

the co-accused Mr Latu. On the 5th April, 2016, I adjourned the case after hearing the evidence and submissions for a verdict to be given on the 7th April 2016. Both accused were unrepresented.

[3] The circumstances of the case are tragic. A child of about 8 months, who was the second child of the relationship of the co-accused, developed an illness, the symptoms being vomiting, diarrhea, and also sunken eyes. The child had become ill on Thursday 30th January 2014 in the evening and had been unattended by any doctor until he died sometime after midday, on the 2nd February 2014. The cause of death given by a paediatrician from the Vaola hospital, a Dr Aho, was dehydration. He was of the opinion that had the child been brought to the hospital as late as 8am on the 2nd February 2014, he could have received liquids, been treated and his death avoided. The Crown's case was that the accused had grossly neglected their child over this period rendering them liable to an offence of manslaughter by negligence or in the alternative had both been guilty of wilful neglect by not seeking medical assistance or taking the child to hospital.

[4] Section 86 (1) of the Criminal Offences Act provides relevantly that culpable homicide consists in the killing of any person

(b) by omission without lawful excuse to perform or observe towards such person any legal duty..."

Under section 92 of the Act, culpable homicide which does not amount to murder is manslaughter and, if such homicide was caused by negligence, the offence is manslaughter by negligence.

Under section 95(2) of the Act a person having the charge of any other person unable by reason of.... youth ... sickness to withdraw himself from such charge is under a legal duty to supply such person with the necessaries of health and life and any death resulting from omission to do so shall be deemed to be a death caused by omission to perform a legal duty within the meaning of section 86 (1)(b).

Section 95(3) provides that necessaries of health and life; include proper food, clothing shelter, and medical and surgical treatment.

96 (2) provides that a person's death shall be held to have been caused by an act or omission –

(c) Although the act or omission would not have caused the person's death but for his refusal or neglect to submit to or seek proper medical or surgical treatment or but for his negligent or improper conduct or manner of living..."

[5] In order for me to convict on manslaughter by negligence, I must be satisfied of the following essential matters beyond a reasonable doubt.

- i. That the accused was in charge of the baby at the relevant time;
- ii. That the accused omitted to supply to the child the necessaries of health and life particularised as being a neglect to seek proper medical treatment for the child.

iii. That the accused by the omission to supply the child with proper medical treatment caused the child's death.

iv. That the omission to provide the child with proper medical treatment was grossly negligent in the circumstances.

[6] On the issue of whether the accused was grossly negligent, I further direct myself that in order to constitute gross negligence.

v. the omission of the accused must have;

a. fallen so short of the standard of care which a reasonable person would have exercised in the circumstances ; and

b. involved such a high risk of death or serious harm,

that proper thinking members of the community would regard the degree of negligence involved in the conduct as so serious that it should be treated as criminal conduct.

In this regard, I also direct myself;

vi. "Every person owes a duty to conduct himself that he will not cause injury to another person in circumstances where a reasonable person in his position would have foreseen a risk of injury from such conduct of that person. A person acts in breach of that duty of care where he does not do something which a reasonable person in his position would do in the circumstances."

Further, I direct myself;

- vi. The reasonable person with whose conduct *I* must compare the conduct of the accused in this case must be assumed to possess the same personal attributes as does the accused – being of the same age and experience – and the same knowledge as the accused would have in the circumstances in which he found himself.

Further, I direct myself;

- vii. The Crown does not have to establish that the accused had the intention to injure. The offence of manslaughter is complete even if no injury were intended, and even if the accused had not realised that he was exposing the deceased to the risk of injury which would have been foreseen by the reasonable person in his position. The test is whether a reasonable person in the position of the accused would have realised the risk existed.

