

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 102 OF 2021

STATE

-v-

- 1. LAISIASA ROKOBECI**
- 2. RUCI KALOKALO**

Counsel : Ms. S. Naibe for Prosecution
Accused in Person

Dates of Hearing : 22, 23 January 2024 and 02 February 2024
Date of Judgment : 16 February 2024

JUDGMENT

1. The Accused persons (the Accused) were arraigned on the following information filed by the Director of Public Prosecution:

FIRST COUNT

Statement of Offence

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

Particulars of the Offence

LAIASIA ROKOBEKI AND RUCI KALOKALO between the 1st day of December, 2020 and the 23rd day of February, 2021 at Toko, Tavua, in the Western Division, made an omission which amounted to a negligent breach of duty, by not taking **ALANIETA DRUA NAITUVA**, a 7 years old child to hospital for medical attention which resulted in the death of the said **ALANIETA DRUA NAITUVA**.

ALTERNATIVE COUNT

Statement of Offence

FAILING TO PROVIDE THE NECESSARIES TO LIFE: Contrary to Section 264 of the Crimes Act 2009.

Particulars of Offence

LAIASIA ROKOBEKI AND RUCI KALOKALO between the 1st day of December, 2020 and the 23rd day of February, 2021, at Toko, Tavua, in the Western Division, being charged with the duty of providing **ALANIETA DRUA NAITUVA**, the necessaries of life, without lawful excuse failed to do so, whereby the life of **ALANIETA DRUA NAITUVA** was endangered and her health was permanently injured.

SECOND COUNT

Statement of Offence

RESTRICTION OF BURIAL OF DEAD BODIES: Contrary to section 12 (1) (a) and (2) of the Burial and Cremation Act 1911.

Particulars of Offence

LAIASIA ROKOBEKI AND RUCI KALOKALO on the 23rd day of February, 2021, At Toko, Tavua, in the Western Division, caused to bury the body of **ALANIETA DRUA NAITUVA**, without a certificate of death in the forms prescribed by the Registrar -General by regulation under the Births, Death and Marriages Registration Act in respect of that body signed by a medical practitioner.

2. The Accused pleaded not guilty to the charges. At the ensuing trial, the Prosecution presented the evidence of 6 witnesses. At the close of the case for the Prosecution, the court, being satisfied that there was a case for each accused to answer put the Accused to defence. Both Accused gave evidence under oath and called a witness on their behalf.

3. Written submissions were filed by the Accused and the State Counsel. Having considered the evidence presented at the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.

Burden of Proof and Standard of Proof

4. The Accused are presumed innocent until they are proven guilty. The onus or the burden of proof rests on the Prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove their innocence. The Prosecution must prove each Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court is not sure of the Accused's guilt, the Accused must be found not guilty and acquitted.
5. Although the accused are charged jointly, the case of each accused and evidence against each accused must be considered separately.
6. I shall now summarise salient parts of the evidence led in trial.

Case for Prosecution

PE 1 - Alipate Vuki

7. Vuki has been residing at Toko, Tavua since 2005. In 2021, he was residing in a big house with his family and 30-plus people who belonged to the church faith group called *Yavu Vatu ni Vanua* founded by Ratu Meliki Satiki in the year 2017.
8. On the morning of 23 February 2021, when he was returning from the plantation, he could hear voices of crying in his house. He was told that Alanieta had passed away. Alanieta was lying down in the living room, where her parents Laisiasa and Ruci were seated. Alanieta's parents decided to bury Alanieta's body the same afternoon in the compound. Vuki identified Laisiasa and Ruci standing on the dock.

PE 2 DC Tomasi Cabecuva

9. In 2021, DC Cabecuva was based at the Criminal Investigation Department at Tavua Police Station. On 22 March 2021, he conducted the caution interview of Laisiasa Rokobici in the presence of the witnessing officer, Corporal Ala. The interview was conducted in the iTaukei language. The record of interview was tendered marked as PE 1. After the interview, the record was read by the suspect which he signed. He translated the iTaukei version into English which he tendered as PE 2. He read the entire record of the caution interview into evidence.
10. During the interview, there was no threat or assault done to Rokobici to admit the allegations or give his answers in the caution interview. The suspect understood the caution and rights that were given to him when they were explained in the iTaukei language.

