

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 154 OF 2013

STATE

-v-

LANIETA SALADUA NEIRABO

Counsel : Mr. A. Singh for the State
Mr. M. Fesaitu with Ms. Hazelman for Accused

Dates of Trial : 7th, 8th June 2016

Date of Summing Up : 9th June, 2016

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me as the Judge who presided over this trial to sum up the case to you. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused person.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if

I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.

4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the accused made submissions to you about the facts of this case. That is their duty as the Counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this Court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this Courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.

11. As Assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
12. In assessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence.
13. In this case the Prosecution and the Defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of time of this Court.
14. Prosecution and the Defence have agreed on certain facts: I have given you a copy of the set of agreed facts. It includes the bundle of documents tendered by the Police Investigating Officer Jona Toga. Legal effect of such admissions is that they constitute sufficient proof of the facts. Therefore, such facts need no further proof by way of evidence by the prosecution. You can accept those 'AGREED FACTS' without further proof.

Information

15. The accused person is charged with two counts of "Manslaughter arising from breach of duty" contrary to section 240 and 241(1) (a) and (b) of the Crimes Decree 44 of 2009.

First Count

Statement of Offence

MANSLAUGHTER ARISING FROM BREACH OF DUTY: Contrary to Sections 240 and 241 (1) (a) and (b) (iii) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

LANIETA SALADUA NEIRABO on the 17th day of January 2013 at Nadi in the Western Division, made an omission which amounted to a neglect breach of duty, in that she left LUSI GRACE VUILAWE, a 1 year and 11 month old child, unattended which resulted in the death of the said LUSI GRACE VUILAWE.

Second Count

Statement of Offence

MANSLAUGHTER ARISING FROM BREACH OF DUTY: Contrary to Sections 240 and 241 (1) (a) and (b) (iii) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

LANIETA SALADUA NEIRABO on the 17th day of January 2013 at Nadi in the Western Division, made an omission which amounted to a neglect breach of duty, in that she left LAVENIA KUTAULI VUILAWE, a 1 year and 11 month old child, unattended which resulted in the death of the said LAVENIA KUTAULI VUILAWE.

16. Section 240 of the Crimes Decree states that;

"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"*

17. Accordingly, the elements of the offence of "**manslaughter** arising from breach of duty" are that;

i The accused person was in a duty of care towards the deceased,

ii She made an omission,

- iii Such omission caused the death of the deceased,
- iv That omission constitutes a breach of her duty of care towards the deceased, and
- v. The breach of such duty of care was such as to be considered as **gross negligence** and therefore a crime.

18. There is no dispute that the deaths of the twin daughters were caused by drowning. In view of the evidence adduced during the hearing and arguments of the Counsel, the main issues in dispute are whether the accused had a duty towards the victims who has died and if there was such a duty whether she breached that duty when she failed look after them properly in their mother's absence.
19. If such breach of duty is established the next question is whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the accused in all the circumstances in which she was placed when it occurred. You will have to consider whether the extent to which the accused's conduct departed from the proper standard of care incumbent upon her, involving as it must have done a risk of death to the deceased, was such that it should be judged criminal.
20. You have to use the objective test to determine whether, in the circumstances of this case, accused should have taken action to prevent a foreseeable death being caused to two girls. In other words, you have to decide whether she had acted in such a way that a reasonable and prudent woman would have acted in similar circumstances of this case to prevent the foreseeable death of the deceased. The legal meaning of gross negligence is greater negligence than mere absence of such ordinary care which, in the circumstances, a prudent woman ought to have taken.
21. In a case of manslaughter by negligence, you have to bear in mind the distinction between civil and criminal liability for death by negligence. The law of criminal liability for negligence could be conveniently explained in this way. For example, If A. has

caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of B.

