

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 198 of 2022

STATE

V

REAPI NAMOSIMALUA

Counsel : Ms. S. Swastika for the State.
: Ms. B. Mohammed for the Accused.

Date of Plea : 19 February, 2024
Date S.O.F's read : 27 February, 2024
Date of Submissions : 06 March, 2024
Date of Sentence : 14 March, 2024

SENTENCE

1. The accused is charged with the following offence as per the information filed by the Director of Public Prosecutions dated 19th February, 2023:

Statement of Offence

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

Particulars of Offence

REAPI NAMOSIMALUA, on the 11th day of September, 2021 at Malake Island in the Western Division, omitted in her duty by failing to ensure the safety of JOSEFA JUNIOR DULAKIVERATA who was under her charge, by leaving him unattended near a creek and that such failure caused the death of the said JOSEFA JUNIOR DULAKIVERATA, a child under the age of 14 years.

2. This matter was first called in this court on 20th December, 2022. After some adjournments for the filing of information, trial disclosures, and for the accused to seek legal representation on 23rd March, 2023 the accused pleaded not guilty.
3. On 8th August, 2023 a pretrial conference was conducted and a trial date was fixed for 26th February, 2024. On 19th February, 2024 the matter was for mention to see if there were any issues before trial proper. On this date the defence counsel informed the court that the accused wanted to take a progressive approach.
4. The information was again put to the accused in the preferred Itaukei language. The accused after understanding the allegation pleaded guilty. Thereafter on 27th February, the accused in the presence of her counsel admitted the summary of facts read.
5. The brief summary of facts is as follows:
 - a). On 11th September, 2021 at Malake Village in Rakiraki after having breakfast, the accused asked Nani Sova a 12 year old child, to look after her 2 years and 8 months old son the deceased while she cleaned the kitchen and the dining area.

- b). Malake Village is a coastal village and the accused house is close to the sea approximately 5 meters from the shore line. On the day in question, the accused intended to attend a birthday party at a neighbouring village. The accused was cleaning the house and getting things ready in anticipation of the same.
- c). Nani and the deceased remained in the main house with Nani's great grandparents while the accused cleaned the kitchen and dining area which was separate from the main house.
- d). While Nani was looking after the deceased in the main house, her great grandmother namely Karalaini Yavu asked Nani to go to the village canteen and collect her money. Nani went to the canteen leaving the deceased behind in the main house with no body attending to him.
- e). On her way back from the canteen, Nani was met by the accused who was looking for the deceased. While they were searching for the deceased, Peniasi (an 11 year old) informed them that the deceased had been found lying motionless beside the seawall.
- f). When the accused went to the seawall she called out to the deceased three times, but he did not respond, a CPR was performed on the deceased but he remained motionless and was non-responsive. The deceased was immediately taken to the hospital.
- g). At the hospital, the doctor initiated the Hospital Emergency Protocol, according to the doctors at the hospital the deceased showed no sign of life i.e. nil pulse and nil pupils etc. Despite this, a CPR was initiated and maintained for 10 minutes. After 10 minutes, the CPR was called off as there was no return of sporous circulation.
- h). The post mortem examination report stated that the deceased died from asphyxiation due to drowning. The accused was arrested,

caution interviewed and charged. The accused made full admissions to the allegations raised against her. At question 56, the accused admitted that she failed in her duty of care to the deceased by sending him off with another child knowing fully well that the house was located close to the sea.

i). At question 58, the accused admitted that although her grandparents were present in the main house, her grandmother attends to her grandfather who suffers from shortness of breath and they did not notice the deceased exit the house. At question 60, the accused admitted that due to her negligence her son drowned.

6. After considering the summary of facts read by the state counsel which was admitted by the accused and upon reading her caution interview, this court was satisfied that the accused had entered an unequivocal plea of guilty on her freewill. This court was also satisfied that the accused had fully understood the nature of the charge and the consequences of pleading guilty. The summary of facts admitted by the accused satisfied all the elements of the offence as charged.

7. In view of the above, this court on 27th February found the accused guilty as charged and she was convicted accordingly.

8. The state counsel filed sentence submissions and the defence counsel filed mitigation submissions for which this court is grateful.

