

PUBLIC PROSECUTOR

-v-

**PHILIP KALON
LEINEARU KALON**

Coram: Justice C. N TUOHY

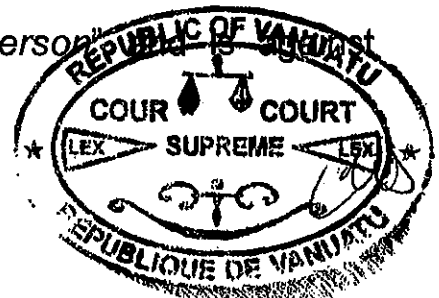
Date of Hearing: 6, 7, 8, 11 February 2008

Date of Decision: 15 February 2008

**Counsels: Mr. Lent Tevi for Public Prosecutor
Mr. Toa for Defendants**

ORAL JUDGMENT

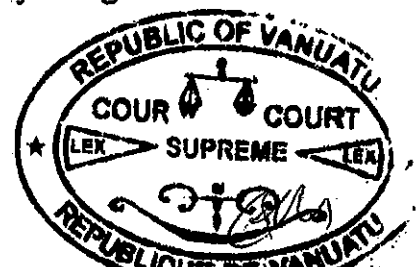
1. The Defendants Leinearu and Philip Kalon are charged jointly in an information containing two charges. The charges were laid following the death in July 2007 of Livan Kalon, the twelve year old daughter of Leinearu, who lived at Eton Village with Leinearu and her husband Philip as a member of their family. Count 1 is headed "*Abandonment of Incapable Person*"



Section 103 of the Penal Code Act. The particulars of the charge are in Bislama and state "*Leinearu Kalon mo Philip Kalon samtaem long yia 2006 I go kasem manis July 2007 long Eton Village long Efate yutufala I bin lego gel ia Livan Kalon olsem yutufala I no lukaot gud long hem mekem se I causem death blong hem*".

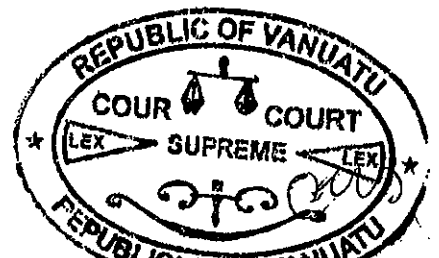
Count 2 is headed "*Failure to Provide Necessities of Life*" and is against Section 104 of the Penal Code Act. The particulars in Bislama are as follows: "*Leinearu Kalon mo Philip Kalon samtaem long yia 2006 I go kasem manis July 2007 long Eton village long Efate, yutufala I bin fail blong providem ol necessities long laef blong smol gel ia Livan Kalon taem we yutufala I no karem aot ol duti blong yutufala olsem parent blong hem mekem I causem ded blong hem*".

2. Evidence was given by the following witnesses: Charlie Kalon who is the brother of the accused Philip and who lives close by them at Eton village; Susan Kalon his wife; Leisau Kalon who is married to a son of Susan and Charlie and who also lives close up to Philip and Leinearu Kalon; Leimelu Pesal who is the nurse aide at the Aid Post at Eton village; Kalegor Rosie who is a lady member of the church group at Eton village who visited the accused's home and met Livan while she was alive; Richard George the police officer nominated as the crime scene officer; Inspector Marilynne George who interviewed the accused at Port Vila Police station on 17 August and produced the signed and written statements which they made; and finally Sergeant Jeanne



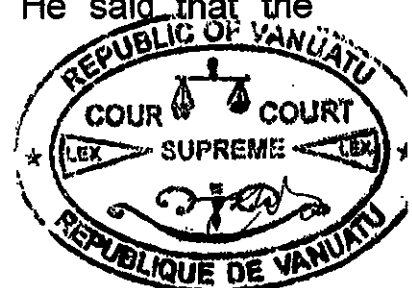
Thomas, officer in charge of the Police investigation. All of them were cross examined to a greater or lesser extent.

3. The evidence disclosed that Livan was the child of Leinearu who came from Siviri village but not the child of Philip, her husband, who comes from Eton village. Leinearu and Philip came to Eton village with Livan after their marriage in about 2002 or 2003. Livan was then about 8, an exact date of birth was not established in the evidence. Even her mother was uncertain of the year of her birth, let alone the day or the month.
4. A considerable amount of evidence was directed towards the mental condition of Livan at that time, that is, the time she arrived in Eton village. Evidence about that was given in the statements of Philip and Leinearu who of course were the persons closest to her and also by Susan, by Charlie, by Leisau and by the nurse aide.
5. All that evidence satisfies me that this child Livan was quite severely intellectually handicapped from a young age and possibly since her birth and that she suffered from some neurological disorder, probably epilepsy. Although without any medical evidence I am unable to say that she did suffer with epilepsy as a matter of certainty. Her physical condition however at the time was fairly normal. However she was unable to feed herself, she was unable to dress herself, she was unable to toilet herself, she was not capable of playing normally with other



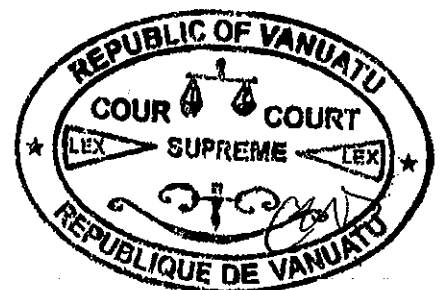
children and her speech and her understanding of speech was very limited. She was able to walk but her disabilities made walking for any long time difficult for her. She was a child who required constant intensive care. This would be an extreme strain on her care givers, particularly as the evidence is that after their arrival at Eton village, other children were born to Philip and Leinearu.