THE EVIDENCE

- [7] The first witness to give evidence was Dr Siasoi Aho. He was a paediatrician at the Vaola Hospital and had worked there for about thirty years. He presented a report on the child, Kalopas, who had died on the 2nd February 2014 before he reached hospital. He had noted that the mother had informed him that on the 30th March the baby had been vomiting and had diarrhea. He did not take solid food. He preferred to drink Milo and water. On the 31st of January, she cooked chicken with some breadfruit because he did not have much to eat or drink. The food was masticated for him by mother and he seemed to take more than

five mouthfuls. She tried to give him the same food later in the afternoon but, by evening, he was having more diarrhea and vomiting. The stools were of big volume. They were very watery. She said he had no fever but he seemed to sleep a lot. On Saturday the 1st of February, he had more diarrhea and more vomiting followed by some cooked chicken and breadfruit. She tried to give him more milo and more water but the diarrhea was on going. The same evening, she gave the last drop of Milo and as they had no money she went to her sister's home in Popua to ask for more Milo. She was back by 10pm only being away for half an hour. The older sibling made the comment the Milo was stale. The mother's sister suggested they bring him over in the evening and she thought that he was possessed of demons and suggested applying Nonu leaves. On the 2nd February, the baby's breathing slowed down so the aunt asked a pastor to come and pray for the child with a view to taking him to hospital because he had a vehicle. She told the doctor the pastor came and applied oil saying the baby had gone to sleep, and this was about 2pm. By the time he turned to go the baby, he was dead. The witness had been told they had thought of taking him to hospital, but there was no vehicle, no money and no phone. Dr Aho suggested they could have gone by hitchhiking. It was confirmed that the father had been fishing. He had returned to find the child had died.

- [8] Dr Aho gave evidence that the mother had stopped breast feeding and had given the baby Milo as a substitute. Records and his opinion suggested this was not appropriate and the baby had lost weight. He had been home delivered. Feeding had been poor and the doctor suggested living conditions had also been poor. He said when he examined the baby there were some signs of wasting and the eyes were wildly opened and he said this would have made the family think he could be possessed by demons. He said sunken eyes were a common feature of severe

dehydration. The severe dehydration was due to vomiting, diarrhea and poor intake of fluid. He considered the child had been inappropriately fed. He spoke of the baby having a stomach upset and having lived in an impoverished environment. He said also that condensed milk, Milo and chicken was not appropriate at the time of illness. What was required was rehydration fluid. In his opinion, poor fluid and severe dehydration led to the baby's death.

[9] He also said that the attempt to get medical assistance was weak. She could, in his opinion, have walked to the hospital or hitchhiked with the baby from where they lived in Fangaloto which was a distance he said of about 5ks. He said had the baby arrived by 6 to 8 am on the 2nd February, there was the possibility the child could have been saved. To the accused Ms Mafi under cross-examination, he suggested she had been grossly negligent although he did not express such a view to me. Plainly, however, he considered greater efforts should have been made by the accused and others to ensure medical assistance for the child. In a nutshell, he considered she had not made reasonable endeavours for proper health care. He also opined, in a question from me, whether in his opinion the state of the child was such that an ordinary person would know the child was seriously ill, and required medical assistance, and he said yes.

[10] Dr Maletino Mafi gave evidence that she was in emergency at the hospital when the baby came in. She observed that the baby had very shrunken eyes, very dry skin and death was likely from severe dehydration. The back of the child was covered with Tongan leaves.

[11] La'aina Mafi, aged 32, lived with her husband in Fangaloto and had 5 children. The accused lived about quarter of a mile away.

She said her sister had come over and asked her for help on the evening of the 1st February, 2014 and asked her for money to get a vehicle to take the baby to the hospital because it was sick. She said she told her they were in financial difficulty. She suggested that the accused return and bring the baby back. She saw the baby was sick because he was crying and looked to be uncomfortable and experiencing some difficulty. She did not see the baby vomiting or having diarrhea, however. They came over at about 9am and slept the night. The baby was fed with pawpaw and coconut juice. That was about 8am in the morning. She spoke of putting Nonu leaves on the baby because the accused had been living near a cemetery and a spiritual disturbance had affected the child. She said that the accused and her four children all were in the house that night. She said the baby did not cry in the night. It was peaceful. She, on the Sunday, asked her church pastor to come over and she wanted help from God. The accused Ms Mafi had gone home to get some clothes for the child. La'aina said she told the Minister to say a prayer for the baby before she intended to ask him to take the child to hospital. She said the Minister walked outside. She said she had not asked him to take the baby to hospital. She said that she had picked up the baby after the Minister had gone outside and found that he had died. She then asked her sister to run and get Ms Mafi. She had been away about half an hour. She said later Mr Latu came over and the child was taken to hospital.

- [12] She said the Minister was still outside when she observed the baby to be dead under cross-examination. She said she had not asked him to take the baby to hospital because she was waiting for the baby's clothes to be brought before they left. She agreed with Mr Latu in cross-examination that she had never seen him neglect the children. She said that Ms Mafi was in tears when she asked for the money to go to the hospital. She said she did not have money to give her. She said she had no friends who could

come over with a car and take the child to hospital. She said she thought the baby was better after he had been fed and gone to sleep on the Saturday morning. Neither she nor her sister had a mobile phone. All she got a week for maintaining the family of 5 children was \$150 paanga and it had gone. She said she never thought the child was so ill his life might be in serious jeopardy.

[13] Lealoa Tuiaki, a district nurse, gave evidence that she had been the district nurse who had been involved with routine examinations of the baby since birth. She recorded that the mother had gone off breast feeding and had substituted this with condensed milk. She had told her that was not good. She had told her breast milk and then SMA formula which cost \$46 for a can which would last a week and a half should be given to the baby. The baby had lost weight on the 16th December when she last saw him.

[14] Evidence was given by police officers of statements made by both accused. As to Ms Mafi, she was spoken to and made a voluntary statement to Detective Paea Penisoni on the 2nd February at 6.30pm at the Police station. She said that she had asked Mr Latu to get a vehicle to take the child to the hospital on the 30th January 2014 after the child had been vomiting and unable to eat and had diarrhea. That was refused by his parents. She asked the co-accused what they could do. He said the weather is rough and he could not go to sea. They had no money. She gave the baby water and Milo to drink. On the Friday he was still sick and she had roasted some Tongan chicken and breadfruit. She fed him about 11am and he took about five mouthfuls. She gave him further food in the afternoon. He continued to have diarrhea. She had chewed the chicken first.

[15] She said, on the Saturday, Mr Latu went fishing that is to sea. She got some chicken and roasted it with breadfruit. He came back and told her a boat was not confirmed. She said that the baby had not stopped vomiting or diarrhea. Later, he went fishing. Later in the evening, she went to her sister's La'aina's house, and was told to go back and get her son. She had poured out some Milo she had left earlier because she was told it was stale. She gave the baby water. La'aina had suggested the baby might be possessed of the devil and gave him Nonu leaves. At that point, the child was still discharging diarrhea and vomiting. She said the vehicle belonging to her sister and husband had no petrol in it. They all slept. When they got up the child was fed pawpaw and coconut juice and went to sleep. He had stopped vomiting and diarrhea. She then went to get the washing from her home. Later, she was met as she returned by her family to say the baby had died. She said the truth is we fell short in getting the baby to the hospital. Most of the time, she said she had relied on Mr Latu trying to get a vehicle, and hoping he will get a vehicle to take the child to hospital which his parents had refused.

[16] Detective Oneone took a statement from Mr Latu at 6.40 on the 2nd February, 2014. He said he and Ms Mafi had two children, a son of three, and the baby born on the 20th July, 2013. He said he had tried to get a vehicle on the 30th January from his parents but they would not give it to him. He said he suggested they try to treat the child with Tongan medicine, and hoped to resolve the illness. He fetched some fig leaves and fekika leaves and they were fed as a drink to the baby. He said he showed some improvement. They stopped giving him food and started to feed him with Milo and he said he improved. He said it went like that to the Saturday which was the first of February, 2014. He thought the baby was getting well and so he went fishing. He no longer worried about getting him to hospital. He had come home

8

on Saturday and went to his parents' home because Ms Mafi and the children had gone to her sisters. He slept at his parents'. He later received a message that his child had passed away. He then waited for a car of his sister to drive to the hospital.

[17] Uikilifi Veikoso aged 51 was the Church pastor who saw the child shortly before he died. He said he went to provide a prayer service. It was about 12pm. He said the baby's face was abnormal. He said he was in great difficulty. His breath and appearance was not normal. He said he did not think of hospital only spiritual assistance which was what he had been asked to give. He said he did not think, at the time, the baby should visit a medical practitioner at the hospital. He said, however, that the reason he did not think so was that the parents would be making all endeavours for the baby. Later, however, he appeared to say that he did not think the baby should be taken to hospital. He said he had left for a long time supposedly before the baby died. He said it did not cross his mind, having seen the baby for about twenty minutes, to say to La'aina this baby should be in hospital or taken to hospital.

