

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 69 of 2022**

**STATE**

**V**

**MARISILINA QEREITOGA**

**Counsel:** Ms. Saini Naibe with Mr. Unal Lal for the State  
Mr. Moses Naivalu with Mr. Peceli Heritage for the Accused

**Sentence Hearing:** 26 February 2024

**Sentence:** 19 March 2024

## **SENTENCE**

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

### **ONE COUNT**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**MARISILINA QEREITOGA**, on the 25<sup>th</sup> day of October 2019, at Ba, in the Western Division, made an omission which amounted to a negligent breach of duty, by not supervising **REBEKA BAINIVALU**, a 1 year 3 months old child, which resulted in the death of the said **REBEKA BAINIVALU**.

- [2] On 8 July 2022, the DPP filed the Information in Court, while the Disclosures relevant to the case were filed in Court on 15 August 2022.
- [3] Marisilina, on 18 August 2022, you were ready to take your plea. On that day you pleaded not guilty to the charge against you in the Information. More than 1 year later, on 13 September 2023, you wished to take your plea once again. 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 27 November 2023, 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] Marisilina, I now proceed to pass sentence on you.
- [6] The Summary of Facts filed by the State was as follows:

*“The accused in this matter is **MARISILINA QEREITOGA**, at the material time was 23 years old, domestic duties of Clopcott Street, Ba.*

*The deceased in this matter is **REBEKA BAINIVALU**, at the material time was 1 year 3 months old, of Clopcott Street, Ba [**Annexed herein copy of deceased Notification of Birth**].*

*On the 25<sup>th</sup> of October 2019, at about 7.00 a.m., **KITIONE NATOGA (PW1)** who is the father in law of the accused, went to accused house at Clopcott Street, Ba. PW1 picked up the deceased in his arms and was moving around the compound. PW1 gave the deceased to the accused and asked her to clean the deceased since she passed stool. The accused was putting the dirty clothes in a tub to take it for washing. PW1 was supposed to take the accused to one of the neighbour’s house to wash the clothes in car registration number FZ 952. While the accused went to clean the deceased, PW1 told the accused that he is going to reverse the car to load the dirty clothes in the car. When PW1 was in the car, he called out to the accused and asked whether the deceased was with her inside the house and the accused said yes. PW1 started the car, checked all the mirrors and he could not see anyone and therefore he reversed the car. As PW1 was about to reach the door he could feel that the back tyre of the passenger side of the car went on top of something. PW1 applied the brakes, he got off the car and ran to check what was run over by the back tyre. PW1 saw the accused was also running from inside the house and he saw the deceased was lying on the ground breathing. They rushed the deceased to the Ba Mission Hospital and after half an hour the deceased passed away.*

**DR. MAKELESI KAUTOGA (PW2)** from Ba Mission Hospital stated that the deceased was attended by nurses, child breathing supported via bag and mask, as saturation was unrecordable. On physical assessment there was suspected skull fracture on the left and right sides. Visible tyre marks noted on right side of the head extending to the back. On the suspected skull fracture sides, area of bogginess felt. Child noted to be cyanosed with right facial ecchymosis noted pupils on the right side was unreacted to light glasgow coma scale-gradually decreased capillary refill was delayed. Fluid resuscitation was initiated and baby intubated as per orders by paediatric registrar. The deceased collapsed at 9.20 a.m., CPR was commenced, and resuscitation unsuccessful and time of death was 9.40 a.m.

**DR. PRANEEL KUMAR (PW3)** conducted the post-mortem of the deceased and noted that the cause of death was; Subarachnoid haemorrhage; cerebral oedema and multiple skull fractures; severe traumatic head injury which was caused by a motor vehicle accident **[Annexed herein post-mortem examination report]**.