6. Evidence about Livan's life and her treatment by the accused from the time of their arrival at Eton village until her death at the end of July 2007 was given by a number of the witnesses. The witnesses who spoke about those important matters were Charlie, Susan, Leisau, the nurse aide, Kalegor Rosie and of course the statements made by the accused were part of the evidence as well. And I intend to at this point discuss that evidence in some more detail.
7. Charlie's evidence was that he lived with his wife Susan in a house about 20 metres from Philip and Leinearu's house. He said that after a couple of years after their arrival at Eton they started to treat Livan badly and that that bad treatment continued until she died. There were three matters which Charlie particularly spoke about, that was the poor clothing which Livan was provided with, the lack of food and that she was dragged about by the accused. He said that Livan was shut inside her house and ate her own faeces and that his wife had to wash Livan. He said that he saw that once. He said that the

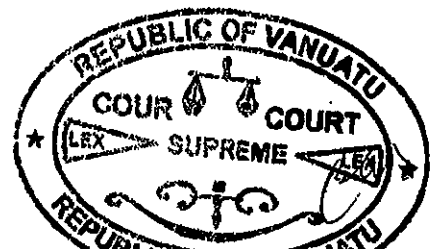


Defendants shut her in the house while they went to the garden and that they would go to the garden sometimes for a full day but they would come home at night time. He said they shut her in the house leaving one window open only. He described the house as an iron sheet house, iron sheet walls and roof and he said that it would get very hot when it was sunny. He said that only one window was left open. The windows were described by another witness as not windows with glass in them, but windows which are like shutters on a hinge and propped up with a stick or a piece of wood.

8. Charlie said that he and his wife got into the house secretly to care for Livan either through the door or the window. He said they did that secretly because they believed that the accused would be angry if they found out that Charlie or Susan had been going into the house or somebody had been going in to help Livan. He said that he thought that Livan slept anywhere in the house where she lay down. He said that he got into the house twice so that his wife could feed Livan and that he saw no food inside. He also said that he had seen Livan at the window biting on the wooden window frame. He also said that he had seen the accused drag her by the arm. He said that he saw Livan losing weight and becoming thin. He also said that when he went inside the house it was smelly because Livan had urinated and defecated inside.

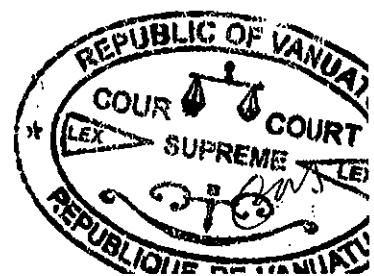


9. He knew of her death. He had seen her in the days before she died, but he did not see her body after death. When asked to describe what her body was like when he saw it before her death, his words were "*skinny like her flesh stuck to her bones*". Charlie was cross examined and one of the points in the cross examination was that it was suggested to him that locking Livan up was necessary to protect her from danger.
10. Susan was the next witness. She is Charlie's wife. She established that the accused have 3 children who have been born since their arrival at Eton, these children being called Pamela, Lucy and David. She said that it was after the first year or two in the village following the marriage that Leinearu and Philip started to keep Livan inside the whole day when they went to the gardens. She said they did not go to the gardens every day but they went on some days. At this time Susan would go into the house without the knowledge of Livan's parents to sit with Livan. She said that she was never asked by Leinearu or Philip to look after Livan or to look in on her to see if she was alright or to help her in any way, nor did they tell her when they had left Livan alone in the house. When she did go in she would find Livan had messed her nappy and eaten her faeces. Susan washed her and bathed her and took her out into the sun. She said that Livan was left without food and that Susan fed her. She said that on one occasion Livan held out her hand for food and she did eat the food that was given to her. She said that she did not tell Livan's parents what she had done because she thought



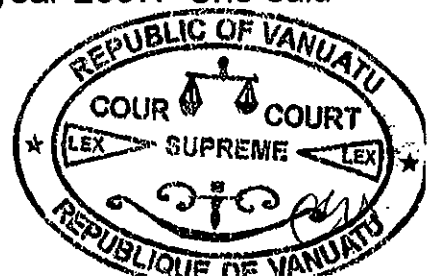
they would be angry with her. She said that the house smelled of faeces and urine. She said that she stopped visiting at times when the parents were home.

11. It was very unclear from her evidence as to what period of time she was talking about. In this respect all of the important witnesses who gave evidence about observations of Livan, they were all vague and somewhat uncertain about dates and time, possibly because dates and times are not important to them. However, as far as Susan's evidence is concerned I am satisfied that she was describing a period from 2006 up until the time approaching Livan's death which the evidence established was on a day in late July 2007. Surprisingly, even the exact date of the death was slightly doubtful in the evidence, it could have been a Wednesday, it could have been a Thursday.
12. Susan said that she was at home on the day that Livan died. Leinearu told her about it, at about 8 in the morning. Susan went in and tried to lift Livan but found her body stiff. I have to say that I heard no expert evidence as to what the stiffness would mean in terms of the time of death in tropical conditions as they would be at Eton village even in July. So I draw no conclusion about the time of death from Susan's evidence that the body was stiff, Unless I heard from an expert I do not purport to know exactly what that indicates in terms of time of death.