PW 3 DC - Qata

11. On 22 March 2021, at the Tavua Police Station crime office, DC Qata interviewed Ruci Kalokalo under caution in iTaukei language. WCpl. Sainimere witnessed the interview. After the interview, the record was read by the suspect and signed. He tendered the record of interview of Ruci Kalokalo marked as PE 3 and its English translation was marked and tendered as PE 4 and read in evidence.
12. Ruci Kalokalo was never forced, threatened or assaulted to give answers or to sign the record of her interview.

PE 4: Adi Vika

13. Adi Vika is a daughter of Laisiasa Rokobici and Ruci Kalokalo. In 2021, she was residing in Toko, Tavua with her parents and her four siblings, the youngest being Alanieta who was 7 years old. None of them were attending school in 2021 because her parents had decided not to send them to school.

14. On 23 February 2021, she was home. Her sister Alanieta had a stomachache and was crying and screaming. Her parents were at the plantation at that time. Alanieta had not suffered from any other sickness before she got this stomachache. When Alanieta complained of a stomachache, she informed her parents. The parents did nothing. Tavua hospital is near to Toko. They did not take Alanieta to the hospital although she was crying in pain. Alanieta passed away at around 11 a.m.
15. After Alanieta had passed away, her parents decided to bury her beside the house on the same evening. Alanieta's body was not taken to the hospital before it was buried. No police officer had come to the burial site.
16. Under cross-examination by the 2nd Accused, Adi Vika admitted that her parents were home when Alanieta got sick. In re-examination, she explained that her mother was home and only her father was at the plantation when Alanieta started crying.

PE 5 Dr. James Kalougivaki

17. Dr James has been the Head of Forensic Pathology Services since 2014. He has conducted more than 2,500 medical autopsies and prepared postmortem reports. He performed the post-mortem of Alanieta Druanaituva at Toko, Tavua on 11 March 2021. He tendered the post-mortem report marked as PE 5.
18. The body of Alanieta was exhumed from a graveyard that was behind a religious residence. Once the body was brought to the surface, the deceased was covered with handwoven mats tapa cloth and other clothing. The deceased's father identified Alanieta's body. The estimated time of death was 1100hrs on 23 February 2021.
19. The external examination did not show clear signs of injury. The body was in a state of decomposition. Decomposition was largely due to the deceased being wrapped in a huge amount of clothing and traditional mats.

20. Upon internal examination, the doctor found no signs of injury but showed the presence of decomposition. The cause of death could not be established due to decomposition and putrefaction. From the history provided by the police investigation officer, the deceased was noted to have been a household ambulator and was sickly for 3 months before the death. The burial place at Toko was situated approximately 10 to 20 minutes' drive from Tavua Hospital.
21. Under cross-examination, the doctor said that he was unable to give a precise answer to the question as to what percentage of patients who are admitted to hospital could be cured or saved.

PW 6 Dr. Vishneel Goundar

22. Doctor Goundar is a general practitioner based at the DSM Centre, Tavua. From 2020 to 2022, he was the Acting Subdivisional Medical Officer at Tavua Hospital. He was approached by the CID Team in 2021 to verify whether the deceased in this case had been presented to the hospital and whether a death certificate was issued upon her death. He found no record of the deceased attending the hospital for any time recent around her death and no record of a death certificate being issued by him or any other doctors at the hospital.
23. Answering a question posed by the 1st Accused, Dr Goundar said that doctors cannot guarantee that every patient admitted to hospitals are cured or saved. It depends on the condition they have come in with. However, a high percentage of patients admitted to the hospitals are saved.