22. To impose criminal liability and convict A. of manslaughter, the Prosecution must prove the three things above mentioned and must satisfy you, in addition, that A.'s **negligence amounted to a crime**. In the civil action, if it is proved that A. fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done.
23. In a criminal a criminal case like this, on the contrary, the amount and **degree of negligence** are the determining question. There must be *mens rea*..that is whether the negligence is culpable.
24. To explain to you the test which you should apply to determine whether the negligence, in this case, amounted or did not amount to a crime, I have used the word "**gross**". In order to establish criminal liability the facts must be such that, in your opinion, 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. You must see whether, having regard to the risk of death involved, the conduct of the accused was so bad in all the circumstances as to amount in your judgment to a criminal omission.
25. That completes my directions to you on the legal issues.
26. I must also remind you of the evidence given and the cases of both the Prosecution and Defence. In doing this I do not propose going through all the evidence of every witness. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the

evidence in coming to your decision on this case.

PW1 Tamara Nicole Vuiyawe

27. Tamara is the mother of the deceased twins. She is married with three children. In 2012, she had twin daughters namely Lusi Grace Vuniyawa and Lavenia Kutauci Vuniyawa and a son Viliame Jale.
28. In September, 2012, she attended her husband's grandfather's funeral at her in law's place in Tavua Village, Malolo in the Mamanuca Group, with her children. After the funeral they decided to stay in the same village at her uncle Viliame's house. Her son Viliame Jale was turning 4 years in November 2013 and the twins were going to turn 2 years in 2013 February.
29. On the 17th day of January 2013, she prepared breakfast and did housework. Around 11.30 a.m. after having cooked lunch, she informed Lanieta, the accused, that she will be going to the water tank to soak the laundry and fill the tub. Lanieta is a friend and a family member as well. She lived next to her house and shared the same kitchen located just outside Viliame's house.
30. When she and Lanieta were cooking inside the kitchen, her three children, the twin girls and son Viliame were playing with the sand in the kitchen. Lanieta was cooking her father-in-law's lunch.
31. When her cooking was done, she went to the tank at Lanieta's house asking Lanieta to look after the kids while she soak her laundry and fill the water for the kids to bath. She trusted Lanieta as the person who attended to and helped her at the hospital when the twins were born. She knew that Lanieta will look after the kids.
32. She returned roughly in 10 minutes. Upon her return to the kitchen, children were not to be seen. She asked Lanieta for the children. She asked Lanieta because she left the kids

with Lanieta. She said that the children are in the kitchen. She went inside to look for them but could not find. She checked several places and went back to the kitchen to find that Lanieta was still cooking. She informed Lanieta that children had gone missing. Then Lanieta asked her to look around the well side. So she went to the well which is within 2-3 minutes walking distance. She found her three kids all inside the well. She jumped into the well and grabbed them all. She was screaming out to her husband and to Lanieta to come and help her. They came running and helped her put the kids to the ground. They tried to revive them, but the twins were dead and gone already. They could not do much, but the boy Jale gained consciousness. They took the bodies to the next village which had a Health Centre. Twins were confirmed dead by a nurse. Post mortem was conducted at the Lautoka Hospital.

33. Describing the well, she said that it was an abandoned ground well not covered with a wall, having water level up to her stomach.
34. By looking at the sketch plan tendered in evidence as an agreed fact, Tamara confirmed that the distance between the well and the kitchen was approximately 70 metres. Before this incident happened, she was aware that there was a well approximately 70 m away from the place where they were cooking.
35. Under cross examination, Tamara said that when she came to Thauva village for the funeral Lanieta was not in Thavua village. She had come back to the village sometime in November 2012. From November 2012 to January 2013, Lanieta did not babysit her children at any time. Lanieta only helped her the day she delivered the twins at the hospital. She herself looked after the children and took them with her whenever she goes. She admitted that whilst she was cooking in the kitchen Lanieta was preparing the bele and was waiting for her to finish her cooking. Once she had finished cooking, Lanieta had started cooking for her father- in- law who was sick. She admitted that, given the age of the children, it was not possible for Lanieta to give full attention to the children. However, when she asked Lanieta to look after children, she did not tell her that she can't do that because she was occupied or busy.