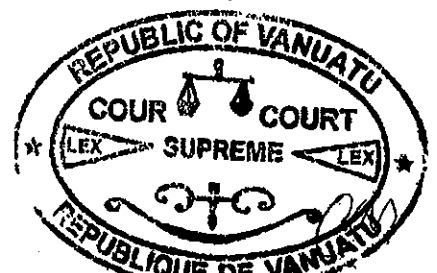
13. The body was inside Livan's room. She was lying down on her side bent and fluid ran out of her mouth. Susan described it as water with a blue color, which smelled bad. She was not wearing anything, although as I understood the evidence, I was not entirely clear, she was covered with an island dress at the time that Susan arrived. Susan described the condition of Livan's body as skinny, no meat just skin and bones. She said that Livan's body had lost flesh since Susan last changed her. Philip was not there but he arrived shortly afterwards. Susan was cross examined at some length but it is fair to say that the cross examination did not cause her to significantly change the evidence in chief which I have just outlined.

14. The next witness was Leisau Kalon. She is Susan's daughter-in-law and lives about 30 metres from Philip and Leinearu's house. She said that she started to know Livan when Livan's parents went to Vila for the birth of a baby, a baby she identified as David who she said was one year and 2 months old. She said they were away for a week. She said that they already had Pamela and Lucy as children. She went into their house to help Livan. She said that she saw Livan eating the window frame while Leisau was passing on the track near the house. She went inside and carried Livan outside and bathed her because she had faeces all over her body. She said that she first went into the house the day that the parents went to Vila. She said that she wore clothes and trousers only and her body was very skinny. She said that this was in June last year 2007. She said



that she took her outside, bathed her, dressed her fed her rice and fish and put her back inside. She said that she was walking then. She said that she saw no food inside the house. She said that she fed her three times a day. She also did not talk to Livan's parents about this because she also thought that they would get angry. She said that it was three weeks later that Livan died.

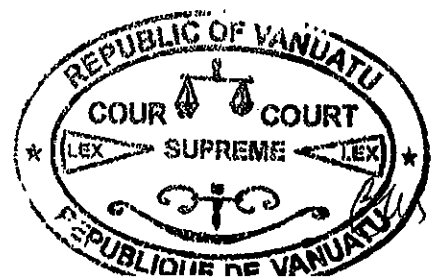
15. She said that she saw the body at the time of death but it was dressed by the time that she saw it. She said the body was skinny and it was flesh stuck to bones. She said that the funeral was that day and she was buried immediately after the funeral.
16. She was cross examined by Mr. Toa. Mr. Toa suggested in cross examination that Leinearu's baby David was born in November 2007, that is after Livan's death. I should mention that, although that is what he suggested, there is actually no evidence by anyone as to when David actually was born. But Leisau immediately accepted Mr. Toa's suggestion that David was born in November 2007. That means of course that the accused could not have been away in Vila for the birth of David while Livan was alone because we do know for sure that Livan died at the end of July 2007. Despite accepting Mr. Toa's suggestion that David was born some months after Livan's death, Leisau did not step back from her evidence about feeding and bathing Livan while her parents were away from the village. This question of timing was never resolved in evidence. Of



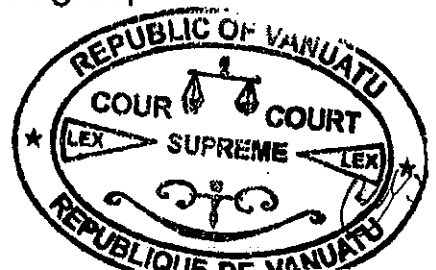
course the accused themselves did not give evidence. They are not required to do so.

17. My conclusion on this point is that I accept the substance of Leisau's evidence that Philip and Leinearu did go to Vila for a period of days leaving Livan alone in the house obviously at the time before Livan's death and within a period of weeks. I do not put much weight on her statement that it was three weeks before because I think that Leisau was like Charlie and Susan. Their evidence about time was vague, uncertain and not to be relied upon as being precisely correct at all. It may not have been for David's birth that they went to Vila, but I believe Leisau's evidence. I do not have any reason to disbelieve it and I conclude from her evidence that the reason for their trip to Vila was probably in some way related to the pregnancy with David even if it was not for his actual birth.

18. The next witness was Leimelu Pesal. She was the nurse aide. She had some training but not extensive training but she did have quite extensive experience. She has been in the job now for 15 years. She is distantly related to Philip and she saw Livan in 2003, not in the course of her duties as nurse aide, but just saw her around the village. Livan never once was brought to her for examination or treatment. There was no medical attention ever sought for Livan at any time after her arrival in Eton village in 2002 or 2003.

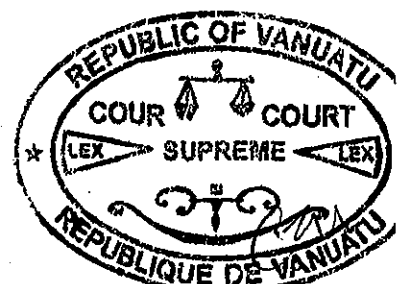


19. Leimelu said that in 2003 Livan's physical attention was OK. She could walk but she needed to be guided while she was walking. She saw her again in 2005 through the window of her house. At that time she was told by relatives that her parents had gone to the gardens. Now the reason why she looked in is because she heard Livan cry. She saw her walking around and crying in the house and then her relatives came in to her. Livan was thinner then than she was when Leimelu first saw her. She did not see Livan again. She said that it was up to the parents to ask her to visit a child but if they did she would have gone and visited the child. She said there was another child in Eton village who was handicapped, whose parents have sought medication and she has been able to find medication for her.
20. In answer to questions from the Court, she said that there are cases of malnutrition of children in the village but these are not caused because people cannot obtain food but, she said, because of laziness on the part the parents. So she said that there was food available in the village for everyone if they wanted to find it and give it to their children.
21. The next witness was Kalegor Rosie. She is a lady in the village who is a member of the Presbyterian mothers group. She saw Livan on a couple of occasions when she first came to the village and she said that her body seemed healthy but not her mind. She had seen her walking on one occasion but not well. She said that she went for a visit with the church group to the house

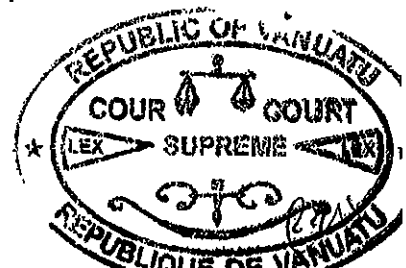


and prayed with the family on two occasions. She said that on the second visit she noticed that Livan was losing weight. She came to the house after the death when Livan would have been clothed for her funeral and burial and she said Livan was very skinny at that time.