Case for Defence

Laisiasa Rokocibi (1st Accused)

24. Laisiasa is the father of the late Alanieta. He testified that he had recorded his statement with the police and that is all what he had to say. Everything happens according to the will of God. Some sicknesses are cured in hospitals, while some are not. There are other traditional ways to cure some kinds of sicknesses. They kept faith in God until their daughter passed away. Everything is already planned by God. We are the ones who carry out the will of God. The death of his daughter was already planned.
25. Under cross-examination, Laisiasa agreed that all his five children were born in hospital. Alanieta passed away when she was only 7 years old. He joined the faith group headed by Ratu Meli Kisateki Uluibau called *Yavu Vatu ni Vanua* in 2017. Before joining that group, he was part of the Methodist Congregation. Although Ratu Meli was the head of the faith group, people in the group were at liberty to decide what they wanted to do.
26. Alanieta had been sick for three months before her passing on 23 February 2021. Within that period, she was never taken to the hospital although she kept losing weight and was complaining of stomachache from time to time with which she eventually died. When Alanieta kept losing weight and complaining of a stomachache, he was just praying for her at home and giving her lemon juice. He did not agree that he should have taken Alanieta to the hospital because he believed that if he prayed for her, she would be well. Before joining the faith group in the year 2017, he would go to the hospital whenever he was sick. He would also take his children to the hospital. After knowing the truth, he stopped going to the hospital. He did not take his child to the hospital because of his beliefs.
27. The day his daughter passed away; he was at the plantation. One of his kids came to inform him that Alanieta was in pain. They were massaging Alanieta because she was having severe body pain. They kept massaging her until she passed away. He did not think that Alanieta should have been taken to hospital at that time because he kept his faith in God.
28. On the day Alanieta died, he decided to bury her on that same day. He did not know anything about the laws. The police or the hospital were never notified of Alanieta's death.

29. The distance between Toko to Tavua Hospital is very short. He did not want his child to die. He was taking care of his child when she was sick. People do not understand the plans of God in life. He stuck to his faith and prayed for his daughter to get well but if it's God's decision for her daughter to pass on, then that's God's will. It is written in the Bible that God gives, and God takes.

DW 2- Ruci Kalokalo (2nd Accused)

30. Ruci also said that everything is all in God's plan. From the day their child was born until the time when God had taken her, nobody else but it was just them that were taking care of her child.
31. When Alanieta passed away, they were at peace because they knew that that was God's plan for her. The God gave and he took her back. They thank God for everything that will happen, everything that will happen in Court. Everything has already been planned. The men are putting God's plans into action.
32. Under cross-examination, Ruci agreed that Alanieta had been sick for quite some time (3 months) before her passing. She agreed that at no time she had taken Alanieta for any medical attention at the hospital or consulted any Doctor on her condition. As a parent, she would want the best for her child. She can't say Alanieta would have been in good condition if she were taken to the hospital. She knew the sickness that her daughter was suffering from from their own spiritual perspective. Even if they had taken Alanieta to the hospital, she would not be well because if it's God's will for her daughter to be sick then his will shall prevail. If God wanted her child to live, her child would have still been alive today. But if he had taken her child's life that is where, the humans will rest.
33. Ruci agreed that she herself used to visit the hospital when she had an illness. She agreed that she would get medical attention and feel better with the medication that Doctors would give. Before they had joined the Faith Group, as a parent she took responsibility to take her children to the hospital. She agreed that the sickness of her children would be

determined when they are seen by the doctors. They took care of her daughter but when they found out that she was sick, they are only dependent on God.

34. Ruci agreed that on the 23 February 2021, she was present when Alanieta was complaining of her sickness and till the time she had passed away. She agreed that she and her husband both decided to bury her daughter the same day as she passed away. She agreed that when Alanieta had passed away, her body was not taken to the hospital for the doctors to determine her cause of death. She agreed that at no time the police were notified of Alanieta's death or burial. She agreed that Alanieta was buried in Toko, Tavua in a piece of land belonged to Vuki.

