

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

Date of Summing Up : 9th June, 2016

Date of Judgment : 10th June, 2016

JUDGMENT

1. The accused 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**.

2. Accused was tried before three assessors. At the end of the trial, assessors, in their majority opinion, found the accused guilty on both the counts. I do not concur with the majority opinion which, in my opinion, is not supported by the evidence led in trial. Having reviewed my own summing up, I deliver my judgment as follows.
3. Prosecution called two witnesses, Tamara, mother of the deceased twins, and the investigation officer to prove their case.
4. Credibility of the evidence called by the Prosecution was not mush in issue in this case. Defence agreed most of the facts adduced by the Prosecution in evidence. However, I am not satisfied that all the elements of the offence with which the accused was charged had been proved by the Prosecution beyond reasonable doubt.
5. 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.
6. There is no dispute that the deaths of twin daughters were caused by asphyxia due to 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 deceased victims and if there was such a duty, whether she breached that duty when she failed to look after them properly in their mother's absence.
7. 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. Court must consider whether the extent to which the accused's conduct departed from the proper standard of care incumbent upon accused, involving as it must have done a risk of death to the deceased, was such that it should be judged criminal.
8. Prosecution says that the accused owed a duty of care towards the deceased twin girls 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.

9. Defence took up the position that there was no such duty of care on accused's part towards the deceased and it was the mother of the children that was negligent and therefore, she was responsible for the deaths. Defence further contends that accused was not supposed to babysit the deceased children on that unfortunate day or any time before. Accused was busy with her cooking and also attending to her sickly father-in-law and, therefore, there was no duty of care on her part towards the deceased.
10. Kitchen was shared by the accused and Tamara (complainant) for cooking. Accused was preparing the *bele* until she gets her turn when Tamara's poke curry is cooked. Tamara admitted, as an agreed fact, that accused was cooking when she went to the tank to soak the laundry. Tamara knew that accused was attending to her sickly father-in-law as well while she was cooking his lunch. Accused owed a duty to her father-in-law and her primary duty of care was towards her sickly father-in-law. She was not the babysitter of Tamara's children at that point of time. It is true; accused did not refuse when Tamara asked her to look after the children. In our culture, it is hardly possible for a mother to decline such a request how much she is busy. Acceding to such request, in itself, in my opinion, does not give rise to a legal duty of care attracting criminal liability.
11. Primary duty of care and wellbeing of children are, in law, incumbent upon their parents. That duty cannot easily be abdicated or renounced. Duty of care expected of a mother towards children gives rise to a bundle of legal obligations. Those obligations are not simply transferable to others for mere expediency. Tamara knew very well that the accused was busy cooking for his ailing father and at the same time attending to him. Accused was not simply there to baby sit Tamara's children. Tamara had been in Tauva village for four months and was quite aware of the hazards present in her compound. Despite that knowledge and being aware of accused's situation, she left the three small kids with the accused. Given the age of the children, mother should not have left three kids in accused's care and kept herself away for ten minutes in such a situation.
12. I am of the considered view, given the circumstances of the present case, accused did not owe a legal duty of care towards the deceased children attracting criminal liability and punishment in case of an omission.

13. Another 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.

14. The well was situated 70 Meters away from the kitchen where accused was cooking. Children were playing sand beside the kitchen. According to the sketch plan, the well is only 1.5 Meters in depth. Tamara said water level was only up to her stomach. In the circumstances in which accused was placed, it is hardly possible for her to foresee the danger or risk of death being caused to children.

15. Answers accused had given to police in her caution interview clearly indicate her position.

16. 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”.

17. 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”

18. Observation made by Lord Hewart CJ in **R v Bateman** (1925) 19 Cr App R 8, CCA, is worth mentioning here.

'In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for death by negligence.

... 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. In a criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be mens rea ... 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.'

19. The observation made by Lord Hewart CJ in *Bateman* (*supra*) was further elaborated by Lord *Mackay LC in R v Adomako* (1994) 3 ALL ER 79 at 86, where his Lordship stated;

"On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider 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 defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.

It is true that to a certain extent this involves an element of circularity, but in this branch of the law I do not believe that is fatal to its being correct as a test of how far conduct must depart from accepted standards to be characterised as criminal. This is necessarily a question of degree and an attempt to specify that degree more closely is I think likely to achieve only a spurious precision. The essence of

the matter, which is supremely a jury question, is whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission"

20. I find that even if the accused was in breach of a duty, having regard to the risk of death involved, the conduct of the accused was not so bad in all the circumstances as to amount, in my judgment, to a criminal omission. For the reasons given, I reject the majority opinion of the assessors. I acquit the accused and discharge her on both counts.
21. That is the judgment of this Court



At Lautoka
10th June, 2016


Aruna Aluthge
Judge

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