22. The next witness was Richard George. He was the scene of crime officer. He went to the house. He saw the window frame of the house appeared to show bite marks. Unfortunately there were no photos available for the Court on that because they have been lost on the computer. I should perhaps add a side issue here and that is in these days of fairly cheap digital cameras the Court expects much greater use of photos in criminal cases than the Court has been given up until this time. The Police should automatically be photographing anything relevant in an investigation. Photos always help the Court in a criminal case. For example in this case there was a lot of time spent in descriptions of the house and the roof, which was not a very important issue but nevertheless it would be an issue on which we would not have had to spend much time if we had had a couple of digital photographs. Anyway that is a side issue.
23. What Mr. George did say was that he spoke to Philip about those bites. Philip gave an answer which indicates that they had been made by Livan when she was angry about food.

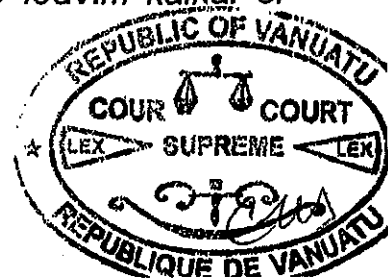


24. The next witness was Inspector Marilyn George. She took statements from the two accused after giving them cautions. She was questioned vigorously by Mr. Toa about the taking of the statements and in various ways it was suggested that there may have been some unfairness in the taking of the statements. However, having listened to that competent and hard cross examination I am satisfied that there was nothing unfair about the taking of the statements and in fact, when one reads the questions, they were put in a fair way. There is no indication of bullying or tricking or anything like that, just straight questioning and recording of the answers.
25. Leinearu's statement stated that she was the mother of Livan, that she moved to Eton in the year of the marriage, 2002, that she could not remember Livan's date of birth whether it was in 1992 or 1994. I think it is much more likely to be in 1994 because everyone thought that Livan was about 8 when she arrived at Eton village which seems to have been about 2002.
26. She said that Livan was not a normal child, she had to be fed by her parents. She said that she was sick and could not talk. She described her sickness in Bislama as "*sick blong faoul*", and I am told that that is the Bislama phrase for epilepsy. She certainly described losing consciousness and episodes which seemed to be epileptic fits. But as I said earlier, in the absence of any medical evidence, although that is very likely I would not be so presumptuous to make a diagnosis as a lay person. She said



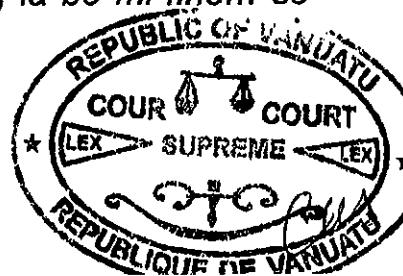
that the sickness started before Livan was one year old and that after her birth she was crying a lot and I would think it likely that Livan had this condition from the time of her birth. She described what sounded like epileptic fits happening about three times a week. She said that the family knew about it and of course her husband knew well about it.

27. She said that she never took her to the aid post at Eton, but she did take her to Paunangisu Clinic, while she was living at Siviri and was given Panadol there. When asked why she did not take her to the aid post at Eton, she said that they did not have the medicine at Paunangisu. I think that she was intending to convey that if they did not have the medicine at Paunangisu they are not likely to have had it at Eton, Paunangisu having a clinic and Eton only an aid post. She said that she never told the nurse aide about the epilepsy but she did mention that she was advised by someone to bath Livan in hot water.
28. She admitted shutting her inside but said that she let her out sometimes. She said that she shut her in because she was afraid that she was not normal and might walk onto the road because she did not know about trucks and she might eat rubbish. Some of the questions were quite important and deserve to be specifically referred to.
29. In question 29 she was asked "*Sometimes taem yu wetem husband I aot long haos, yu tufala ino stap leavim kaikai or*



water blong Livan, wanem nao yu save talem”? And her answer to that was *“mi no save se mbai mi talem wanem”*.

30. In the circumstances that really amounts to an admission, that the answer to the question is in fact she is admitting that sometimes they left the house and left her without food or water. That is certainly how Inspector George took it because her next question was *“long taem we yu tufala I stap sarem Livan hem wan long haos mo givim kakae long hem, hemi stap sitsit mo kaekae bagegen, wanem nao yu save talem”*. And the answer to that next question was *“ I tru”*. In answer to question 32, she said (and I am using my English translation) *“She eats timber (referring to the window frame) only when we are slow making her food and sometimes when we are in a hurry to go to the garden and we don't leave food for her, then she will eat timber”*.
31. Other significant questions and answers are question 36 *“Livan hemi no stap kakae gud I mekem se hemi loosum plante weit, wanem nao yu save talem”* answer *“yes I tru”*. Question 37: *“samtaems taem we hemi sitsit long diaper blong hem, hemi save stap two days olsem bifo yu save changem hem, wanem nao yu save talem?”*. Answer *“yes I tru, samtaems mi no gat mani blong pem diaper, samtaems mi changem hem long napkin”*. In question 41: *“mi stap putum long yu se yu bin minim blong no feedim Livan mekem se hemi ded, wanem nao yu save talem?”*. The answer was *“mi mi no minim, mi mekem kakae blong givim long hem long Thursday morning ia be mi finem se*

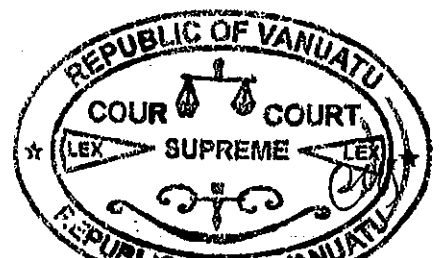


hemi ded finis". And then question 42: "*mi stap putum long yu wetem husband blong yu se yutufala I plan blong no feedim Livan mo causem ded blong hem, wanem nao yu save talem?*". Answer "*no mitufala I no mekem plan*".

32. So Leinearu denied any intention to kill and I have to say also that the prosecution does not allege any intention to kill in this case. If it had, this would be a charge of intentional homicide and it is not such a charge.

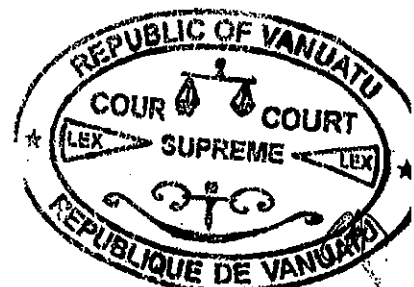
33. Philip was also questioned. It is not necessary to relate everything that he said, but I think that its worth drawing attention to certain of the question and answers. Question 15: "*Taem we sik ia I stap mekem hem long Eton, yutufala I stap karem hem I go long aid post or no?*". Answer was "*No mitufala I stap prei blong hem nomo be mitufala I no karem hem I go long aid post*". Next question "*from wanem reason nao yutufala I no karem hem I go long aid post?*". Answer "*Mitufala I lovem hem be mitufala I shame tu blong karem hem I go long aid post*". Next question "*from wanem nao yutufala I shame*". Answer "*Mitufala I fraet se nogud ol man oli tokabaot hem wetem mitufala se hemi kasem wan kaen sik*". So it seems that shame caused the defendants according to Philip anyway to not seek medical attention for Livan. Of course such shame is very misguided.

34. Question 23 was: "*mi andastand se taem we yutufala I stap go long garen yutufala I stap lockem Livan hem wan long haos,*

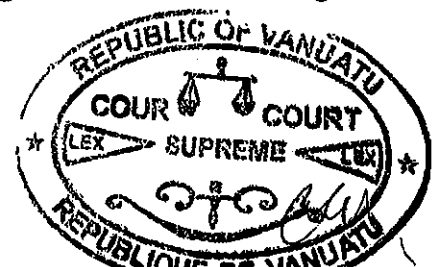


wanem nao yu save talem?". The answer was "*mi wantem talem bagegen se shame nomo I mekem se mifala I lockem hem long haos*". So that is really an admission by Philip that they did lock Livan in the house and leave her there alone. Question 28 was "*mi andastand se fulap taem yu wetem waef I stap lockem Livan insaed long haos mo go long garen. Wanem taem stret nao yutufala I stat blong lockem hem long haos?*". The answer was "*ating bifo last yia finis long 2005*". So that really is an admission also of locking her in the house and going to the gardens over the period since 2005.

35. Question 29 is an important question and answer, it was "*samtaem taem yutufala I stap lockem hem insaed long rum, yutufala I no stap givim kaekae o wota long hem, wanem nao yu save talem*". The answer was: "*wanwan taem mitufala I givim kaekae long hem*". Which has been translated to me in English is "*once in a while (or occasionally) we gave her food*", which of course means that most time we did not. Question 32 is an answer which is also important, all of those questions really but question 30 "*yu ting se I stret blong givim kakae long Livan wan wan taem olsem*" the answer was "*ating ino stret*". And he basically said in following answers that that was because they were too tired after working. All the rest of the questions and answers are relevant but I do not see it as necessary in this judgment to reproduce them all.



36. The last witness was Sergeant Thomas and she was the officer in charge of the investigation and she really had no significant evidence to give and I do not intend to specifically refer to her evidence.
37. At the end of the prosecution case, the accused were given the usual statement under section 88 the Criminal Procedure Code Act and they elected not to give or call any evidence.
38. I have weighed all the evidence that I have heard and I find that the standard of care given by the accused, who were Livan's mother and stepfather and the only adults in her home, deteriorated very badly over the period of a year or two prior to Livan's death. I find that on many occasions from no later than 2006 until her death they left Livan locked up in the house the whole day while they went to the gardens. This was a village house of three rooms made of iron sheeting. It must have been very hot in warm weather of which there is plenty in this country.
39. She was left with no one to look after her at all, either adult or child, and no arrangements had been made with anyone to provide care or oversight for her, even though there were relatives around, Susan and Leisau for example, in a very short area. This meant that she was left unable to eat or drink even if there was food in the house and I am satisfied from the evidence that at least on some occasions there was no food. But even if there was food, she had no way of feeding herself or drinking

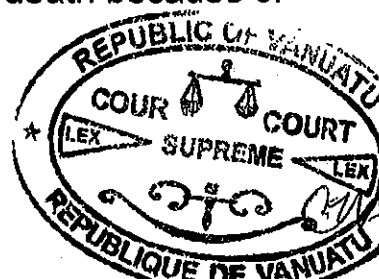


which in the short term is probably even more important to health than eating. She was unable to go to the toilet except by messing herself. There was no one available to wash her body wastes from her body or to change her. There was no chance for her to feel the sun on her body and she was left without any human contact. She may have been handicapped but she, like all other humans, needed human contact.