DW 3- Ratu Meli Kisateki Uluibau Sovosi

35. Ratu Meli Kisateki giving evidence said that on 23 February 2021, he was home asleep. He saw the mother carrying Ala, the deceased, wrapped in a towel soaked in a cold water. He got hold of the deceased to massage which calmed her down. The daughter stopped crying and she asked if she could have a cup of juice which she drank. When he came back from the washroom, juice that Ala had drunk, had been spitted. He was calling her name, but Ala did not respond. Ala was not breathing, and her stomach started to swell. From December 2020 to January 2021, he had noticed the changes taking place in Ala's body. Ala didn't eat and kept losing weight.
36. After Ala had passed away, he sat down and talked to the parents. They had made their decision to bury the body. He could not cross their decision because that is the decision that no else could make, it is only given to the parents by God because the child was given to them by God. He did his duty, to pray over the daughter. After that he called everyone to come and give their last gift to their daughter. Then they buried her and had lunch. They thanked God for the life he had given the daughter. That is the door that God opened for Ala for her to come into this world and it is also his decision for him to take Ala back. They will respect that decision.

37. Under cross-examination, Ratu Meli said that he started this faith group but, he is not the leader of the group. It is his job to share the Word of God. Before civilization came, before the hospitals were brought to Fiji, ancestors survived without hospitals. They were given herbal medicines and lived up to 100 years. The God created us and gave us that dominion for us to decide on what we want to do. It is their God-given child not the State-given child and the State brought in the law but the reality of the matter is that it is God-given child. And their child is their responsibility like God gave them that responsibility to take care of their children.
38. Ratu Meli did not agree that if parents had taken Alanieta to the hospital, she would have lived because the sickness she had suffered from was *kalounidraki*, a Fijian sickness. He experienced it because two of his family members suffered from it but they never survived in the hospital.

Evaluation and Analysis

39. There were admissions by the Accused in the records of their respective caution interviews. They did not wish to challenge the admissibility of caution statements in a *voir dire* hearing. Notwithstanding that, since the Accused were unrepresented, a *voir dire* hearing was run to test the admissibility of the caution statements so that the fairness of the trial could be ensured. At the end of the *voir dire* hearing, the Court found that the caution interviews had been conducted fairly and the admissions made were voluntary. Thus, the caution statement of each Accused was held admissible.
40. At the trial, the Accused exercised their right to cross-examine the Prosecution witnesses. However, they did not challenge the evidence of the Prosecution. The evidence produced by the Defence rather affirmed the credibility of the version of events of the Prosecution case. Therefore, I have no difficulty in relying on the evidence of the Prosecution. However, I considered all the evidence led in trial in finding whether each element of the offences in the information has been proved beyond reasonable doubt.

41. At the outset, I would deal with the elements of Manslaughter Arising by Breach of Duty, the first alternative count in the information. If the Court is satisfied that this count has been proved beyond reasonable doubt, there is no need for me to look at the second alternative count – Failing to Provide the Necessaries to Life.

42. The offence of Manslaughter Arising by Breach of Duty is defined in Section 240 of the Crimes Act which provides as follows:

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.

Penalty Imprisonment for 25 years.

43. I would first deal with the question of whether each Accused had a duty to the deceased in accordance with Section 241 of the Crimes Act. The relevant parts of Section 241(1) provide as follows:

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.

44. The deceased was 7 years old at the time of the alleged offence and unable by reason of age and sickness to provide herself with the necessaries of life.

45. A duty of care is imposed by law on the Accused by virtue of Section 241(2) of the Crimes Act to provide the deceased with the necessaries of life.

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.

46. The Accused as the parents of the deceased were the head of the family and they had charge of the deceased as a member of their household. The necessaries of life of a child include medical care and attention in the event of sickness. Therefore, the Accused owed a duty of care to the deceased in accordance with section 241 of the Crimes Act.

Omission

47. Let me now come to the issue concerning omission. There is no dispute that the deceased was sick for approximately three months before her death. The 1st Accused in his answer to Q-42 of the caution interview admitted that his daughter was very sick for a long time. This was confirmed by him in his evidence when he said that his daughter had been sick for three months before her passing on 23 February 2021. The 2nd Accused also admitted in her caution interview and evidence that the deceased was sick for approximately three months before her death.

48. The Accused did not describe what that sickness was, but its symptoms - body pain and stomachache. They observed the deceased getting thin day by day and losing weight. Ratu Meli (DW-3), the leader of the faith group to whom the Accused finally turned for help identified the illness to be '*kalounidraki*', or 'Fijian sickness'. This diagnosis was based on the changes that were taking place in the deceased's body from December 2020 to

January 2021 when she didn't eat and kept losing weight. He found this sickness to be deadly or incurable from his own experience that two of his family members who had suffered from the same illness did not survive in the hospital. Based on that knowledge, he was of the view that even if the deceased were taken to the hospital, she would not have survived.

49. The omission on the part of the 2nd Accused is quite evident from the evidence she gave in Court. From what she described as her own spiritual perspective, 2nd Accused knew the sickness that her daughter was suffering from. This spiritual knowledge most likely to have been sourced from her faith leader, Ratu Meli who held the same view. Based on that knowledge, she doubted that the deceased would have survived if she were taken to the hospital. She strongly believed if it's God's will for her daughter to be sick, His will shall prevail. In that belief, she said that even if she were 100% sure that her daughter was going to die, still she would not have taken her daughter to the hospital.
50. The 2nd Accused agreed that she herself used to visit the hospital whenever she was ill. She agreed that she would get medical attention and feel better with the medication that the doctors would give. Before they had joined the faith group, she, as a parent, took responsibility to take her children to the hospital whenever they were sick. She agreed that the sickness of her children would be determined when they are seen by the doctors.
51. Similar sentiments were shared by the 1st Accused in his caution interview and his evidence. I am satisfied that each accused made an omission in not taking the deceased to the hospital for medical care and attention.

Did the said omission cause the death of the deceased?

52. There is no evidence as to what the immediate cause of death of the deceased would have been except for Ratu Meli's non-expert opinion that she died of 'Fijian sickness'. Such a disease is not known to the medical science or the court of law. One thing is clear. The conduct of the Accused was responsible for not letting the world know of the real cause of

death of their child. As the 2nd Accused conceded, the sickness of her daughter would have been determined if she were seen by the doctors.

53. Doctor James, the pathologist who conducted the autopsy could not ascertain the cause of death as the body was in a state of decomposition and putrefaction. He had conducted the autopsy more than two weeks after the burial upon exhumation of the body. He agreed that if he had the opportunity to conduct the autopsy soon after the death, the cause of death of the deceased could have been determined.
54. As a matter of policy, it is reasonable to assume that the sudden burial was arranged by the Accused without the relevant authorities being informed because they wanted to suppress the real cause of death. Otherwise, those responsible for unlawful killings could easily get away by simply burying the dead body with the evidence attached to it.
55. The omission on the part of the Accused to take the deceased to hospital was willful and deliberate. They believed that if they prayed over her, the deceased would be well. They held the belief that taking the sick to the hospital was ungodly. They were just praying over the deceased at home and giving her lemon juice.
56. The Accused had joined the faith group called *Yavu Vatu ni Vanua* in 2017 headed by Ratu Meli Kisateki Uluibau (DW3). Before joining that group, they were part of the Methodist Congregation. They agreed that they used to go to the hospital before 2017 whenever the children were sick until they realised the 'truth'. The teachings of the faith group had stopped them from believing in medical science and medical care in hospitals and medicine. They believed that to make use of the medical facilities at the hospital was to indicate a want of faith in the God. They did not take the deceased to the hospital only because of the beliefs they held. There was no problem at all as to the Accused's ability to procure and pay for medical assistance. Transport was readily available to visit the Tavua hospital which was a 10-15 minutes' drive where medical facilities and medicine are provided free of charge.

