IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CHELSEA NGIRAKESIIL,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2021 Palau 23
Criminal Appeal No. 20-001
Appeal from Criminal Case No. 19-070

Argued: July 23, 2021
Decided: July 27, 2021

Counsel for Appellants ..... Yukiwo P. Dengokl
Counsel for Appellee ..... Rebecca Sullivan, Assistant Attorney General, Kathleen M. Burch, Assistant Attorney General[1]

BEFORE: JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

[1] Assistant Attorney General Burch submitted a brief and appeared in Court to argue the motion for recusal.

OPINION

PER CURIAM:

[¶ 1] Chelsea Ngirakesiil is appealing her conviction for manslaughter of her late husband, Charlie Ngcheed, on the grounds that the Republic has failed to carry its burden of proof. For the reasons set forth below, we **REVERSE**.

BACKGROUND

[¶ 2] On March 30, 2019, Appellant, her late husband, and a number of other individuals attended a party in Ngermid Hamlet, Koror State. It is undisputed that alcohol was consumed by both Appellant and her husband. There was also testimony that some skirmishes between unidentified participants took place. At one point during the evening the festivities were interrupted by a loud thud. As several witnesses testified, after hearing the sound, they saw Charlie on the ground. Dr. Jason Arurang who was at the scene, examined Charlie and advised the bystanders, including Appellant, that Charlie may have sustained a serious head injury and needed to be taken to the hospital as soon as possible.

[¶ 3] It is undisputed that Appellant did not follow Dr. Arurang's advice. Instead, with the help of some friends and relatives, she bundled Charlie up into one vehicle, and then another, and eventually took him home. It is also undisputed that Appellant left him there for some time and returned to the party. Appellant claims that after dropping Charlie off at home she ran, barefoot, to her sister-in-law's house in order to call the ambulance (though ultimately never did). Because, according to Appellant, her sister-in-law's house is closer to the party than to her own home, Appellant returned to the party merely to ask for a ride back home. The Republic, on the other hand, contends that Appellant's return was evidence of her lack of care for her husband.

[¶ 4] The next morning, Appellant woke-up only to find her husband in the same state as the night before. He was not responsive to her attempts (including physical shaking and slapping him) to wake him up. It was only at this point 911 was called by Appellant's brother and Charlie was brought to the hospital by ambulance.

[¶ 5] In the hospital Charlie was administered CPR but his condition did not improve. Eventually a cranial CT scan was ordered and showed extensive damage to his skull and several areas of intracranial bleeding. Ultimately, Charlie was taken off of life support and died on April 1, 2019.

[¶ 6] On June 20, 2019, the Republic charged Appellant with manslaughter alleging that she

> recklessly cause[d] the death of Charlie Ngcheed, by striking him repeatedly in the head, pushing him into the car, and releasing his shirt allowing him hit his head on the concrete surface. Defendant was advised by a doctor, at the scene, to take the victim to the hospital immediately, which she failed to do and instead left victim on the porch of their home overnight, in violation of l7 PNC § 1303(a)(l).

Information at 1 (June 20, 2019).

[¶ 7] A six-day bench trial, beginning May 18, 2020, was held before Justice Salii. At trial, the Republic called several witnesses to testify about the events of March 30, 2019, as well as several medical professionals who testified about Charlie's condition when he was brought to the hospital and provided opinion as to the ultimate cause of death. Of particular note is that none of the Republic's witnesses testified that they saw an altercation between Charlie and Appellant. Instead, all of the Republic's witnesses who were questioned on the subject testified that they observed Charlie's injury when he was already on the ground. Dr. Emais Roberts testified that he conducted the autopsy and that Charlie's cause of death was "[e]xtensive [i]ntracranial [h]emorrhage causing brain tissue damage." Exh. 5 (Autopsy Report) at 3 (April 22, 2019).

[¶ 8] The prosecution also introduced into evidence an audio recording of Appellant's conversation with police officers during her arrest for an unrelated drunk driving charge on November 28, 2019. There is some dispute as to what Appellant actually said, but the Republic contends that on the tape Appellant admitted that she said "beat her husband to death." Appellant challenged both the translation and completeness of the tape.

[¶ 9] The Trial Division convicted Appellant of the charged offense and sentenced her to 10 years of probation, on condition that she serve a two-year term of incarceration in Koror Jail. The present appeal followed.

[¶ 10] On July 20, 2021, after all briefing had been completed and reviewed by the Court, we ordered Appellant's release from prison pending the disposition of the present appeal. On the morning of July 23, 2021 — the day oral argument was scheduled for — the Republic filed an emergency motion seeking recusal of all justices who joined in the release order. The Republic argued that because the order was (for various reasons) unlawful, its issuance created the appearance of bias against the Republic on the part of the Justices who joined in it. We orally denied the recusal motion and indicated that detailed reasons for the denial will be provided in a subsequent written order. This opinion sets forth these reasons.[2]

STANDARD OF REVIEW

[¶ 11] "A judge shall disqualify himself or herself from participating in any proceedings in which . . . it may appear to a reasonable observer that the judge is unable to decide the matter impartially." ROP Code of Judicial Conduct Canon 2.5. At the same time, "a judge's prior adverse ruling is not sufficient cause for recusal." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir.1986); *see also Ngerketiit Lineage v. Ngirarsaol*, 8 ROP Intrm. 50, 50-51 (1999).

[¶ 12] We review the Trial Division's findings of fact for clear error and its conclusions of law *de novo*. *Tulop v. ROP*, 2021 Palau 9 ¶ 11. Challenges to sufficiency of evidence to support a criminal conviction are subject to clear error review viewing "the evidence adduced at trial 'in the light most favorable to the prosecution.'" *Xiao v. ROP*, 2020 Palau 4 ¶ 8 (quoting *Wasisang v. ROP*, 19 ROP 87, 90 (2012)). "If the evidence presented was sufficient for a rational fact-finder to conclude that the appellant was guilty beyond a reasonable doubt as to every element of the crime, we will affirm." *Waisang*, 19 ROP at 90 (internal quotations and alterations omitted).

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[2] "Ordinarily, a motion to recuse directed at an appellate judge is decided by that judge. Because the instant motion raises legal issues common to each of the undersigned, we have determined to" address it as part of the unanimous opinion for the Court. *Ngerketiit Lineage v. Ngirarsaol*, 8 ROP Intrm. 50, 50 n.1 (1999) (internal citation omitted).

DISCUSSION

I.

[¶ 13] The Republic's motion to recuse stems from its contention that our order of July 20, 2021, was *ultra vires*. According to the Republic, by acting beyond our authority, each of the Justices on the present panel can be perceived by a reasonable observer to harbor bias against the Republic. There is no merit to the Government's position.

[¶ 14] "The standard for recusal under [Canon 2.5] is whether a reasonable person with knowledge of all the facts would conclude the judge's impartiality might reasonably be questioned." *Taylor v. Regents of Univ. of California*, 993 F.2d 710, 712 (9th Cir. 1993) (quoting *Studley*, 783 F.2d at 939). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Prior adverse rulings are "proper grounds for appeal [or a motion for reconsideration], not for recusal." *Id.* Thus, even assuming, *arguendo* (and *dubitante*) that our order was erroneously issued, that error does not require recusal.

[¶ 15] We note that the order was issued after the full briefing in the underlying appeal was complete, and based on the evaluation of the evidence and record before the Court. As parties are well aware, oral argument is not a requirement for the Court to act. *See* ROP R. App. P. 34(a) ("The Appellate Division on its own motion may . . . order a case submitted on briefs without oral argument even if oral argument is requested."). As it happens, the Republic did not request one in its opening brief. *Id.* ("Parties must make their request on the cover sheet of the opening brief . . . .").[3] The argument was scheduled on the Court's own motion. *See id.* Instead of scheduling argument, the Court could have, on the basis of briefs submitted by the parties and the record below only, issued a judgment and opinion in this matter, reversing Appellant's conviction. Such an approach, though adverse to the Republic, surely could not raise a perception of "bias" in any reasonable observer. Neither can an interim order. To be sure, our order can, and probably did,