40. I am satisfied also that on one occasion in 2007 within an unknown period of weeks from her death, she was left for a minimum of two of three days and nights entirely alone, this being the occasion about which Leisau gave evidence. Also she was left throughout the whole period without any medical aid.

41. I am satisfied that this treatment endangered her life. Specifically it placed her life at risk through malnutrition or dehydration from lack of food and drink. It also endangered her life from the unclean conditions that she was in, her bodily wastes, eating them and of course infection that they could cause if she had any cut or any sore. And it endangered her life because a child like that could die in an accident if something happened while they were locked in the house by themselves such as fire. She would be too young to save herself if that house got alight somehow.

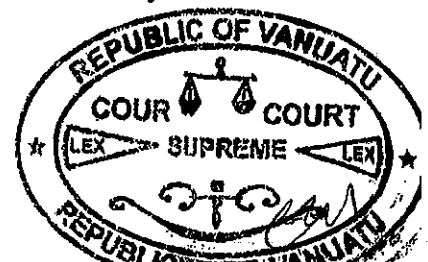
42. I am satisfied also that her life was endangered by the failure to provide medical care. The evidence satisfied me that that was required during the period of weeks prior to her death because of



her deteriorating physical condition. That must have taken place over a period of some time, not suddenly.

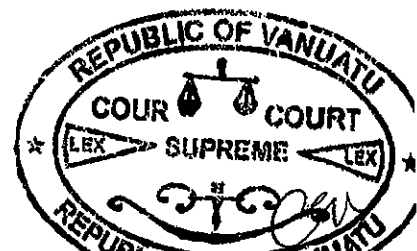
43. Having made those findings of facts, I turn to consider whether the prosecution has proven the charges against the accused. I remind myself that the onus is on the prosecution to prove each charge and each element of the charge against the accused before I can find either of them guilty. And I also remind myself that the standard of proof in criminal cases is beyond reasonable doubt. I also remind myself that I must consider the case of each accused separately and I must not reason that because one of the accused might be guilty so must the other one be. I have to consider the evidence against each accused separately. That goes particularly for their statements. The law is that the statement of one accused is not evidence against the other and I bear that in mind. Each charge must also be looked at separately and it will be wrong for the Court to reason that because one charge is proven the other one must be.

44. I turn to the first charge of abandoning an incapable person. There are two elements to this charge. First it must be proved that Livan was a person who is physically or mentally incapable of protecting herself. Rather surprisingly, this was weakly disputed by Mr. Toa. However, I am satisfied beyond reasonable doubt that Livan was, at all times covered by this charge, incapable mentally and physically of protecting herself. The evidence shows that she was as vulnerable as a baby less than



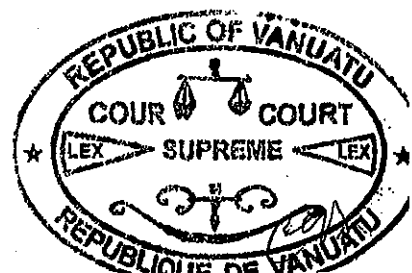
2 years old. She was incapable of feeding herself or going to the toilet. Her powers of speech and understanding were those of a very little child. She could not have protected herself against any of the dangers of life, injury or danger to life or health from any external force like fire or someone breaking in and hurting her or abusing her or lack of nutrition, food or water, or illness or disease. She was quite incapable of protecting herself against any of those things. This incapacity was primarily from her mental condition but her mental condition made her physically incapable as well. When I say her mental condition I mean the condition of her brain or mind.

45. The second element that must be proven is that the accused abandoned Livan. To abandon a child means to leave a person, to leave her to her fate, to leave her without some proper person to guard her life. Section 103 which creates this offence does not in terms require any particular relationship between the accused and the person who is incapable of protecting themselves. But some sort of relationship is implied by the word abandoned. You cannot abandon someone that you have no relationship with or no responsibility for. In this case I am satisfied that there was the necessary relationship between Livan and both of the accused. Leinearu was her mother, her parent and had her actual custody and care. Philip, although he was not her natural father, had voluntarily assumed the position of a parent to Livan. She had been accepted as a member of the family of him and Leinearu. I am satisfied that he was in the

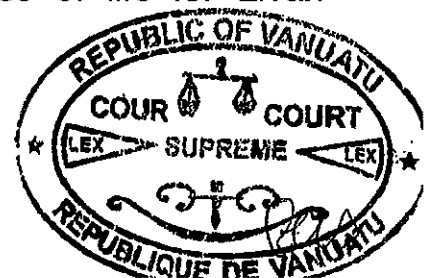


position of a father to her, a position that he had voluntarily assumed and therefore he was a person who was in charge of her and could abandon her.

46. Is it proven in relation to each accused that they did abandon her? The charge as laid covers the period of year 2006 until the month of 2007 July. This charge of abandoning is a continuing offence: see **R v. White** (1871) LR 1 CCR 311. No particulars are given in the charge other than "*yutufala I bin lego gel ia Livan Kalon olsem yutufala I no lukaot gud long mekem se I causem ded blong hem*".
47. In submissions Mr. Tevi pointed to two areas of evidence which he said amounted to abandonment. First when they went to the gardens and left Livan locked up whole day, seemingly without access to food and drink and with no one arranged to look in on her and to attend to her safety and needs. The evidence about the time that they were in the gardens is from at least 9 am to 4 pm, a period of 7 hours minimum.
48. The second area that he pointed to was when they left her altogether and went to stay in Vila, making no arrangements for her care or feeding. In relation to that latter evidence it satisfies me to the required standard that she was abandoned and abandoned by both accused.