57. Section 241(2) of the Crimes Act provides for a deeming provision regarding the offence of Manslaughter arising out of a breach of duty towards a child under 14 being in charge of his or her parents. Accordingly, 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.
58. This deeming provision is put in place to protect a vulnerable segment of our society. The children are vulnerable in that they are unable to take independent decisions as to their health and other basic necessities. The Constitution provides that the best interests of a child are the primary consideration in every matter concerning the child¹. The laws should be interpreted in that spirit. Section 41(1) of the Constitution provides that every child has a right to health and that family care and protection are the equal responsibility of the child's parents. Every child has a right to be protected from neglect and harmful cultural practices². If the cultural practices are harmful to a child's health and protection, it is the responsibility of the courts to intervene. When the interests of a child come into conflict with the freedom of religion and belief of its parents, the former should prevail. A limitation on the right to belief guaranteed in Section 22(1) of the Constitution is permissible in my view to protect the rights of the child under Section 22(7) of the Constitution.
59. The evidence is overwhelming that the illness of the deceased was deteriorating day by day over a period of three months without medical attention and treatment culminating it in her death on 23 February 2021. Therefore, I would come to the conclusion that the omission on the part of the Accused by not taking the child to hospital for medical attention caused its death.

¹ Section 41(2) of the Constitution

² Sections 41 (1) (c) and (d) of the Constitution

Does the omission amount to a negligent breach of the duty?

60. It is useful to examine the statutory provisions and the case law on negligent breach of duty concerning Manslaughter. Section 22 of the Crimes Act defines negligence in the context of a criminal offence. The section requires two elements to be satisfied for criminal negligence.

A person is negligent with respect to a physical element of an offence if his or her conduct involves-

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element exists or will exist—that the conduct merits criminal punishment for the offence.

61. *R v Senior* ([1899] 1 QB at 290, [1895–99] All ER Rep at 514), is a case factually similar to the present one, where a child had died following the failure of the father to call in a doctor in circumstances where it was contrary to his religious beliefs so to do. In that case the court held that there was evidence that the prisoner had willfully neglected the child in a manner likely to cause injury to its health and having thereby caused or accelerated its death he was rightly convicted of manslaughter.
62. In the House of Lords decision of *Andrews v Director of Public Prosecutions* [1937] 2 All ER 552³, Lord Atkin in the course of citing Lord Hewart CJ in *R v Bateman* (1952) [1925] All ER Rep at 48, said at 582, 583:

In *R v Bateman* 'In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving punishment.'

³ Shameem J cited *Andrews* in *State v Toka* [2003] FJHC 182; HAC0008X.2003S (19 September 2003)

63. The question of whether the accused's conduct was negligent is an objective one requiring the court to ask whether a reasonable sober man would have behaved in that way⁴. In the circumstances of the present case, the extent to which the Accused's conduct departed from the proper standard of care incumbent on them, involving as it must have done a risk of serious harm to the sickly child, was such that it should be judged criminal deserving punishment.
64. It is now well established in common law that the degree of negligence required to establish the offence of Manslaughter is pitched very high. In order to make out a case of manslaughter by negligence of this kind, the negligence must be gross and wanton. Andrews (supra) involved motor manslaughter as a result of neglect, but the speech of Lord Atkin is in the widest terms and is clearly intended to apply to every case of manslaughter by neglect. His Lordship went on to say ([1937] 2 All ER at 556, [1937] AC at 583):

'Here, again, I think, with respect, that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the connotations of *mens rea* helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether, in a particular case, the degree of negligence shown is a crime, and deserves punishment. But the substance of the judgment is most valuable, and, in my opinion, is correct. In practice, it has generally been adopted by judges in charging juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. **For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case.**' (emphasis added)

65. It is clear, the degree of negligence required to establish the offence of Manslaughter by negligence is now elevated to the level of recklessness. This standard is recognized in our law. According to Section 239 of the Crimes Act 2009, the offence of Manslaughter in general, is made out if a person engages in conduct causing the death of another person

⁴ See: Govind J in State -v- Nadessan Mudliar Crim. Case No. HAC 0007/01L

when he is reckless as to a risk that his conduct will cause serious harm to the other person. The same fault element – recklessness- applies to manslaughter by negligence.

