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**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR.NO.264 of 2005

REX

-v-

SEINI TOKILUPE 'ONE'ONE

BEFORE THE ACTING CHIEF JUSTICE ANDREW

Counsel : Mr Sififa for the prosecution
Mr Tu'utafaiva for the accused.

Date of Hearing : 30 & 31 May 2007.

Date of Judgment: 1 June 2007.

Judgment

The accused is charged with an offence of Manslaughter by negligence contrary to s.92 of the Criminal Offences Act (Cap.18). The particulars of the offence are in the following terms:

"Seini Tokilupe 'One'one, on or about the 26th September 2005, at Kolomotu'a, you caused the death of your new born baby, in that you were grossly negligent whilst giving birth by cutting the baby's umbilical cord without tying first thereby causing death due to bleeding."

The facts are not greatly in dispute. The accused openly stated in a Record of Interview conducted on the 18th October 2005 that she had concealed her pregnancy from her parents in the belief that they would disapprove of her having another child. She resided in a house which was over 20 meters away from her parents house. She said that she had gone into labour very fast and after delivery the child was alive and "she cried and her eyes were open". She said,

"I gave birth and I was the midwife in which I gave birth on my own. She died when the umbilical cord was cut". She admitted that she had cut the umbilical cord with a razor blade. The umbilical cord had not been tied and the evidence is quite clear that the child bled to death. It was submitted that she had no knowledge of the need to tie the umbilical cord before cutting it but I am not convinced that that is correct because she described how she had seen the child's umbilical cord "being pinched and I then thought that it would be alright if I cut it". This was not her first child and that answer suggests that she was aware that the cord must be pinned or tied. In a confessional statement she said,

"My only answer to this offence is that I did not know that my baby would die for I hoped and knew that she would live. I cut her umbilical cord for I had great difficulty whilst giving birth and I tried to call my mother".

There was also evidence that the placenta had not been delivered and this was later relieved by an attending nurse who was a mid-wife. I am satisfied that this was another reason confirming that she had been in great pain at the time of birth.

I make the following findings of fact.

I am satisfied beyond reasonable doubt that the child was born alive and was a person in being within the meaning of s.98(1) of the Criminal Offences Act. The accused described how the child was alive and the fact that she had been so born is confirmed by the midwife who attended soon afterwards. I am satisfied beyond reasonable doubt as

to causation, that is that the child bled to death as a result of the accused having cut the umbilical cord in the way she did.

I am also satisfied that she had gone into labour very fast and that it was a difficult birth and although there is some contradiction, that she had attempted to call her mother for help. I accept that because of the distance between their houses that the mother did not hear her.

MANSLAUGHTER BY NEGLIGENCE

S.92 of the Criminal Offences Act provides that homicide which does not amount to murder is manslaughter and if such homicide was caused by negligence, the offence is manslaughter by negligence: See *Fisi'inana v R* [1995] Tonga Law Reports at p.62 and further at p.65 where the Court of Appeal said,

“Although the section does not refer to gross negligence, we are prepared to accept that the onus resting in the prosecution is to prove that the person is guilty of negligence to such a degree that justifies a finding of manslaughter. It may well be convenient to describe negligence of that degree as gross negligence”.

Involuntary manslaughter by gross negligence may be established where the accused causes the death of a person by an act or omission which so far falls short of the standard of care required by a reasonable person, that it goes beyond a matter of civil wrong and amounts to a crime.

In my judgment a reasonable person in the accused's position would not regard the degree of negligence involved in her conduct as so serious that it should be treated as criminal conduct. I am not satisfied that her conduct amounted to gross negligence.

I consider that in the circumstances she had gone into labour quickly with little if any warning. She was isolated and in a desperate situation and in great pain. She called out for assistance when she was in a weakened state but she could not attract any attention. In those circumstances she cut the umbilical cord when she believed that the

cord, in her words, had been pinched. In all of those circumstances I am not satisfied beyond reasonable doubt that her conduct reaches a level of gross negligence and accordingly I find the accused Not Guilty and she is discharged.

DATED: 1 June 2007.



Andrew J.
ACTING CHIEF JUSTICE