49. I am also satisfied that when they left her on occasions for the whole day, even though they came back in the late afternoon each day, that amounted to a series of abandonments. There can be no doubt in my mind that she was abandoned. No arrangements whatever were made for her care and feeding and it is just fortunate that at least to some degree, she was looked after by her relatives. That was no thanks to the accuseds.
50. Although the word "*wilfully*" is not used in the section there is still a mental element which must be proven and that is that the abandonment was deliberate and intentional. I am satisfied that it was. They must have known and intended to leave her locked up alone and without care and indeed they to all intents admitted that in their statements. Anyway that is the inevitable conclusion from the fact that she was their child living in their home and they left her alone there.
51. Although in the particulars it is alleged that their abandonment caused the death of Livan that is not an element of the offence under section 103 and need not be proven in order to convict. I find that the prosecution has proven all the essential elements of Count 1 against both accused and they are both convicted of it.
52. I turn to Count 2, and I am afraid that I have to say some legal things in relation to the charge and how it is framed in the information. It refers to Section 104 only but it alleges that the accused's failure to provide the necessaries of life for Livan

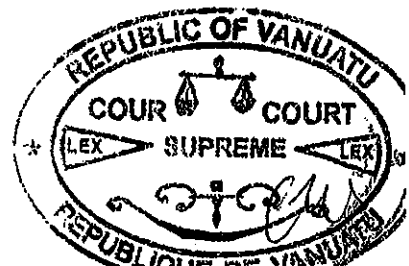


caused her death. Section 104 has two subsections. Subsection 1 states that in certain conditions a person who fails to provide the necessities of life to another is criminally responsible if the death of the other person is caused or the life of the other person is endangered or her health permanently injured by the failure.

53. Section 1 does not in itself create any offence. An offence is created by subsection 2 if the life of the other person is endangered or their health permanently injured. Unlike subsection 1, subsection 2 makes no mention of the situation where death is caused. If that is the allegation then a charge of either intentional homicide under Section 106 or unintentional harm causing death under Section 108 is the proper charge. The authority for that is the New Zealand Court of Appeal decision of **R v. Burney** [1958] NZLR 745 which is the leading New Zealand case on the section of the Crimes Act of New Zealand which is materially identical to the Vanuatu Section 104.

54. In this case the prosecution is alleging that death resulted from the failure to provide the necessities of life but it is not alleging that this was intentional. I intend therefore to treat this charge as one under Section 108 based upon negligent failure to observe the duties imposed by law in Section 104.

55. In fact the particulars of count 2 do sufficiently state such a charge. All that is missing is a reference to section 108 because the charge does actually state all the elements sufficiently to



fairly inform the accused of the charge. I do not see any prejudice to the accused in treating this as a charge under Section 108. Indeed I think it is fair to say that neither counsel appreciated the technical issue which I am raising or at least if they did they did not raise it before I did.

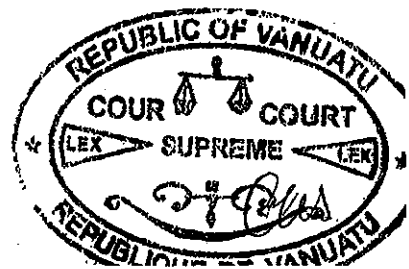
56. So the essential elements to be proven are these:

- i) That the accused were each under the duty imposed by section 104 (1) in respect of Livan
- ii) That they negligently failed to observe that duty
- iii) That they thereby caused damage to the body of Livan which resulted in her death

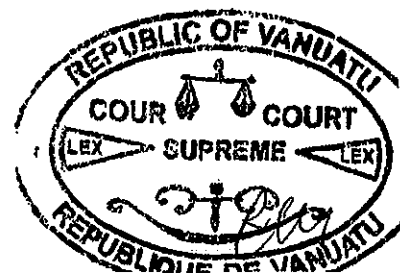
This is using the words of section 108.

57. The first element required to be proven is that they were in charge of Livan and that she was a person unable by reason of detention, age, sickness, insanity or other cause whatever to provide the necessities of life for herself. The necessities or necessities of life means food and drink, clothing, housing and medical care.

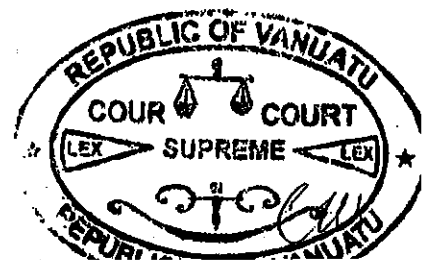
58. I am satisfied of both these matters for the reasons already set out by me in relation to the abandonment charge. So I am satisfied of the first element.



59. I turn to the second element, is it proven that they negligently failed to observe their duty to provide the necessities of life? The prosecution alleges that they failed to supply nourishment, that is food and water and medical care. I do not think there is any real reliance on clothing and of course there is no failure about shelter.
60. I am satisfied that there was a failure by both the accused to supply both nutrition, nourishment by way of food and water, and medical care to Livan in the period leading up to her death. As far as food and drink is concerned she was left in the home, when they went to Vila and during the day when they went to the gardens, leaving her apparently without food but anyway without any way of feeding herself or drinking even if there was food and there was no evidence that food or water was left and there was an admission by the accused that on occasions they did not leave her with food or water.
61. As far as medical care is concerned I am satisfied that in the period of weeks or even months before her death, her physical condition deteriorated. She was skin and bones at her death according to Susan Kalon. This condition does not happen overnight. It must have been obvious for weeks that she needed medical attention and of course she really needed to be seen for her epilepsy, if that is what she had but I do not rely on that.

