

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 108 of 2016**

**STATE**

**V**

**VIKA KELEKELE LALIQAVOKA**

**Counsel** : Ms. Darshani Kumar for the State  
Ms. Christina Choy for the Accused

**Dates of Trial** : 27-29 June and 3-6 July 2017

**Date Summing Up** : 10 July 2017

### **SUMMING UP**

Madam Assessors and Gentleman Assessor,

**[1]** It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

**[2]** As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted

the particular suggestion as true. The opening and closing submissions made by both Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting. Consider also the likelihood or probability of the witness's account.
- [14] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
- [15] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

- [16] You may also have to consider whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [17] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charge against her. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw

reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [24] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [25] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [26] This is because the accused is presumed to be innocent. She may be convicted only if the prosecution establishes that she is guilty of the offence charged. The fact that the accused has given evidence does not imply any burden upon her to prove her innocence. It is not her task to prove her innocence.
- [27] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [28] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [29] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [30] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the deceased or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty

dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.

[31] Let us now look at the charge contained in the information.

[32] There is one charge preferred by DPP, against the accused:

### **FIRST COUNT**

#### ***Statement of offence***

**MURDER** : Contrary to Section 237 (a) and (b) and (c) of the Crimes Act No. 44 of 2009.

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

**VIKA KELEKELE LALIQAVOKA** on the 18<sup>th</sup> of July 2011 at Cunningham, Nasinu, in the Central Division, murdered her unnamed child.

[33] In order to prove the count of Murder, the prosecution must establish beyond reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 18<sup>th</sup> day of July 2011);
- (iii) at Cunningham, Nasinu, in the Central Division;
- (iv) engaged in a conduct; and
- (v) the said conduct caused the death of her unnamed child (the deceased);  
and
- (vi) the accused intended to cause the death of her unnamed child; or
- (vii) the accused was reckless as to causing the death of her unnamed child  
by the conduct.

[34] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt. In this case, the identity of the accused, the date of offence and place of offence are not disputed.

[35] The fourth element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The

prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental.

- [36] When dealing with the fifth element, whether the said conduct of the accused caused the death of the deceased you should remember that, at law, the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the deceased's death. Therefore, if you are satisfied beyond reasonable doubt that the conduct of the accused substantially contributed to the death of the deceased, that is sufficient to satisfy the element that the 'conduct caused the death of the deceased'.
- [37] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of the accused from the facts and circumstances you would consider as proved.
- [38] In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that she meant to bring about the death or that she was aware that death will occur in the ordinary course of events as a result of her conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
- [39] In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether she had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. An accused will be reckless with respect to causing the death of the deceased, if;
- a. She was aware of a substantial risk that death will occur due to her conduct; and
  - b. Having regard to the circumstances known to her, it was unjustifiable for her to take that risk.
- [40] What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death was a probable consequence or the likely result of her conduct; and yet she decided to go ahead and engage in the conduct regardless of that consequence. The accused must foresee that death was a probable consequence or the likely result of her conduct and after realising that, if she decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then she was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.

[41] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of Murder.

[42] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of Murder.

[43] However, as an alternative, you may consider whether the accused is guilty or not guilty of the offence of Infanticide. Section 244 of Crimes Act provides that:

(1) *A woman commits the indictable offence of Infanticide if—*

(a) *she, by any wilful act or omission, causes the death of her child; and*

(b) *the child is under the age of 12 months; and*

(c) *at the time of the act or omission the balance of her mind was disturbed by reason of —*

(i) *her not having fully recovered from the effect of giving birth to the child; or*

(ii) *the effect of lactation consequent upon the birth of the child; or*

(iii) *any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state that is proved to the satisfaction of the court.*

(2) *The onus of proving the existence of any matter referred to in sub-section (1)(c) lies on the accused person and the standard of proof of such matters shall be on the balance of probabilities.*

(3) *In circumstances provided for in sub-section (1), notwithstanding that they were such that but for the provisions of this section the offence would have amounted to murder, the woman shall be guilty of Infanticide, and may be dealt with and punished as if she had been guilty of manslaughter of the child.*

[44] In terms of Section 245 of the Crimes Act;

*A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother —*

*(a) whether it has breathed or not; and*

*(b) whether it has an independent circulation or not; and*

*(c) whether the navel-string is severed or not*

**[45]** In order to prove the offence of Infanticide, the prosecution must establish beyond reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 18<sup>th</sup> day of July 2011);
- (iii) at Cunningham, Nasinu, in the Central Division;
- (iv) caused the death of her unnamed child (the deceased) by any wilful act or omission; and
- (v) the child is under the age of 12 months at the time.

**[46]** The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt. As mentioned before, in this case, the identity of the accused, the date of offence and place of offence are not disputed.

**[47]** Furthermore, the prosecution will have to establish beyond reasonable doubt that the accused caused the death of the deceased by a wilful act or omission; and also that the deceased was under the age of 12 months at the time.

**[48]** As I have mentioned to you before, the burden rests on the prosecution to prove beyond reasonable doubt that the accused is guilty of Infanticide.

**[49]** However, in this case the onus shifts to the accused of proving the existence of any matter referred to in sub-section (1)(c) of Section 244, namely that the balance of her mind was disturbed by reason of —

- (i) her not having fully recovered from the effect of giving birth to the child; or
- (ii) the effect of lactation consequent upon the birth of the child; or
- (iii) any other matter, condition, state of mind or experience associated with her pregnancy, delivery or post-natal state that is proved to the satisfaction of the court.

[50] The standard of proving such matters shall be on the balance of probabilities. This is also known as preponderance of evidence. This is the standard of proof usually adopted in civil cases, demanding that the case that is the more probable should succeed. This is the kind of decision represented by the scales of justice. As Assessors you have to weigh up the evidence and decide which version is most probably true. The case of the accused or that of the prosecution.

[51] Therefore, if the accused proves the existence of any of the above matters, referred to in sub-section (1)(c) of Section 244, on a balance of probabilities, then you must find the accused guilty only of Infanticide.

[52] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

### **Admitted Facts**

[53] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009, the State and the Defence have consented to treat the following facts as “*admitted facts*” without placing necessary evidence to prove them:

#### **Background**

1. *The accused person is Vika Kelekele Laliqavoka, 40 years of Cunningham.*
2. *On 18 July 2011, Vika Kelekele Laliqavoka resided at Lot 3, Wainitarawau Road, Cunningham, Stage 1 [hereinafter referred to as the residence] at the house of her sister Mere Bale.*
3. *From the month of December 2010 to 18 July 2011 Vika Kelekele Laliqavoka was pregnant.*
4. *On 18 July 2011, while watching television, Vika Kelekele Laliqavoka was wearing a wraparound [sulu] around her waist.*

#### **Alleged Incident**

5. *On 18 July 2011, at about 5pm, Vika Kelekele Laliqavoka went to the bathroom at her residence and remained there for about 1 hour.*
6. *On 18 July 2011, between 5pm and 6pm, in the bathroom of her residence, Vika Kelekele Laliqavoka gave birth to a male child.*
7. *Thereafter, on 18 July 2011, a taxi was arranged by Vika Kelekele Laliqavoka’s family to take her to the hospital. Viniana Digitaki accompanied Vika Kelekele Laliqavoka in the taxi.*

### **Record of Interview**

8. *On 20 July 2011, Vika Kelekele Laliqavoka was interviewed under caution by Woman Detective Constable 2825 Tima at the Valelevu Police Station.*
9. *On 20 July 2011, during the interview under caution referred to in paragraph 8, Detective Sergeant Lemeki Mawalu was present as a witness.*
10. *In the record of interview referred to in paragraph 8, Vika Kelekele Laliqavoka admitted giving birth to her male child in the bathroom of her residence.*
11. *In the interview under caution referred to in paragraph 8, Vika Kelekele Laliqavoka said that her child proceeded from her body and fell on the floor. She pressed his nose and tapped his cheeks. Her new-born child did not respond.*
12. *Further to paragraph 11, Vika Kelekele Laliqavoka said she wrapped her new born child in a cloth, placed him inside a brown bag which she placed outside her residence.*

[54] You must therefore, treat the above facts as proved.

### **Circumstantial Evidence**

[55] It must be stated at the very outset that there are no eye witnesses in this case. The prosecution case is based on what is referred to in law as circumstantial evidence. I now direct you on circumstantial evidence.

[56] In circumstantial evidence you are asked to piece the story together from witnesses who did not actually see the crime committed, but give evidence of other circumstances and events that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.

[57] I wish to cite the following situation as an example for circumstantial evidence. In a silent night you hear cries of a man from a neighbouring house. You come out to see that a man named 'X' is running away from that house with an object in his hand. Out of curiosity you go inside the house to see what really had happened. You see your neighbour 'Y' lying fallen with injuries. Here you did not see 'X' committing any act on 'Y'. The two independent things you saw were the circumstances of the given situation. You can connect the two things that you saw and draw certain inferences. An inference you may draw would be, that 'X' caused the injury on 'Y'. In drawing that inference you must make sure that it is the only inference that could be drawn and no other inferences that could have been possibly drawn from the said circumstances. That should also be the inescapable inference that could be drawn against 'X' in the circumstances. Further in evidence, one witness may prove one thing and another witness may prove another thing. None of those things separately alone may be sufficient to establish guilt, but taken together may lead to the conclusion that the accused committed the crime. Therefore, you must consider all direct evidence, as well as circumstantial evidence, together.

[58] Please note that it must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the accused person having committed the crime. To find her guilty you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt that the accused committed the crime.

[59] Therefore, before you can draw any reasonable inferences you must first be satisfied beyond reasonable doubt that the evidence given by witnesses relating to the circumstances giving rise to the issues of fact to be proven is credible and truthful.

### **Case for the Prosecution**

[60] In support of their case, the prosecution led the evidence of Viniana Digitaki, Mere Bale, Mereoni Buloulevu and Dr. James Kalougivaki.

### **[61] Evidence of Viniana Digitaki**

- (i) *She testified that the accused was her niece from her mother's side. Her mother and the accused mother are first cousins.*
- (ii) *In 2011, she was a student at FNU doing a Diploma in Business Accounting. At the time she was staying in the house of one of her cousin brothers, Viliame Rokobuli. This was at Lot 20, Wai Place, Cunningham, Nasinu.*
- (iii) *Around July 2011, the accused was residing at her sister Mere Bale's house at Cunningham. The two houses were located 10-15 meters apart on the same street.*
- (iv) *On 18 July 2011, around 5.00 p.m. - 6.00 p.m. in the evening, Viniana had been with the accused at Mere Bale's place. They were watching a movie and having conversation. Mere Bale's two daughters had also been present at the time.*
- (v) *When the accused had stood up the witness saw a stain on the accused's sulu. It was a blood stain. She testified that the stain was like when we have our monthly period. She had told the accused that there is a stain on her sulu.*
- (vi) *The accused had told her that during the 7<sup>th</sup>, 8<sup>th</sup>, or 9<sup>th</sup> month of pregnancy they receive some sort of blood. Up to that time the witness did not know about the accused's pregnancy.*
- (vii) *The accused had then taken a towel and gone into the bathroom to have a shower.*

- (viii) *After about 15 minutes, she had come to the front of the bathroom door and called out to Vika the accused. She had informed that if Vika was about to give birth she will go and inform Vika's mother and ask for taxi fare. Vika had informed her to go and ask for the taxi fare from her mother. The witness testified that the bathroom door was locked from inside at the time.*
- (ix) *Viniana had then gone to get the taxi fare from the accused's mother, Mereoni Buloulevu, to take the accused to the CWM Hospital. However, the mother had informed that she does not have any money for taxi fare.*
- (x) *Viniana had then gone to play volleyball with her friends. She had played volleyball for about 45 minutes to 1 hour.*
- (xi) *When Viniana went back to Mere Bale's house, Mere Bale was outside and her mother, Mereoni was with the kids. The accused was still in the bathroom.*
- (xii) *Viniana had then gone to look for a taxi. She found a taxi, got into it and returned to Mere Bale's residence. She had then taken the accused in the taxi, together with another friend named Emele Vukuono, who was standing alongside the road at the time. They were travelling towards the CWM Hospital.*
- (xiii) *They got down from the taxi at the bus stop in front of the CWM Hospital as the accused had said she wanted to rest.*
- (xiv) *Then Viniana had received a call from the accused father, Temo Laliqavoka. She had then got to know that Vika's baby was found in the house. Viniana said that she had been very scared when she heard this news.*
- (xv) *Viniana, the accused and the friend had then left by bus. They had got down at the Suva bus stand. She saw that the accused was shivering at the time. Then they got into a taxi and returned to Mere Bale's house.*
- (xvi) *On her arrival, she had seen the accused's baby wrapped with a piece of cloth, lying on top of a blanket, on the floor, in the sitting room of the house.*

**[62] Evidence of Mere Bale**

- (i) *She is the elder sister of the accused. She lives at Lot 6 Wainitarawau Road, Wainimako sub-division, Cunningham Stage 1. She has been living at this residence for nearly 10 years.*

- (ii) *In 2011, her sister Vika had come to stay at her house for about 2 weeks. Prior to that the accused had been staying with a lady friend of hers.*
- (iii) *On the 18 July 2011, around 5.00 p.m. in the evening, she was cooking in the extension to her house. The accused, Vika, was in the bathroom at the time. She thought that Vika was having a shower.*
- (iv) *Her brother (Serevi Veikauyaki), had informed the witness that he had seen blood coming out of the bathroom outlet. The witness too had then seen the blood coming out of the bathroom outlet.*
- (v) *Mere Bale had gone close to the bathroom and informed Vika that there is blood coming out of the bathroom outlet. Vika had informed that she is having a bath. The bathroom door was locked from inside.*
- (vi) *The witness testified that on seeing the blood she had thought that the accused was doing an abortion inside the bathroom.*
- (vii) *The witness said that she had then run to inform her mother. Her mother had accompanied her back home. When they came back, Vika was still in the bathroom.*
- (viii) *Her mother had called out to Vika, who had replied that she was having a bath.*
- (ix) *After a while, Vika had come out of the bathroom. She was wearing a big t-shirt and a towel around her waist. She was carrying a maroon coloured handbag, with a plastic bag inside. Vika had gone towards the extension of the house. Her mother had followed Vika.*
- (x) *Her mother had told Vika to be taken to hospital. At that time Viniana had come home and she was told to take Vika to the hospital. Viniana had done so.*
- (xi) *The witness testified that her mother had then told her to go and check on the bag that Vika had brought out of the toilet. When she held onto the bag, it had been very heavy. So she had kept the bag down. She had felt scared.*
- (xii) *Her mother had then brought the bag into the sitting room of the house and unpacked it. Inside the bag, the deceased baby had been found wrapped up in a cloth. There was no movement or sound from the baby.*

**[63] Evidence of Mereoni Buloulevu**

- (i) *She is the mother of the accused and also of Mere Bale. She resides at Wai Place, Cunningham.*