9. The counsel for the accused presented the following mitigation and personal details about the accused:

- (a) The accused is a first offender;
- (b) She was 23 years of age at the time;
- (c) Is now separated but has the care of 2 children aged 5 years and 8 months respectively;
- (d) Is engaged in Domestic Duties;
- (e) Is financially supported by her family members;
- (f) Pleaded guilty;
- (g) Is remorseful and promises not to re-offend;
- (h) Fully cooperated with the police during investigation.

TARIFF

10. The maximum penalty for the offence of manslaughter is 25 years imprisonment. The accepted sentencing regime for the offence of manslaughter is a sentence between 5 years to 12 years imprisonment, depending on the circumstances of the offending with the powers of a suspended sentence available to the sentencing court under section 26 (2) (a) of the Sentencing and Penalties Act (*see Samuela Vakaruru vs. The State, criminal appeal no. AAU 094 of 2014 (17 August, 2018)*).

AGGRAVATING FACTORS

11. There are no aggravating factors in this case.
12. Considering the objective seriousness of the offence committed, I select 5 years imprisonment (lower range of the tariff) as the starting point of the sentence. Since there are no aggravating factors the sentence will not be enhanced.

13. The accused is a first offender who has come to court with a clean record hence she receives a discount for good character and other mitigating factors.
14. The accused pleaded guilty although not at the first instance but a week before trial proper. In *Gordon Aitcheson vs. The State*, criminal petition no. CAV 0012 of 2018 (2 November, 2018) the Supreme Court offered the following guidance at paragraphs 14 and 15 in regards to the weight of a guilty plea as follows:

[14]. In ***Rainima -v- The State*** [2015] FJCA 17; AAU 22 of 2012 (27 February 2015) Madigan JA observed:

“Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the “high water mark” of discount is one third for a plea willingly made at the earliest opportunity. This court now adopts that principle to be valid and to be applied in all future proceeding at first instance.”

In ***Mataunitoga -v- The State*** [2015] FJCA 70; AAU125 of 2013 (28th May 2015) Goundar JA adopted a similar but more flexible approach to this issue:

“In considering the weight of a guilty plea, sentencing courts are encouraged to give a separate consideration and qualification to the guilty plea (as a matter of practice and not principle) and assess the effect of the plea on the accused by taking into account all the relevant matters such as remorse, witness vulnerability and utilitarian value. The timing of the plea, of course, will play an important role when making that assessment.”

[15]. The principle in **Rainima** must be considered with more flexibility as **Mataunitoga** indicates. The overall gravity of the offence, and the need for the hardening of hearts for prevalence, may shorten the discount to be given. A careful appraisal of all factors as Goundar J has cautioned is the correct approach. The one third discount approach may apply in less serious cases. In cases of abhorrence, or of many aggravating factors the discount must reduce, and in the worst cases shorten considerably.

15. This court accepts that genuine remorse leading to a guilty plea is a substantive mitigating factor in favour of an accused, however, the guilty plea must be entered in the true spirit of remorse since genuine remorse can reduce the harshness in the final sentence (see *Manoj Khara v The State*, CAV 0003 of 2016 (1 April, 2016)).
16. This court does not believe that the accused has shown genuine remorse when she pleaded guilty, however, by pleading guilty the accused did express some remorse which is taken into account by this court as a favourable factor.
17. Genuine remorse is about genuinely feeling sorry for what a person has done, accepting guilt because of strong evidence and proof of the offender's deeds and then pleading guilty is not genuine remorse *per se* (see *Gordon Aitcheson's case* supra). In this regard, the sentencing court has a responsibility to assess the guilty plea along with other pertinent factors such as the timing of the plea, the strength of the prosecution case etc.
18. Nevertheless, by pleading guilty the accused saved the court's time and expenses. Bearing this in mind, the accused ought to receive some reduction for her guilty plea. The sentence is therefore further reduced for guilty plea.