66. In the case of Manslaughter however, a clear distinction is to be drawn in relation to an act of commission and an act of omission; mere neglect, even though deliberate, which caused injury to a child's health and resulted in its death, do not necessarily constitute manslaughter where the accused had failed to foresee the consequences of his neglect⁵
67. According to Section 21(2) of the Crimes Act a person is reckless with respect to a result if —
- (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
68. There could be no doubt that the Accused willfully and deliberately abstained from calling in medical assistance, though they were aware for some considerable period before the child's death that it was in a state of great danger, and that, therefore, their failure to procure medical aid could be called neglecting the child so as to cause some serious harm to its health.
69. The standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation which would not have been thought so in a preceding generation, and regard must be had to the habits and thoughts of the day.
70. The Accused were the members of a faith group called "Yavu Vatu ni Vanua," who based their religious doctrines as to the treatment of sick people. The leader of the faith group - Ratu Meli said that *before civilization came, before the hospitals were brought to Fiji, ancestors survived without hospitals. They were given herbal medicines and lived up to 100 years.* The words of Ratu Meli seem contrary to the present-day realities and the law as it stands today. We have come a long way in terms of medical care and treatments from

⁵ (see R v Lowe [1973] 1 All ER 805); dictum of Lord Atkin in Andrews v Director of Public Prosecutions [1937] 2 All ER at 555, 556 applied).

the days the hospitals were not in existence in Fiji. The notion of neglect must be understood in the present-day context and the courts are bound to give effect to the law of the land which is supreme.

71. During cross-examination, the 1st Accused challenged the medical evidence on the basis that some patients though admitted to hospitals are not cured or survived. Dr Goundar said that the doctors cannot guarantee that every patient admitted to hospitals are cured or saved. However, a high percentage of patients admitted to the hospitals are saved.
72. Both Accused admitted that the deceased was not taken to the hospital although she kept losing weight and was complaining of stomachache from time to time over a period of three months. According to Adi Vika (PW 4), the deceased was screaming in pain the day she passed away. When the deceased complained of a stomachache, Adi Vika informed the Accused, but they did nothing. Tavua hospital was near to where they were residing, but they did not take trouble in taking the child to the hospital. Instead, the child was taken to their spiritual leader in the belief that the prayers over her will cure the illness.
73. Medical aid and medicine are such essential things for a sickly child that reasonably careful parents in general would have provided. In these days the resources of medical science are within the reach of the humblest and the poorest. A strong belief in God's ability to cure an illness might have a psychological effect on the believer in terms of getting well. However, there is no evidence that the prayers themselves could cure illnesses.
74. The Accused had not supplied the deceased with any medical aid or medicine, though aware that the case was of great gravity and that the deceased would probably die. The deceased's life would certainly have been prolonged and in all probability saved if medical assistance had been procured. The Accused were aware of the substantial risk that serious harm will occur to the deceased and having regard to the circumstances known to them, the risk they took by not taking the child to the hospital was unjustifiable.

75. The Accused were in breach of a duty of care towards the child who has died. That breach of duty caused the death of the child. That breach of duty should be characterised as gross negligence and therefore as a crime. In the circumstances known to them the Accused took an unjustified risk and thus were reckless in not taking the child to the hospital. I find that the offence of Manslaughter Arising from a Breach of Duty is established beyond reasonable doubt.

Count 2 –Restriction of Burial of Dead Bodies

76. There is no dispute that the dead body was buried without informing either to the nearest hospital or the police station. The Accused in their respective caution interviews and evidence admitted burying the dead body without informing the relevant authorities. They admit that as a result, no death certificate was issued according to law. Their excuse was that they were ignorant that such law ever existed. Ignorance of the law is no excuse. The concept comes from Roman law and is expressed in maxim *-Ignorantia Juris Non Excusat*.

77. The Prosecution proved each charge beyond reasonable doubt. I find each Accused guilty on each count and convict them accordingly.




Aruna Aluthge
Judge

16 February 2024

At Lautoka

Solicitors:

- Office of the Director of Public Prosecution for State