- (ii) *In July 2011, the accused had come to reside at Mere Bale's house for two weeks. Prior to that Vika had been staying at a friend's house and looking after the friend's father. The friend's house was also situated close by.*
- (iii) *Prior to leaving to stay at her friend's place, the accused had been staying with her along with her four children.*
- (iv) *On 18 July 2011, around 5.00 p.m. the witness was at her home doing her washing. Mere Bale had come and informed her that she had seen blood coming out of the bathroom outlet. She had also told her that Vika was in the bathroom having a bath.*
- (v) *She had then accompanied Mere Bale to her house. She had told Vika that if she is having any pain to come out so that she can be taken to the hospital.*
- (vi) *After some time Vika had come out of the bathroom. She had been wearing a t-shirt and had a towel wrapped around her waist. The accused was holding a maroon bag at the time and she placed that bag on a table in the extension of the house. The accused had gone to the extension of the house to wear her pants.*
- (vii) *Viniana had come to the house at the time. The witness had requested Viniana to take the accused to the hospital. Viniana had done so. They had left by taxi.*
- (viii) *After they left, it had come to her mind that she did not see Vika's stomach at the time Vika came out of the bathroom. Thus she had asked Mere to check on the maroon bag. When Mere checked the bag, it had been very heavy. So Mere had left the bag as it was.*
- (ix) *Mereoni had then gone and brought the bag to the sitting room. On opening the maroon bag she had seen a blue and white shopping/plastic bag inside. She had taken the plastic bag out and opened it. She had seen the deceased inside the bag wrapped from head to toe with a sulu cloth. There was no movement or sound from the baby.*
- (x) *She had noticed a red mark on the face of the baby close to the forehead (the witness pointed to the nasal bridge area of the baby).*

**[64] Evidence of Dr. James J.V. Kalougivaki**

- (i) *The Doctor is a Forensic Pathologist and Head of the Forensic Pathology Unit within the Fiji Police Force (The Doctor's curriculum vitae was handed over to Court).*
- (ii) *The post mortem examination on the deceased had been conducted by Dr. Ramaswamy Ponnu Swamy Goundar, who was the former Head*

*of the Forensic Pathology Unit within the Fiji Police Force. Dr. Goundar is now retired and currently based in Australia.*

- (iii) The post mortem report signed by Dr. Gounder was tendered to Court as **Prosecution Exhibit P1**.*
- (iv) The post mortem examination was conducted at the CWM Hospital on 20 July 2011, at 0955 hours.*
- (iv) The Doctor said that the estimated time of death was around 1800 hours on 18 July 2011.*
- (v) The Doctor explained that the deceased was a full term baby (infant), 53cm in height and 3.46kg in weight.*
- (vi) The Doctor explained in detail the external and internal injuries on the deceased.*
- (vii) There is a contusion over the nose and nostril of the deceased, extending from the right side of the face to the left side of the nose measuring 2.5cm x 1.3cm. There is another contusion measuring 0.8cm x 0.3cm, 0.7cm from the left side of the nose.*
- (viii) The Doctor explained that a contusion can be a bruise – bursting of small blood vessels due to impact by blunt force object.*
- (ix) Examination of the lung showed the following features:
  - float on water,*
  - picks in dark appearance, and*
  - pulmonary oedema and congestion.**
- (x) Examination of the gastro intestinal tract showed that the stomach contained greenish mucoid material.*
- (xi) The Doctor testified that the above features are associated with high probability of a live birth.*
- (xii) The cause of death has been stated as Asphyxia due to or as a consequence of smothering.*

**[65]** That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to her that she could give sworn evidence and call witnesses on her behalf. She could also address Court. The accused could have even remained silent. She was given these options as those were her legal rights. The accused need not prove anything. The burden of proving her guilt rests entirely on the prosecution at all times. However, the accused opted to offer evidence under oath.

**[66] Evidence of the Accused - Vika Kelekele Laliqavoka**

- (i) *She is 40 years of age. She has four children. The eldest Everlyn (21 years), the second Levani (14 years), the third Apisai (11 years) and the fourth Lasarusa (8 years).*
- (ii) *On 18 July 2011, she had been residing at her sister Mere Bale's house for about 2 weeks. Prior to that she had been residing at her friend's house taking care of her friend's father.*
- (iii) *Prior to moving to her friend's house, she had been staying with her parents along with her four children. She had to leave her parent's home due to an argument with her parents. The reason for the argument was that her parents did not approve her relationship with Laisiasa Matanisiga, who was an army officer.*
- (iv) *Around December 2010, she got to know that she was pregnant because her period had stopped. She had not done a pregnancy test to confirm. The father of the child was Laisiasa Matanisiga. She had not informed him about the pregnancy.*
- (v) *The rough sketch plan of Mere Bale's house was tendered to Court as **Defence Exhibit D1.***
- (vi) *The accused explained in detail as to the events which took place on 18 July 2011.*
- (vii) *Around 5.00 p.m. in the evening, she had gone to the bathroom to have a shower. She had been wearing a t-shirt and a sulu as the time. After hanging her sulu, she took off her panty. She was taking off her t-shirt, when she had felt like someone poked her with a needle on her lower back. She was still in a standing position. She had then felt something fall off. She said it was her baby.*
- (viii) *She had then tried to sit down. She had then laid the back of her head on the toilet pan. She had then had a blackout.*
- (ix) *After regaining consciousness, she had looked at the newborn baby. The baby had been lying face downwards. She had then held the baby. The baby wasn't moving nor breathing. She had noticed the baby was not breathing as the baby's stomach was not moving. She had then tried to open the baby's mouth. She had pressed his nose*

*twice. She had been pressing the baby's nose and trying to open his mouth. However, the baby did not respond.*

*(x) She had then pulled her sulu that was hanging on the wire and wrapped the baby. She had cut the umbilical cord with an old scissor. She had done so after wrapping the baby in the sulu.*

*(xi) The accused denies having killed her new born baby.*

**[67] Evidence of Doctor Kiran Bhalachandra Gaikwad**

*(i) He is the Acting Medical Superintendent at the St. Giles Hospital. He is a Medical Practitioner with over 20 years of experience.*

*(ii) St. Giles Hospital is a speciality hospital which treats and deals with patients suffering from mental health issues.*

*(iii) During his years of service, he has experience in examining patients who are under stress during pregnancy.*

*(iv) The accused had not been examined by him during the time of her pregnancy.*

*(v) The Doctor testified in detail as to the mental health issues that could usually be associated with women, during pregnancy and after child birth.*

*(vi) He testified that the most common symptoms would be depression and anxiety.*

**Analysis**

**[68]** The above is a brief summary of the evidence led at this trial.

**[69]** Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge of Murder, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Murder against the accused, beyond reasonable doubt.

**[70]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability of the prosecution evidence, also when you are assessing the evidence of the accused. You must consider her evidence also for

its consistency and also the probability of her version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. However, I must caution you that if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

**[71]** As an alternative, you may consider whether the accused is guilty or not guilty of the offence of Infanticide, the elements of which I have explained to you during this summing up.

**[72]** In summary and before I conclude my summing up let me repeat some important points in following form:

- i. If you accept the accused version, then you must find the accused not guilty of the charge;*
- ii. If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iii. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge;*
- iv. If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of murder has been established beyond reasonable doubt. If so you must find the accused guilty.*
- v. As an alternative, you may consider whether the accused is guilty or not guilty of the offence of Infanticide.*

**[73]** Any re directions the parties may request?

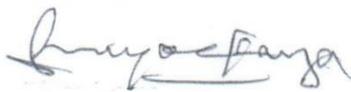
**[74]** Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[75] Your possible opinions should be as follows:

Murder- Guilty or Not Guilty

Infanticide- Guilty or Not Guilty

[76] I thank you for your patient hearing.



**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**



AT SUVA

Dated this 10<sup>th</sup> Day of July 2017

**Solicitor for the State** : **Office of the Director of Public Prosecutions, Suva.**  
**Solicitor for the Accused** : **Office of the Legal Aid Commission, Suva.**