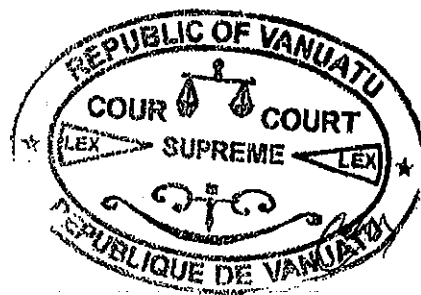


62. Of course medical care available in Eton village is minimal but there is an aid post staffed by a nurse with some training and considerable experience in her job. She said she would have seen the child if asked. She was not asked. If she had been asked and if she had seen the child I am sure that she would have realized how serious Livan's condition was and would have taken steps to provide proper medical care. The case of **R v. Burney** I have referred to establishes that it is not necessary that the neglect is intentional or willful. It is enough that it was negligent to the degree required for criminal responsibility, sometimes called gross negligence.
63. I am satisfied of that. I am satisfied that the accused did negligently fail to observe their duty to provide the necessities of life and that their negligence was of such a degree that they should be held criminally responsible. That is the second element I find proven.
64. The final element is that they thereby caused damage to the body of Livan which resulted in her death. I have no doubt that damage was caused to the body of Livan by their failure but I have to consider the question of whether that failure and that damage is proven to have caused the death of Livan.
65. The difficulty faced by the prosecution on this issue is the fact that no medically qualified person ever saw Livan in the period before her death. And in fact no medically qualified person ever

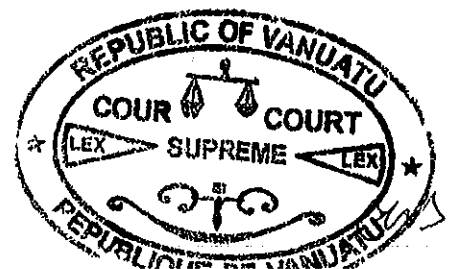


examined her at any stage after she came to Eton, nor was her body seen or examined by a pathologist or any other medically qualified person after her death. So there was no evidence available. That is not the fault of the investigators. By the time they heard of Livan's death she had been buried already for some days, that is even assuming that the necessary expertise was available.

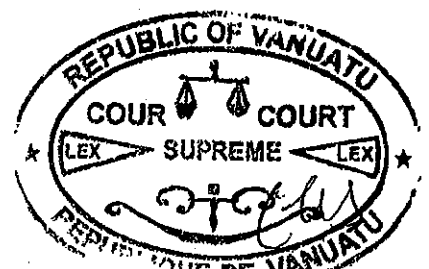
66. She was seen only by close relatives, none of whom have any medical knowledge and she was buried on the day of her death or at least on the day that her death became known. Nor has there been any medical evidence, opinion evidence, which can sometimes be called in these circumstances of what a medically qualified person's opinion is as to the cause of death, based on witnesses account that the medical person has been told about.
67. I have heard evidence about lack of care and the skin and bone state of Livan's body. And I have heard evidence of some blue fluid coming from her mouth after her death. The prosecution asks me to draw an inference from that evidence that the failure to provided the necessities of life specifically nutrition and medical care caused Livan's death. I think it is very likely that lack of nutrition, including possibly even water, and/or a failure to seek medical care caused or at least contributed to Livan's death.



68. However, this is a criminal case where I must be satisfied of this element like all the others beyond reasonable doubt. In the complete absence of medical evidence as to the cause of death, I cannot exclude the possibility that she died of some other unknown cause, for example, an underlying heart condition or some viral or bacterial disease or infection which was not amenable to medical treatment or some undiagnosed syndrome or even in a handicapped child like this, some form of suffocation such as positional suffocation or suffocation resulting from an epileptic fit in which swallowing the tongue is a danger.
69. Although malnutrition and lack of medical care are the likely causes of death, experience shows that a full autopsy and a medical examination by a qualified pathologist with all modern technical facilities can sometimes reveal a cause of death which is quite different from that suggested at first sight. Such facilities are not generally available in Vanuatu especially for someone in Livan's situation and in any event of course it was too late in this case.
70. However without making criticism of any one, I cannot exclude the reasonable possibility of some unknown cause of death having happened in this case. So I cannot be satisfied beyond reasonable doubt that her death resulted from a failure to supply the necessities of life and I must find the accused not guilty of a charge under section 108.



71. That however is not the end of the matter. The Court is required in a case like this to have regard to section 109 (2) of the Criminal Procedure Code Act. Section 109 (2) of the Criminal Procedure Act provides "*when a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it*".
72. Facts are proven in this case which reduce this charge to the lesser offence under section 104 (2). That is that the accused without lawful excuse neglected the duty to provide Livan Kalon with the necessaries of life, namely, nourishment and medical care, so that her life was endangered. The only material difference relates to the third element.
73. Although I am not satisfied beyond reasonable doubt that Livan's death was caused by their neglect, I am satisfied that their neglect endangered Livan's life, as I have already stated. In my view the offence under Section 104 (2) is a lesser offence than that under Section 108, although strangely the latter Section 108 carries a penalty of five years imprisonment and Section 104 (2) carries a penalty of seven years imprisonment. Nevertheless, I think that in substance it is a lesser offence because one alleges that the accused's actions caused death and the other alleges only that they endangered life.



74. The defendants are therefore both convicted on count 2 of a lesser offence of without lawful excuse neglecting to supply the necessities of life for Livan Kalon so that her life was endangered. Both accused are advised that they have a right of appeal against this decision and that appeal must be lodged within 14 days.

Dated at Port Vila, this 15th day of February, 2008

BY THE COURT OF VANUATU
COURT SUPREME
LEX LEX
C.N. TUON
Judge
REPUBLIC OF VANUATU
REPUBLIQUE DE VANUATU