[18] Ms Mafi gave evidence. She said she saw the baby was vomiting and had diarrhea and thought it was normal. She said we were close to a cemetery and could be possessed by demons because they were living close to a cemetery. She shortly summarised the essence of the statement she had made. She confirmed that she had sought help with a vehicle from Mr Latu's parents and her sister. She denied that she knew the child required medical assistance after four days of sickness. Later she admitted when she asked her husband for a vehicle she knew he needed medical attention. She did not have a phone. She used another person's phone to contact Mr Latu on the 2nd February after the baby had died. She saw her sister, who had the phone, after she had returned with the washing. She had no money to buy anything

from shops. She said her sister had provided some chicken. There was nobody that could provide her with a car to take the child to hospital. She said she had done what she could feed and given fluids to the child and had not abandoned him.

[19] Vasiliva Mafi, the accused daughter, confirmed that she had never seen her mother abandon or neglect the baby whilst she went out and enjoyed herself. Another witness Losa said she had a phone and had seen the baby when it died. She said under cross-examination that Ms Mafi had only asked her for a phone on the Sunday and not on the Saturday when she visited as she had said earlier in her evidence.

[20] The accused, Mr Latu told of being very sad at this son's death. He said he had not looked seriously sick to him. He could not get the vehicle from his parents. He had heard from a lady that upset stomach could be treated with fig leaves and he said they fed him a drink and he seemed all right on the Friday. On the Friday afternoon, the weather was very rough and that was the day of the hurricane that had destroyed part for Ha'apai. He went to sea for a time but the fishing was not very good. He said on the Saturday, Ms Mafi had said the baby was improving and he went fishing in the evening. He later returned and the next day saw the baby after he had learned it had died. He was in shock. He maintained that on the Friday before going fishing after the baby had been given Tonga medicine that he thought it had improved. He said he checked on his son before he went fishing. He said he thought the baby was well before he went fishing on the Saturday. He intended to get some money so that money could be spent on what the baby need and diapers. He said later it never crossed his mind to go back to his parents and ask for the car on the Saturday because the baby had improved he believed after the Tongan medicine. He believed when he went fishing that he was getting better.

SUBMISSIONS

[21] Mr Latu und Mrs Mafi made short submissions denying gross negligence or wilful negligence. Ms Moa for the Crown said it was a case of gross negligence. They had known as early as the Thursday evening that the child was ill and should be taken to hospital yet they had not done so. She was critical of Mr Latu for not taking other steps to get a car over that period and going fishing when according to Ms Mafi the baby was still displaying illness. She suggested Ms Mafi did have access to a phone namely her sister and could have walked or hitch hiked to the hospital as the Doctor had stated. In the alternative what had occurred she submitted was wilful negligence.

FINDINGS

[22] I believe Ms Mafi and Mr Latu that over the period between the 30th January 2014 and 2nd February 2014 they had no money and no means to pay anybody such as a taxi to drive them to the hospital. In fact, these people were practically destitute of means at the relevant time and had four children in the household to attempt to feed also. I accept the evidence also from Mr Latu that, on the Friday, a hurricane threatened Tongatapu, and that he spent some time on the Friday getting their accommodation secure for this. Notwithstanding he went out fishing on the Friday and again on the Saturday after apparently the weather had improved to attempt, I have no doubt to make some money to provide for his family who had nothing to live on. I accept they lived in very basic accommodation, were very poor, and would spend time with Ms Mafi's sister La'aina who lived in a house with her large family about a quarter of a mile away. I accept he attempted to obtain a car from his parents who unfortunately denied him the use of the vehicle. I did not hear

evidence from them. Although he turned up it seems in a car belonging to her sister after the child had died, I heard no more about this vehicle or his sister and cannot conclude that this vehicle could have been made available to him in lieu of his parents' vehicle during the relevant period.

[23] I accept also that Mr Latu was likely secondary in the care of this baby and, although he may have known that the baby was ill, on the 30th January, 2014 when he went and sought a car to take the child to the hospital, his appreciation of the seriousness of that illness was more problematic. I accept that he did not at any stage consider it was life threatening or serious. It would be somewhat natural for him to have relied on his wife's observations as he said he did in seeking the car and any assertions she may have made that the baby was getting better when he left to go fishing. I accept his evidence confirmed by his statement made soon after the baby had died that the belief he had was the child was improving before he left fishing. Whilst this was likely not to be the case in fact because the medical evidence and the fact the baby died of dehydration suggest otherwise, I cannot conclude beyond reasonable doubt that he must have known the baby was acutely ill and was grossly neglectful of the child when he went out fishing on the Friday and Saturday evenings to provide money for his family. I accept his evidence that he was in shock when he learned the baby had died which would suggest that he did not contemplate the baby was as ill as it was. In short, in his case applying the test of the reasonable Tongan person, I do not consider beyond any reasonable doubt that a reasonable Tongan with whose conduct I must compare the conduct of the accused and who must be assumed to possess the same personal attributes as does the accused – being of the same age and experience – and having the same knowledge as the accused would have in the circumstances in which he found himself, and I add with the

same lack of means would have acted differently and taken the child to hospital. Put another way, I am not satisfied beyond a reasonable doubt that his omission to do this fell so short of the standard of care which a reasonable Tongan person would have exercised in the circumstances which includes the lack of means and involved such a high risk of death or serious harm that proper thinking members of the Tongan community would regard the degree of negligence as so serious that it should be treated as criminal conduct. I do not, therefore find, Mr Latu to have been grossly negligent. Accordingly, I acquit him of manslaughter by negligence.

[24] As to Ms Mafi as I have said, during that period was the primary caregiver and she was effectively during that period destitute. I accept that she must have known that her baby was ill otherwise she would not have asked Mr Latu to get a car to take the child to hospital. Having heard from Dr Aho that the symptoms the baby showed vomiting and diarrhea and perhaps sunken eyes (although the evidence does not suggest Ms Mafi observed this) was suggestive of a very serious condition and indeed one that was in need of close medical attention by at least the Saturday evening, I have doubt whether Ms Mafi appreciated just how seriously ill the child was. Her sister, La'aina does not seem to have appreciated this when she took the child to her late on the evening of the 1st February, 2014, and she was slightly older than the accused with five children. Nor did the Minister who arrived to spiritually administer to the child appear to see any obvious need for the baby to be taken to the hospital on the 2nd February, 2016 although he said he had focused on the request for spiritual assistance. In any event, as I have said, I find that Ms Mafi did not have the means to take the child to hospital. I am satisfied on the evidence she had no access to a vehicle, no means to pay for a vehicle and no phone on hand to ring for emergency even if she knew there to be an emergency number

(on which the evidence was silent). I find that she and Mr Latu were unsophisticated and very ordinary Tongan people neither of whom was particularly well educated, lived from hand to mouth by Mr Latu's fishing, and lived in very basic accommodation with four children to support. I find that, like the others; her sister and the pastor, the seriousness of this child's condition in terms of having a life threatening or very serious condition may well not have been obvious to her at any time even though she appreciated the child was ill. Even if, however, by the time she took the child to her sister on the evening of Saturday, the 1st February 2014 her concerns had grown pressing and she did appreciate the dire seriousness of her child's situation, I accept she asked for money to take the child to the hospital, and no money was available. She was said to be in tears by her sister. I am satisfied there was nothing more she could reasonably do and even her partner Mr Latu was not available then because he had gone fishing to provide the family with income. Applying the same test as I applied in relation to Mr Latu, that is whether a reasonable Tongan person possessing the same personal attributes as has the accused – being of the same age and experience – and the same knowledge (and I would add the means available to the accused) had in the circumstances in which she found himself, have taken the baby to hospital, and on this I have doubt. Again, put another way, I am not satisfied beyond a reasonable doubt that her omission to do so fell so short of the standard of care which a reasonable Tongan person would have exercised in the circumstances including having her lack of means proper thinking members of the Tongan community would regard the degree of negligence as so serious that it should be treated as criminal conduct. I do not consider her to have been grossly negligent beyond any reasonable doubt. Accordingly I also acquit her of manslaughter by negligence. I also add in her case, I do not think that a very lengthy walk along, in large part, a busy road with no footpath

with a sick child or hitch hiking a lift to the hospital was a reasonable alternative as the Crown had submitted. It is a long way from where the family lived to the hospital, and, especially if at night, hazardous for a woman to undertake.

WILFUL NEGLIGENCE

[25] Ms Moa provided me with the judgment of the House of Lords in *R v Shepherd* [1981] AC 389 for which I am grateful. In that case, in a situation involving also a sick infant, the House of Lords considered that an offence of wilful neglect, did not involve absolute or strict liability, but required mens rea to be established. There, the issue was whether the parents had appreciated the extent of the illness of their child and the need for medical treatment. The judge had directed on an objective basis and the appeal was allowed. That is not the issue here. In order for a conviction to be entered, following *Shepherd*, I would have to be satisfied beyond reasonable doubt;

- (1) That the child did in fact need medical aid at the time the defendant was charged with failing to provide it and ;
- (2) Either that the defendant was aware at that time that the child's health might be at risk if medical aid were not provided or that the defendant's unawareness of that fact was due to his not caring whether the child's health was at risk or not.

[26] I do not think, however, that proof of these two ingredients in the circumstances of this case is sufficient for conviction. The offence is one of wilful neglect, and the evidence in this case to my mind established that neither parent, even if they were proven to have known the child health was at risk and did not

see a doctor, had the means to take the child to the doctor. *Shepherd* was factually different from this. I do not think that a parent who is unable to take a sick child to the hospital because he or she did not have the means to do so should be found to have wilfully neglected the child. It seems to me that Ms Mafi's desire was to take the child to the hospital on the 30th January, and on the evening of the 1st February, also but she had no means of doing so. That also applies to Mr Latu on the 30th January 2014 but, he says and I believe him, that he was reliant on the observations of the mother on the Friday and Saturday that the child was improving and went fishing so on that ground alone I would have acquitted him; that is he was believed that the child was getting better and the need for hospitalisation had passed. I am satisfied as I have said that he went fishing only after he thought the child was improving so as to secure money to pay for the baby and his family's needs. However, plainly, in my view, neither party had the means, in any event, on the evidence I heard to get the child to hospital.

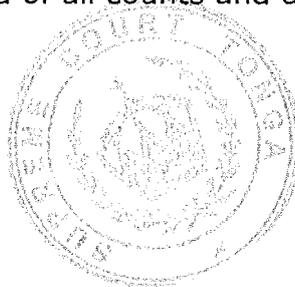
[27] The argument of counsel for the appellants however, in *Shepherd* which the House accepted, was that the offence was not one of strict liability, counsel submitting that the word "wilfully" must import a moral element. In my view, it does, and a person should not be convicted of wilful neglect where the accused does not have the means to secure medical help; access to a motor vehicle, money or even a phone. As I have said, the offence is not absolute. I am satisfied that their futile attempts to apply Tongan medicine was for the purpose of assisting the child and in part because they did not have the means to seek the assistance of a doctor or take the child to hospital. In short, I find both not guilty of the alternative count of wilful neglect.

[28] I can well understand why Doctor Aho expressed the view that he was an advocate for the child, and his frustration at the

child's death and the lack of appropriate response. This infant's death was clearly avoidable. However, I consider that all concerned, the baby and his parents were victims of poverty, and the parents perhaps lacking also in education and awareness of the child's acute needs. The child's feeding had been disrupted by a shortage of breast milk and the substitution of inadequate liquids instead of formula which in Tongan is expensive and he lost weight. An inadequate diet or hygiene may have caused his stomach ailment, and the vomit, diarrhea, and crying which followed. These are all factors that bear upon the poor living conditions in which this baby was cared for. Both parents did not, in my view, wilfully neglect, or abandon their child, but sought a vehicle or money and assistance from the extended family which was not forthcoming. In the absence of the means to take the infant to hospital, they provided Tongan medicine and at the end, the aunt, turned for spiritual help. Even it seems the Minister who came to see the child shortly before his death did not turn his mind to the urgent need for the child to be in hospital. Had he done so, and appreciated the seriousness of the child's position, it is difficult to believe he would not have taken the child there in his car. Perhaps they may have done more over the three day period but taking into account their lack of means it is not clear to me, on the evidence I have heard, what more they could have done. This case, as I said at the commencement of my judgment is very sad and tragic.

VERDICTS

[29] Both accused are acquitted of all counts and discharged.



A handwritten signature in black ink, appearing to read "C. B. Cato".

C. B. Cato

JUDGE

DATED: 8 APRIL 2016