19. From the court file it is noted that the accused has been in remand for 11 days in exercise of my discretion and in accordance with section 24 of the Sentencing and Penalties Act I further reduce the sentence by 15 days as a period of imprisonment already served.
20. The final sentence is 2 years, 11 months and 15 days imprisonment. Under section 26 (2) (a) of the Sentencing and Penalties Act this court has a discretion to suspend the final sentence since it does not exceed 3 years imprisonment.
21. In *State vs. Alipate Sorovanalagi and others*, Revisional Case No. HAR 006 of 2012 (31 May 2012), Goundar J. reiterated the following guidelines in respect of suspension of a sentence at paragraph 23:

"[23] In DPP v Jolame Pita (1974) 20 FLR 5, Grant Actg. CJ (as he then was) held that in order to justify the imposition of a suspended sentence, there must be factors rendering immediate imprisonment inappropriate. In that case, Grant Actg. CJ was concerned about the number of instances where suspended sentences were imposed by the Magistrates' Court and those sentences could have been perceived by the public as 'having got away with it'. Because of those concerns, Grant Actg. CJ laid down guidelines for imposing suspended sentence at p.7:

"Once a court has reached the decision that a sentence of imprisonment is warranted there must be special circumstances to justify a suspension, such as an offender of comparatively good character who is not considered suitable for, or in need of probation, and who commits a relatively isolated offence of a moderately serious nature, but not involving violence. Or there may be other cogent reasons such as the extreme youth or age of the offender, or the circumstances of the offence as, for example, the misappropriation of a modest sum not involving a

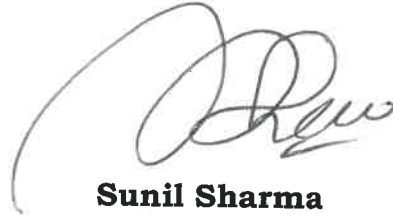
breach of trust, or the commission of some other isolated offence of dishonesty particularly where the offender has not undergone a previous sentence of imprisonment in the relevant past. These examples are not to be taken as either inclusive or exclusive, as sentence depends in each case on the particular circumstances of the offence and the offender, but they are intended to illustrate that, to justify the suspension of a sentence of imprisonment, there must be factors rendering immediate imprisonment inappropriate."

22. The following relevant special circumstances or special reasons for the suspension of the imprisonment term in my view needs to be weighed in choosing an immediate imprisonment term or a suspended sentence.
23. The accused is a young offender (23 years of age at the time of the offending), is of good character, isolated offence has been committed by her, has pleaded guilty although not at the earliest opportunity, is remorseful, cooperated with police and she takes full responsibility of her action. These special reasons render an immediate imprisonment term inappropriate.
24. I am sure this case has been daunting and depressing for the accused and the fact that she has lost a child without doubt would have added to her misery hence an imprisonment term will not augur well for her. The accused also has two children to look after. In view of the above, this court has taken into account rehabilitation as a significant and paramount factor in keeping the accused away from a custodial sentence.

25. Having considered section 4 (1) of the Sentencing and Penalties Act this court is of the view that a wholly suspended sentence is justified in all the circumstances of this case.
26. Ms. Namosimalua you have committed a serious offence, whilst you will no doubt carry the scar of losing your child forever as a result of your negligence, it cannot be ignored that an innocent life has been lost which could have been avoided. Parental responsibility and legal responsibility go hand in hand, and any breaches will have serious consequences.
27. I am mindful of your remorse and the fact that you have endured anxiety and shame, the stigma and regret is obvious to me. This tragedy would have been avoided had you exercised restraint and common sense by not leaving your child under the care of another child. He was your child and you had the responsibility of care and control. No amount of repentance will bring back the victim.
28. Being a young mother it would have been difficult for you to get over your loss and the fact that you have looked after your other two children without any difficulties is a testament of the fact that you are a good mother and you have learned from your mistake. This court will give you a second chance to get your life in order with a suspended sentence.
29. In summary the accused is sentenced to 2 years, 11 months and 15 days imprisonment for one count of manslaughter arising from breach of duty which is suspended for 3 years. The effect of the suspended sentence is explained to the accused.
30. In addition to the above, the accused is to undergo general and parental counseling facilitated by the Social Welfare Department or an NGO recommended by the Social Welfare Department. A copy of this

sentence is to be given to the Social Welfare Department. The accused is ordered to comply with the above orders failing which she will be subjected to due process of committal.

31. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge



At Lautoka

14 March, 2024

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.