PW 2 D S 1970 Jona Toga

36. DC Toga was the Investigating Officer who conducted the investigation when he was based at the Nadi Police Station in 2013. He compiled a report for this case. He tendered number of reports including the caution interview of the Accused. All the documents were tendered in agreement as admitted facts.
37. That was the case for the Prosecution. At the closure of the Prosecution case you heard me explain to the accused what her rights were in defence and how she could remain silent and say that the Prosecution had not proved the case against her to the requisite standard or they could give evidence in which case they would be cross-examined.
38. You are aware, Accused elected to remain silent. That is her right. She has nothing to prove in this case. You must not draw the inference that she remained silent and did not call witnesses because she is guilty. The Prosecution still has the burden to prove the case beyond reasonable doubt.

Analysis

39. Credibility of the evidence called by the Prosecution was not mush in issue in this case. Defence had agreed most of the facts adduced by the Prosecution in evidence. Having considered the evidence adduced by the Prosecution, you have to be satisfied that all the elements of the offence that I explained to you early have been proved by the Prosecution beyond reasonable doubt.
40. Prosecution says that the accused owed a duty of care towards the deceased twins when she accepted to look after the children in the absence of her mother. Accused admitted in answer to questions No. 31 and 32 in the cautioned interview that Tamara told her that she is going to soak the cloths at the nearby cement tank that is about 100 m. away from

home and that Tamara left her twin daughters with her before she went to soak the cloths. She also admitted in answer to question No. 61 that she knew that the twin daughter's mother had asked her to look after them before she went to soak their cloths.

41. Defence is running the case on the basis that there was no such duty of care on accused's part towards the deceased and that it was the mother of the children that was negligent and, therefore, she is responsible for the deaths. Defence further contends that accused was not supposed to babysit children on that day or any time before, and was busy with her cooking and also attending to her sickly father-in-law. Being aware of her situation, and given the age of her children, mother should not have left three children in her care, they argues. It is up to you to form your own opinion on that and decide whether accused owed a duty of care towards the deceased twins.
42. If you find that accused, owed in law, a duty of care towards the deceased then, you have to be satisfied that there was an omission on her part that constituted a breach of that duty.
43. There is no dispute in this case that the deaths of the twin girls were caused by drowning. Cause of death report adduced in agreement confirms that fact.
44. Most important issue to be resolved in this case is whether the accused, in the circumstances of this case, is grossly negligent so as to attract criminal liability and punishment.
45. In answer to question 62 of the caution interview, accused says:

I did look after them but as I was also busy doing my cooking and they were just playing beside the kitchen I did not really expect them to end up right to the village well.
46. In answer to question 64, she says:

"I did not expect them to go to the village well as they never go there and it was really fast for them going to the village well as they were just playing beside the kitchen but by the time I came back to see my in laws which was just for two minutes and I was not sure whether they were still there or not as it was really fast." You decide whether accused could have foreseen the danger or the risk that children might have run in this situation and she had been grossly negligent in failing to prevent that risk.

47. You apply the legal principles and tests that I have explained to the facts proved in this case and form your own opinion. If you are of the view that the accused did nothing unlawful by her conduct or you have a reasonable doubt about that, then you must find the accused not guilty of the offence. On the other hand, if you find her conduct is grossly negligent deserving punishment you must find the accused guilty on the two counts of Manslaughter as charged.
48. Madam assessors and gentleman assessor, this concludes my summing up of the Law. Now you may retire and deliberate together and may form your individual opinions on the charges against the accused. You may peruse any of the exhibits you like to consider. When you have reached your separate opinions you will come back to court, and you will be asked to state your separate opinion.


I thank you for your patient hearing to my summing -up.

You may retire for your opinions now.

Any redirections?



On 09th June, 2016


Aruna Aluthge
Judge

**Solicitors: Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused**