or her control anything (whether living or inanimate, and whether moving or stationary) of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precaution to avoid such danger; and he or she shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to perform that duty.

[13] According to Section 240 of the Crimes Act the maximum penalty for the offence of Manslaughter Arising from a Breach of Duty is an imprisonment for 25 years. The offence of Manslaughter involves the loss of a human life. As a result of your conduct the life of another human being has been lost. Though the degree of culpability of Manslaughter is lesser in comparison to Murder, still the offence of Manslaughter involves the death of another human being. Causing another person's death for whatever reason or under whatever circumstances is indeed a serious offence. In this instance, most unfortunately, it is your own child, who was 1 year and 7 months old, whose life has been taken away.

[14] In the case of ***Kim Nam Bae v. The State*** [1999] FJCA 21; AAU 0015 of 1998S (26 February 1999), the Fiji Court of Appeal held as follows;

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

[15] It can be noted from the above case, that the Court of Appeal had observed that the penalty imposed for Manslaughter ranges from a suspended sentence to 12 years for different Manslaughter cases. Thus, the case of ***Kim Nam Bae*** (supra) seems to be only making an observation on the range of sentences which were pronounced by the courts in Manslaughter cases, rather than establishing a tariff for the offence.

[16] In the case of ***State v. Dumukoro*** [2016] FJHC 199; HAC27.2014 (23 March 2016), His Lordship Justice Vincent Perera having considered and analysed 21 sentencing decisions in Manslaughter cases stated "From the above decisions I have perused, it is evident that this court has been inclined towards selecting a starting sentence of 5 years

imprisonment or above for the offence of Manslaughter. In majority of the cases, the court has taken 5 years as the starting point.”

- [17] Accordingly, Justice Perera held “.....since this court has been more favourable towards selecting 5 years as the starting point, I am inclined to form the view that the tariff for the offence of Manslaughter under Section 239 of the Crimes Decree (Act) should be 5 years to 12 years imprisonment.”
- [18] I am inclined to agree with the above tariff of 5 years to 12 years imprisonment proposed by Justice Perera for the offence of Manslaughter. In **State v. Seniceva & Others** [2017] FJHC 481; HAC26.2016 (29 June 2017) and **State v. Naimoso & Others** [2018] FJHC 345; HAC095.2016 (27 April 2018); I followed the same tariff for the offence of Manslaughter.
- [19] In determining the starting point within a tariff, the Court of Appeal, in **Laisiasa Koroivuki v State** [2013] FJCA 15; AAU 0018 of 2010 (5 March 2013); has formulated the following guiding principles:

“In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range.”

- [20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, Asenaca, I commence your sentence at 5 years imprisonment for the offence of Manslaughter Arising from a Breach of Duty.
- [21] Asenaca, as per my opinion, the only aggravating factor in this case is the tender age of the deceased, who was only 1 year and 7 months old at the time of his passing away.
- [22] Asenaca, in mitigation you have submitted as follows:
- (i) That you are a first offender and that you have no previous convictions to date. The State too confirms that there are no previous convictions recorded against you.
 - (ii) That you fully co-operated with the Police when you were taken in for questioning and subsequently charged instead of trying to circumvent the course of justice.
 - (iii) You have submitted that you are truly remorseful of your omission which amounted to a negligent duty. You have promised not to re-offend and said you are willing to reform.

- (iv) That you entered a guilty plea at a very early stage of these proceedings.
- [23] Considering the aforementioned aggravating factor, Asenaca, I increase your sentence by a further 2 years. Now your sentence would be 7 years imprisonment.
- [24] Asenaca, I accept that you are a first offender and that you have fully co-operated with the Police in this matter. I also accept your remorse as genuine and the fact that you have promised not to re-offend and undertaken to reform. Accordingly, considering these mitigating factors, I deduct 3 years from your sentence. Now your sentence would be 4 years imprisonment.
- [25] Asenaca, I accept that you entered a guilty at a very early stage of these proceedings. In doing so, you saved precious time and resources of this Court. For your early guilty plea I grant you a further discount of 16 months.
- [26] In the circumstances, Asenaca Baulawamafi, I sentence you to 32 months imprisonment (2 years and 8 months imprisonment) for the offence of Manslaughter Arising from a Breach of Duty, contrary to Section 240 of the Crimes Act.
- [27] The next issue for consideration is whether your sentence should be suspended.
- [28] Section 26 of the Sentencing and Penalties Act provides as follows:
- (1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*
 - (2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*
 - (a) *does not exceed 3 years in the case of the High Court; or*
 - (b) *does not exceed 2 years in the case of the Magistrate’s Court.*
- [29] Asenaca, you are now 33 years of age [Your date of birth being 30 October 1989]. You are residing at Matavouvou Settlement, Korovuto, Nadi with your husband and your four children-the eldest being 15 years of age, second being 13 years, third being 11 years and the youngest being the deceased in this case.
- [30] You are doing domestic duties while your husband, namely Joeli Mavu, is a Carpenter by profession and employed at Concrete Solutions.

[31] You have submitted to Court a character reference from Reverend Semesa Hacere, General Superintendent, Youth Explosive Ministry, International Church, Nadi. Therein, it is stated you have been an active member of the church and a person of very good character.

[32] In *Singh & Others v. State* [2000] FJHC 115; HAA 79J of 2000S (26 October 2000); Her Ladyship Madam Justice Shameem held:

“...However as a general rule, leniency is shown to first offenders, young offenders, and offenders who plead guilty and express remorse. If these factors are present then the offender is usually given a non-custodial sentence.”

[33] In *Nariva v. The State* [2006] FJHC 6; HAA 148J.2005S (9 February 2006); Her Ladyship Madam Justice Shameem held:

“The courts must always make every effort to keep young first offenders out of prison. Prisons do not always rehabilitate the young offender. Non-custodial measures should be carefully explored first to assess whether the offender would acquire accountability and a sense of responsibility from such measures in preference to imprisonment.”

[34] In *State v. (Kami) Namalo* [2014] FJHC 199; HAC167.2013 (25 March 2014); the accused was convicted for Manslaughter Arising from a Breach of Duty for death of his 4 month old daughter. He was sentenced to 18 months imprisonment, which sentence was suspended for a period of 3 years.

[35] In *State v. Mesake Raburau & Another* [2014]; HAC 326 of 2013 (9 June 2014); the two accused (parents of the deceased child) were convicted for Manslaughter Arising from a Breach of Duty for the death of their 1 year 4 month old son. The two accused were sentenced to 24 months imprisonment, which sentence was suspended for a period of 2 years.

[36] In *State v. (Maria) Teresia* [2014] FJHC 461; HAC057.2013 (27 June 2014); the accused was convicted of two counts of Manslaughter Arising from a Breach of Duty for the death of her 4 year old daughter and 2 year old son. The accused was sentenced to 24 months imprisonment, which sentence was suspended for a period of 3 years.

[37] Asenaca, you have admitted to the Summary of Facts and taken full responsibility for your actions. Although you cannot be considered as a young offender, you are a first offender with previous good character. You have fully cooperated with the Police in this matter and you have accepted responsibility for your conduct. You have submitted that you are truly remorseful of your omission which amounted to a negligent duty and promised not to re-offend and stated that you are willing to reform. You entered a guilty plea at a very early stage during these proceedings. For these reasons, it is my opinion

that the chances for your rehabilitation is high. Therefore, I deem it appropriate to suspend your sentence.

[38] However, in order to deter you and other persons from committing offences of the same or similar nature, and also to protect the community we live in, I suspend your sentence for a period of 5 years.

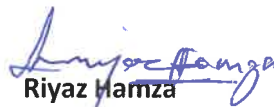
[39] In the result, Asenaca Baulawamafi, your final sentence of 32 months imprisonment, is suspended for a period of 5 years. You are advised of the effect of breaching a suspended sentence.

[40] You have 30 days to appeal to the Court of Appeal if you so wish.



AT LAUTOKA

Dated this 7th Day of June 2023


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Solicitors for the State:
Solicitors for the Accused:

Office of the Director of Public Prosecutions, Lautoka.
Office of the Legal Aid Commission, Lautoka.