[3] Appellant also failed to request one in her opening brief, but the very next business day filed a separate "Request for Oral Argument" stating that she had "inadvertently overlooked putting such request on the coversheet of the opening brief pursuant to R. App. P. 28(a)(1)."

telegraph to the public our view about the relative strengths or weaknesses of parties' respective cases. But judges must often express their view of a party's case during the course of litigation. *See, e.g., Tulop*, 2021 Palau 9 ¶10 (referencing the stay of execution of the sentence granted after the case was taken under advisement and following the Court's conclusion that Appellants raised substantial questions of law in their appeal). For example, any time a judge rules on a motion for a temporary restraining order, or a preliminary injunction, or a motion for a stay, he necessarily express a view on whether the movant's case is meritorious. *See Etpison v. Rechucher*, 2020 Palau 14 ¶ 21. It cannot possibly be that a grant of a preliminary injunction (which necessarily involves a judge expressing a view that the applicant will likely succeed in his underlying claim, *see id.*) requires the judge to recuse himself from further proceedings in the case. So too here. The panel members reached their decision to release Appellant pending appeal as part of judicial proceedings and upon consideration of the record before them. This decision, reached in the ordinary course of litigation, however correct or erroneous it may be, cannot serve as a valid basis for seeking to recuse any of the members of this panel. *See United States v. Holland*, 519 F.3d 909, 913-14 (9th Cir. 2008) (noting that the law "generally requires as the basis for recusal something other than rulings, opinions formed[,] or statements made by the judge during the course of" the legal proceedings before him.).[4]

[¶ 16] Accordingly, we deny the motion to recuse members of this panel, and proceed to the consideration of the merits of the underlying appeal.

II.

[¶ 17] We begin by noting what is not at issue. At oral argument the Republic conceded that there is no evidence in the record to prove, under any

[4] We note in passing, that when the Republic advised the Court that Appellant was released without fulfilling all of the conditions set forth in our July 20th Order, we immediately ordered that Appellant be re-incarcerated until such time as all of the conditions were met. This fact serves as additional evidence that none of the Justices either harbor actual bias, or have conducted themselves in such a manner where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Clemens v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 428 F.3d 1175, 1178 (9th Cir. 2005). We also express our appreciation to the Republic for bringing the initial failure to comply with the release order to the Court's attention and Appellant's counsel for his assistance in carrying out that order.

standard, that Appellant did in fact assault her late husband.[5] Instead, the Republic argued that the conviction can be sustained on the grounds that Appellant's failure to take her husband to the hospital (after being advised to do so by Dr. Arurang) was reckless conduct which caused the victim's death. Appellant, however, contends that because the Information alleged an assault, the Government's failure to prove that element necessarily requires a judgment of acquittal.

[¶ 18] The first question we have to address is whether the proof offered at trial matches the allegations of the Information. On the one hand, "[p]roof at trial that varies from the indictment potentially compromises [one] of the functions of the indictment—notice to the accused . . . Where defendant's right to fair notice of the charges . . . has been violated, reversal is required." *People v. Grega*, 531 N.E.2d 279, 282 (N.Y. 1988). However, a reversal is only necessary where the defendant was deprived of fair notice that the prosecution will attempt to prove a particular theory of a criminal conduct. *See United States v. Miller*, 471 U.S. 130, 134 (1985). Furthermore, some variance between charging documents and proof at trial is to be expected because the purpose of a charging document is to give society confidence that probable cause exists "for all of the alternative theories that go forward," whereas a conviction at trial may be obtained "on any theory contained in the indictment" that is proven beyond a reasonable doubt. *United States v. LaPointe*, 690 F.3d 434, 440 (6th Cir. 2012).