The accused was arrested and interviewed under caution whereby she stated that she told her father-in-law (PW1) to reverse the car so she could load the clothes in the car (Q & A 55). She stated that PW1 had asked her to check if the deceased was inside the house as he was going to reverse the car (Q & A 61). She checked and the deceased was sitting behind her and she told PW1 that the deceased is inside the house (Q & A 62). Just after 2 minutes she heard the car reverse and bumped something (Q & A 63). She ran outside and saw the deceased lying under the car (Q & A 64). She admits that she should have taken all care to ensure that the deceased does not go outside when PW1 was reversing the car (Q & A 94). **[Annexed herein a copy of Marisilina Qereitoga caution interview]**.

The accused was later charged for one count of Manslaughter arising from Breach of Duty, contrary to Section 240 and 241 (2) of the Crimes Act 2009."

- [7] Marisilina, 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 also 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] Marisilina, according to Section 240 of the Crimes Act the maximum penalty for the offence of Manslaughter Arising from a Breach of Duty is a term of imprisonment of 25 years. The offence of Manslaughter involves the loss of a human life. As a result of your omission, which amounted to a negligent breach of duty, 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 (your daughter), who was 1 year and 3 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); **State v. Naimoso & Others** [2018] FJHC 345; HAC095.2016 (27 April 2018); **State v. (Asenaca) Baulawamafi** [2023] FJHC 366; HAC71.2022 (7 June 2023); and **State v. (Uate) Qio** [2023] FJHC 385; HAC173.2022 (14 June 2023); 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, Marisilina, I commence your sentence at 5 years imprisonment for the offence of Manslaughter Arising from a Breach of Duty.
- [21] Marisilina, as per my opinion, the only aggravating factor in this case is the tender age of the deceased, who was only 1 year and 3 months old at the time of her passing away.

**[22]** Marisilina, 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 during these proceedings.

**[23]** Considering the aforementioned aggravating factor, Marisilina, I increase your sentence by a further 2 years. Now your sentence would be 7 years imprisonment.

**[24]** Marisilina, 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]** Marisilina, I accept that you entered a guilty plea during these proceedings. Although, it cannot be said that your guilty plea was an early guilty plea, nevertheless, in doing so, you saved precious time and resources of this Court. For your guilty plea I grant you a further discount of 12 months.

**[26]** In the circumstances, Marisilina Qereitoga, I sentence you to 3 years 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] Marisilina, you are now 27 years of age [Your date of birth being 15 April 1996]. You are residing at Clopcott Street, Yalalevu, Ba. You have been married to Vilive Vatayato for the past 7 years. You now have three children – the eldest 6 years old, second 3 years old and the youngest who is 1 year old.

[30] You attended Saqani High School before continuing your tertiary education at the University of the South Pacific on Environmental Science for 1 year. For the past 18 months you have been working as a Ward Assistant at the Ba Aspen Hospital, earning approximately \$12,400.00 annually.

[31] Your husband was a former employee for 4R Electrical as a Truck Driver. It is said that your husband has secured employment as a Truck Driver in Auckland for a period of 3 years. He had left the country on 2 November 2023. You have submitted that in the absence of your husband, you will have to look after your children single handed for the next 3 years.

[32] You have submitted to Court two character references – 1. From Senior Pastor Kini Deve, of the Ba Christian Mission Fellowship and 2. From Rajnesh Chand, Nursing Unit Manager, Ba Hospital, Health Care Fiji (Pte) Ltd, Aspen Medical. Therein, it is stated you have been an active member of the church and the community and that you are a person of very good character.

[33] 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.”*

[34] 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.”*

[35] 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.

[36] 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.

[37] 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.

[38] Marisilina, you have admitted to the Summary of Facts and taken full responsibility for your actions. At the time of this alleged incident you were 23 years of age and as such can be considered as a relatively 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. Although not at the very outset, you have entered a guilty plea 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.

[39] 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 6 years.

[40] In the result, Marisilina Qereitoga, your final sentence of 3 years imprisonment, is suspended for a period of 6 years. You are advised of the effect of breaching a suspended sentence.

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



AT LAUTOKA

Dated this 19<sup>th</sup> Day of March 2024

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Solicitors for the State:  
Solicitors for the Accused:

Office of the Director of Public Prosecutions, Lautoka.  
Law Naivalu, Barristers & Solicitors, Lautoka.