[¶ 19] While (as even the Government admits) the Information is not a model of clarity, we reject Appellant's argument that the Government was required to prove both the assault and recklessness through failure to follow medical advice. Although the Information can be read as if it is phrased in the conjunctive, it is well established that the Government has a "right to charge in the conjunctive and prove in the disjunctive." *Id.* The question then is, whether the charging document in this case provided sufficient notice to Appellant that the Republic will seek to prove manslaughter by proving *either* an assault that led to the fatal trauma, or reckless failure to follow medical

[5] Because the Republic disavowed its reliance on the assault theory, we need not address the issue of the audio tape that allegedly contains Appellant's confession that she "beat her husband to death."

advice to seek medical attention for Charlie (irrespective of who or what caused the trauma). In our view, the language alleging that Appellant "was advised by a doctor, at the scene, to take the victim to the hospital immediately, which she failed to do and instead left victim on the porch of their home overnight, in violation of l7 PNC § 1303(a)(l)" was sufficient to put Appellant on notice that the Government intends to prove that this conduct amounts to manslaughter. We, therefore, conclude that the variance between the allegations contained in the Information and the proof offered at trial does not violate Appellant's right to a fair notice of the charges and legal theories, nor did it deprive her of the opportunity to put on a complete defense.

III.

[¶ 20] In order to establish that Appellant's failure to take her husband to the hospital in the face of contrary medical advice was criminally reckless, the Government must first prove that Appellant had a legal, and not merely moral, duty to aid her husband.

> A defendant can only be found guilty of [] manslaughter for failing to obtain medical help for the victim if a duty to perform the omitted act is otherwise imposed by law. The affirmative legal duty [] is the vital element of a homicide charge based upon failure to supply medical or surgical attention . . . .

40 Am. Jur. 2d Homicide § 78. "This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation." *People v. Beardsley*, 113 N.W. 1128, 1129 (Mich. 1907).

[¶ 21] Whether or not such duty exists is a question of law that we review *de novo*. 40 Am. Jur. 2d Homicide § 76 ("Criminal liability cannot be premised on a failure to act unless the party so charged has a legal duty to act, and whether or not there is a legal duty is a question of law.").

[¶ 22] A venerable principle of common law (admittedly one that often shocks laypeople and beginning law students) is that "there is no general duty of care imposed on a person to protect, render assistance, or to otherwise be responsible for another's safety and welfare." *State v. McLaughlin*, 621 A.2d 170, 175 (R.I. 1993). Thus, in *State v. Lisa*, 919 A.2d 145 (N.J. App. 2007), a New Jersey appellate court set aside an indictment for reckless manslaughter

that was based on defendant's failure to summon emergency services for his underage friend who suffered a drug overdose. The court reasoned that as the defendant had no affirmative duty to aid the victim, the failure to act, even if it resulted in death, could not have been criminal. *Id.* at 579-80. Even though the court recognized "that defendant's actions, if true, were contemptible," it refused to "equate 'immorality with criminality.'" *Id.* at 580 (quoting *State v. Cohen*, 158 A.2d 497, 502 (N.J. 1960) (Weintraub, C.J., concurring)).

[¶ 23] The rule that there is no duty to aid another, however, is not without exceptions. The law imposes such a duty when a "special relationship" exists. *McLaughlin*, 621 A.2d at 175. For example, under common law, parents are obligated to provide aid to their children. *See, e.g.*, LaFave & Scott, *Criminal Law*, § 3.3 at 203 (2d ed. 1986). Similarly, a custodian may be criminally liable for failure to render aid to a person in his custody. *See, e.g.*, *State v. Kraly*, 423 P.3d 1019, 1023 (Idaho 2018). "[A] duty to supply medical attention may [also] arise where one has voluntarily assumed the care of another and has secluded the helpless person such as to prevent others from rendering aid." 40 Am. Jur. 2d Homicide § 78. It is that last category of "special relationship" that is relevant to the case at hand.

[¶ 24] Testimony at trial (including Appellant's own words) established that Dr. Arurang stated to the assembled crowd that the decedent must be taken to the hospital as soon as possible. Thereafter, Appellant took control of her husband, transferred him to one vehicle and then another, took him home, left him there (outside of the view of anyone else), and did not seek medical aid until the next morning. Even if Appellant had no duty to aid her husband prior to taking him home,[6] she assumed such a duty once she took steps that isolated Charlie from others who may have called for help. When Appellant placed her husband in a car and took him away from the location of his injury, other

[6] A number of American states have held that "a spouse may be guilty of homicide for failure to provide medical care for his or her spouse . . . where his or her spouse has unintentionally entered a helpless state or is less than competent to consciously and rationally deny medical aid." 40 Am. Jur. 2d Homicide § 78. At oral argument we explored whether such a duty exists in Palauan law. In light of complexities raised by Palauan customs as they concern family affairs and obligations, we decline to resolve this thorny issue. Instead, we base our decision that Appellant had a duty to Charlie on the basis of her "voluntarily assum[ing] the care of [Charlie] and [] seclud[ing him] . . . as to prevent others from rendering aid." *Id.* We leave the question of spousal duty to aid for another day.

individuals could have reasonably believed that he was being taken to a hospital and that no further action on their part was needed. By depriving Charlie of an opportunity to receive help from others, Appellant assumed the duty to help him herself.

IV.

[¶ 25] The Government must next show that Appellant not only breached her legal duty to the victim, but that such breach was reckless. 17 PNC § 1303(a)(1). Under Palauan law, "[a] person acts recklessly with respect to a result of his or her conduct when he or she consciously disregards a substantial and unjustifiable risk that his or her conduct will cause such a result." *Id.* § 207(c)(3). "A risk is substantial and unjustifiable . . . if, considering the . . . the circumstances known to [the defendant], the disregard of the risk involves a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation." *Id.* § 207(c)(4). Whether or not a defendant acted with the requisite *mens rea* is a question of fact and subject to a clear error review. *See Tulop*, 2021 Palau 9 ¶¶32-35; *Uchau v. ROP*, 2017 Palau 34 ¶¶ 24-27. Because following a conviction Appellant "no longer enjoys a presumption of innocence . . . we review the evidence adduced at trial 'in the light most favorable to the prosecution'" and draw all inferences in prosecution's favor. *Xiao*, 2020 Palau 4 ¶ 8 (quoting *Wasisang*, 19 ROP at 90).

[¶ 26] In her briefs and at oral argument, Appellant contended that her behavior simply does not rise to the level of recklessness. She emphasized that the victim did not have any visible injuries and simply looked as if he had passed out from too much drinking. Thus, according to Appellant, it was not reckless to wait until the next day to seek medical attention for her husband. The record, even when viewed in light favorable to Appellant, much less in light favorable to the Government, belies these contentions.

[¶ 27] To begin with, Appellant was explicitly advised by Dr. Arurang that her husband was in need of medical attention. She does not dispute this fact or claim that she somehow was unaware of, or misunderstood the advice. This fact alone is sufficient to show that even if in other circumstances it may have been reasonable to think that lack of visible injuries indicate that the victim's condition does not warrant medical attention, in this case, such an assumption indicates a "conscious[] disregard[] [of] a substantial and unjustifiable risk."

17 PNC § 207(c)(3). Furthermore, Appellant's own behavior indicates that despite not seeing any external evidence of trauma she understood her husband's injury to be extremely serious. In her own testimony she admitted that she "panicked" because she thought that her husband was dead. That is hardly consistent with her current argument that she thought that he was simply drunk and passed out and will regain consciousness upon sobering up. Appellant argues that even though she initially thought that her husband was dead, she was "reassured" by her cousin, Geggie Bai, that Charlie is "just sleeping." However, unlike Dr. Arurang, Ms. Bai is not a medical professional. Relying on Ms. Bai's advice to "relax" while ignoring Dr. Arurang's advice to take the victim to the hospital is "a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation." *Id.* § 207(c)(4).

[¶ 28] Appellant's other behavior also supports a finding of criminal recklessness. Her return to the party while her incapacitated husband was left at home alone is particularly egregious. Appellant argues that she only returned to the party to get a ride back to her house. According to her version of events, after depositing Charlie at home, she walked over to Charlie's sister house to see if she could render assistance. Appellant testified that given the relative location of her and her sister-in-law's houses, returning to the party to request a ride home was quicker than walking back home directly. The story has an air of implausibility to it, but even if we were inclined to credit it had we been triers of fact, we are constrained by our standard of review to instead credit the Republic's version of events, *viz*., that Appellant left Charlie at home, and, ignoring his critical state, returned to the revelries.[7]

[¶ 29] In short, under any standard of review, and certainly given the deference owed to the trial court's determination of factual matters, we have no trouble concluding that the Government proved, beyond a reasonable doubt,

[7] There is additional evidence that we need not dwell upon here, that Appellant's handling of Charlie during the transport and the next morning was inconsistent with the care that should have been exercised towards someone in medical distress. Suffice it to say that we do not perceive any error in the Trial Division's conclusion that Appellant's conduct, when viewed as a whole, is "a gross deviation from the standard of conduct that a law-abiding person would observe in the same situation." 17 PNC § 207(c)(4).

that Appellant's conduct was not merely morally opprobrious, but reckless within the definition of the Palau National Code.

V.

[¶ 30] The last element that the Republic was required to prove in order to obtain a conviction was that Appellant's reckless actions caused the victim's death. 17 PNC § 1303(a)(1) ("A person commits the offense of manslaughter if [he] recklessly *causes* the death of another person.") (emphasis added).

> To show cause in fact, or proximate cause, where [a person] dies for want of medical care and the case does not involve two causes, each alone sufficient to bring about the harmful result, the state is required to show that but for the [defendant]'s failure to provide medical care, the [victim] would not have died. If the death was not proximately caused by the defendant's failure to provide medical attention, he or she cannot be convicted.

40 Am. Jur. 2d Homicide § 78.[8] It is here that the Republic stumbles.

[¶ 31] Causation is a question of fact. *See State v. Abella*, 454 P.3d 482, 497 (Haw. 2019) ("Causation is a question of fact (and an element of the offense of manslaughter) and is therefore reserved for the . . . fact finder to determine."). Accordingly, we view the record in light most favorable to the prosecution and defer to trial court's findings. *Xiao*, 2020 Palau 4 ¶ 8. However, "'deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003)). We therefore must ensure that the record contains at least some evidence that Appellant's failure to obtain medical care for her late husband was a "but for" cause of his death. *See United States v. Young*, 39 F.3d 1561, 1565 (11th Cir. 1994) ("If there is a lack of evidence from which a reasonable fact-finder could find guilt beyond a reasonable doubt, the conviction must be

[8] As discussed above, *see supra* ¶ 17, initially the Republic alleged that "two causes, each alone sufficient to bring about the harmful result" (*i.e.*, the initial assault and the failure to seek medical attention) resulted in Charlie's death. The Republic has since abandoned this position, *id*., and has admitted that its case rises and falls on the question of whether Appellant's failure to seek medical aid for her late spouse was a "but for" cause of death.

reversed."). Unfortunately for the prosecution, the record is entirely devoid of such evidence.

[¶ 32] Several medical professionals testified for the prosecution. In addition to Dr. Arurang (whose involvement ended following his recommendation to take Charlie to the hospital), the Republic called Dr. Selailama Lalabalavu (aka "Dr. Lala") and Dr. Emais Roberts to the stand. Dr. Lala treated Charlie after he was brought to the hospital, whereas Dr. Roberts was responsible for performing the autopsy on Charlie's body once Charlie passed away. Dr. Lala provided testimony about Charlie's condition and treatment. She, however, was not asked and did not opine on what the outcome of Charlie's injury would have been had he been brought to the hospital earlier. To the contrary, Dr. Lala noted that the physicians did not immediately discover his head injury and first treated him for suspected aspiration pneumonia.[9] Dr.

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[9] Contrary to the Republic's assertion at oral argument, Dr. Lala did not testify that Charlie had aspiration pneumonia or that vomitus was discovered in his lungs. Rather, she testified that these were the treating team's initial *suspicions*.

> Q: What was your first impression as what has caused his injuries as a result of that?
>
> A : Young man who has been undergoing resuscitation for about an hour. When the tube was placed into his (indiscernible), they found that there was lot of vomitus *in the stomach* in there. So at that time *we thought* that this young man was drinking and then had too much alcohol and went home and slept and then vomited and aspirated on his own vomitus. And that's why he ended up in that condition. When I did the initial physical examination after knowing, being informed of the history, there's no external signs of trauma or unusual signs that we, we look for in the (indiscernible), in the head, chest and (indiscernible). We didn't see any suspicious signs that would contribute to what *we thought at the time* was a young man who was drunk and vomited and aspirated his vomitus.

Tr. at 120, ll. 12-27 (emphasis added).

Furthermore, Dr. Roberts' testimony about the result of the autopsy directly contradicts the Republic's claim that the decedent had aspiration pneumonia.

> Q: Did you give any sort of check for pneumonia (ph) or . . .
>
> A: Yeah, pretty much all the organs looked pretty normal, you know, in the chest and in the abdomen, so just concentrated on the head after that.

Tr. at 169, ll. 17-21. The autopsy report prepared by Dr. Roberts, and admitted into evidence as the Republic's Exhibit 5 clearly states that "all major structures [in the chest and abdomen] appear grossly normal[, and without] evidence of any acute injuries." Exh. 5 at 3.

Lala testified that her diagnosis evolved and changed as time progressed, and that eventually a CT scan of the head was ordered. The scan showed that Charlie suffered massive injuries. *See* Tr. Vol. I at p. 121, ll. 7-9 ("We found a lot of bleeding inside the brain. And it was quite extensive. Multiple sites where there was bleeding on the CT scan."). However, nothing in Dr. Lala's testimony indicated that earlier medical intervention would have saved Charlie's life or even provided an increased chance of successful treatment. To the contrary, Dr. Lala testified that Charlie's "outlook was really poor and basically he was on his way out." *Id.* at 128, ll. 8-9. Dr. Lala also testified that she did not determine the cause of death, and instead relied on Dr. Roberts to do so following an autopsy. *Id.* at 123, ll. 8-10; at 127, ll. 27-28; at 128, ll.3-6.

[¶ 33] The testimony of Dr. Roberts also does not establish a causal link between Appellant's behavior and Charlie's demise. Dr. Roberts testified that, at the request of the Ministry of Justice, he performed an autopsy on the victim so as to establish a cause of death. In his testimony, Dr. Roberts opined that the cause of death was brain injury caused by intracranial bleeding which itself was caused by trauma. *Id.* at 164-66. The in-court testimony was consistent with the autopsy report that Dr. Roberts prepared on April 27, 2019 which states the cause of death was "[e]xtensive [i]ntracranial [h]emorrhage causing brain tissue damage." Exh. 5, p. 3. But Dr. Roberts was not asked, and he did not opine on how quickly the blood may have accumulated in the victim's brain, nor whether given the extent of the injury, any medical intervention, at any time, would have been beneficial.[10]

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[10] At oral argument, the Republic directed our attention to Dr. Roberts' testimony which appears on page 168 of the trial transcript. There, Dr. Roberts testified as follows:

> Q: As a doctor, if you witness someone injure their head and they were then unconscious, what would be your recommendation be in terms of what they, this person should do next.
>
> A: Oh, they should go to the hospital right away. And the first thing to do is you have to, you know, depending on the mechanism of the injury, you have to at least take a look inside the head right away. You need to do a scan. Since we have CT scan, that's usually the first thing we do if somebody has a head injury. We, you know, still do normal physical exams, you know, just depending on the mode of injury then you need to scan the head at least, rule out the bleeding in the head. Because bleeding can start small and the patient will do fine and it can take a day or, you know, even a couple of days and

[¶ 34] At oral argument, the Republic suggested that although Palau does not have a resident neurosurgeon, an emergency trepanation could have been performed to relieve the pressure on the brain, which in turn would have allowed Charlie to be transferred off-island for more definitive treatment. This was not raised at trial and we are unable to take judicial notice to supplement the record on appeal of a fact subject to reasonable dispute. *See Napoleon v. Children of Masang Marsil*, 17 ROP 28, 32 (2009).[11] Judicial notice on appeal should not be used as a tool "to subvert a trial court's role as the finder of fact." *Id.* at 34. We are not triers of fact and have no way of knowing whether such procedure could have been performed, or if performed would have yielded positive results. We are simply not in a position, and lack sufficient knowledge and information, to resolve this complex medical question. It is an issue that should have been explored at trial, where medical professionals could have offered expert testimony and been cross-examined on these questions. We, on the other hand, must take the record as we find it. In the absence of any testimony or documentary evidence suggesting that earlier medical intervention would have saved Charlie's life (or at least increased his chances of survival), we must conclude that no such proof exists.

> the bleeding gets, slowly start getting bigger and start compressing the head and eventually you can die from that.
>
> Tr. at 168, ll. 10-28.

We credit this testimony in full, but it cannot bear the weight assigned to it by the Republic, because nothing therein suggests that in this particular case, failure to seek medical attention was a "but for" cause of Charlie's death. It is quite true that bleeding may be slow and that timely intervention may save an injured person's life. But of course, bleeding may sometimes be fast, and medical science would be powerless to help. Dr. Roberts's testimony implicitly acknowledges that. He testified that "bleeding *can* start small," not that bleeding *always* starts small. Thus, though this testimony supports the finding that Appellant's actions were reckless, it cannot support the finding that Appellant's actions were a "but for" cause of her husband's death.

[11] There is at least some medical debate surrounding the victim's chances of survival following the use of an emergency trepanation. *See, e.g.*, Keita Shibahashi, *et al.*, *Emergency Trepanation as an Initial Treatment for Acute Subdural Hemorrhage: A Multicenter Retrospective Cohort Study*, 106 World Neurosurg. 185, 185 (2017) (finding "that performing trepanation in an emergency room is associated with a decreased survival rate."). Consequently, neither the availability, nor effectiveness of trepanation are facts that are "not subject to reasonable dispute." ROP R. Evid. 201(b).

[¶ 35] The absence of proof of a causal connection between Appellant's reckless conduct and her husband's death dooms the Republic's case for manslaughter. *See* 40 Am. Jur. 2d Homicide § 78 ("[T]he state is required to show that but for the [defendant]'s failure to provide medical care, the [victim] would not have died. If the death was not proximately caused by the defendant's failure to provide medical attention, he or she cannot be convicted."). While, at this stage of litigation, we must draw all inferences in favor of the Government, no amount of favorable inferences can make up for a complete absence of evidence. *See United States v. Ceballos*, 340 F.3d 115, 125 (2d Cir. 2003) ("[I]nferences must be based on evidence and . . . [the] verdict must be reasonably based on evidence presented at trial.") (cleaned up). We are therefore constrained to reverse Appellant's conviction.[12]

CONCLUSION

[¶ 36] The Trial Division's judgment of conviction with respect to Appellant, Chelsea Ngirakesiil, is **REVERSED** and she is **DISCHARGED.**[13]

[12] Our decision should not be understood as an endorsement of, or an excuse for, Appellant's conduct which was both morally reprehensible and criminally reckless. However, in order to be convicted of any criminal charge, the Republic must prove, beyond a reasonable doubt, *all* elements of that charge. *See Polloi v. ROP*, 9 ROP 186, 191 (2002) ("[T]he government b[ears] the burden of proof as to each element of the charged offenses."). Such proof would have been easy to obtain. All the Republic had to do was ask its expert witnesses as to their opinion on the rate of bleeding or on whether, given decedent's condition, early medical intervention would have been beneficial. Had the witnesses provided testimony favorable to the Republic's case, and had the court below credited it, we would have been obligated to defer to the trial court's fact-finding.

[13] All other pending motions are DENIED as moot. To the extent Appellant has posted bail to secure her release pursuant to our order of July 20, 2021, the bail is EXONERATED.