IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 73 OF 2013

BETWEEN	:	**STATE**
AND	:	**K. R.A.K.**
Counsel	:	**Ms. S. Puamau for the State** **Mr. Iqbal Khan for the Accused**
Date of Summing Up	:	**5th July 2013**

SUMMING UP

[1] **ROLE OF THE JUDGE AND ASSESSORS**:

Ladies and Gentleman Assessors.

(i) This is the stage of this entire trial process for me to sum-up the evidence to you and direct you on the law which is applicable to this case. After my summing up, you are required to deliberate together and each one of you, Ladies and Gentleman Assessors, must formulate an

individual opinion, which should essentially be based on the evidence that you saw and heard within this court room, as to whether the Accused child is guilty or not guilty to the charge of Manslaughter.

(ii) As I already said in my opening address to you, I will direct you on matters of law, which you must accept and act upon. Guiding you on the correct legal path has been my area of responsibility. On the other hand, "facts" of the case belong to your area of responsibility. Simply, you are the masters of 'facts'. Therefore, it is entirely up to you to decide what evidence you must accept or reject and which witnesses to accept as being reliable, truthful or credible. You are free to accept the whole version of a witness or part of it and reject the rest.

(iii) In deciding on the credibility of any particular witness, you can rely not only what you heard, but, what you saw as well. The demenour of a witness can be taken into account. The manner in which the witness offered evidence, how he/she stood up for cross examination, the firmness or evasiveness in witness box, all can be taken into account to decide the honesty and reliability of the witnesses.

(iv) You heard both counsel making their submissions before my summing up. They put forward their case theories and formulated their opinions as to the sequence of events and occurrences of the incident. You need not bound to accept either version unless you agree with them. Equally, if I express any opinion on any question of fact, or I appear to express any opinion or view concerning facts, or emphasize a particular aspect of any fact, do not adopt it, simply because I told it. It is entirely up to you, ladies and gentleman assessors, to form your own opinions on facts.

(v) At the same time, if I do not mention something which you think is important, do not hesitate to give due weight to it as you think fit.

(vi) I must say that I am not bound by your final deliberations, but, I assure you that I will treat it with respect and give the greatest weight when I deliver my judgment.

(vii) I am reminding you again that you must only consider the evidence you saw and heard within this court room during the trial process. You should disregard what you heard from your friends, relatives or family members or seen in any media outlet about this case. Any suggestions, recommendations or opinions made to you by anyone on this case should be ignored, no matter how well meaning it may be. The evidence pertaining to this case is led in full by parties and it is finished. There will be no more evidence. You are entitled to draw your own inferences about the issues of this case based on your common sense conclusions, but, in the light of the available evidence.

(viii) It is worthy, you ladies and gentleman assessors for you to know that you were chosen to be judges of the facts of this trial as you are representing a live cross-section of our society with a pool of common sense and experience of human affairs embedded to the community. You are expected to use your common sense and experiences of your day to day life when you deliberate the case. In the same vein you have to weigh any proposition brought forward by the parties with your experience and common sense. This exercise will play a major role in assessing the truthfulness or honesty of a witness and credibility or reliability of their evidence. You ask yourselves whether it appeals to your common sense or is it contrary to your common sense and experience. It is not that difficult as it sounds. When you interact with people in your day to day life, you formulate your own opinions about their honesty or truthfulness based on what they talk and how they behave. Please apply the same theory to this instance as well.

(ix) Finally, I have to ask you to keep aside any feelings of prejudice or sympathy towards any party who are involved in this case. Court room is not a place for prejudice or sympathy. As we all are well aware by now, the Accused in this case is a boy of around 11 years. The deceased was also a small boy of 06 years. You are not supposed to sympathize to anybody or to be merciful to anybody. You must arrive at your final opinions without any passion towards anybody in compliance with the oath taken by you.

[2] **THE BURDEN AND STANDARD OF PROOF**

(i) Before reminding and analyzing the already lead evidence in this court, it is my duty to enlighten you on several legal principles, which are involved in a criminal trial. Firstly, the issue of '**PROOF**'. As a matter of law, I must direct you that the responsibility or the onus of proving the case against the Accused rests upon the Prosecution. That is a continuing responsibility casts upon the prosecution throughout the trial and it never shifts to the Accused. There is no obligation or duty upon the Accused to prove anything, including his innocence or otherwise. Accused, though charged before a court of law, is presumed to be innocent until he is found guilty by a competent court of law.

(ii) What is the standard that the Prosecution has to adopt in proving the case against the Accused? In legal literature, it is said that ***"the Prosecution should prove its case against the Accused beyond reasonable doubt"***. Its simplified meaning is that if you are to find the Accused guilty of the offence charged, you must be satisfied to an extent where you are sure of his guilt. I re-iterate, that you must be "**sure**" of the guilt and nothing less will do. There is no mathematically proven

formula for you to be "**sure**". In the final analysis, it rests on the robust common sense of yours, which should not be fixed from over emotional responses.

(iii) If you have any reasonable doubt, the benefit of such doubt should be given to the Accused. Then it is your duty to express an opinion of "**NOT GUILTY**". But, it has to be borne in mind that such ***'doubts'*** must be ***'reasonable'***. If it is to be ***'reasonable'***, it should be actual and substantial doubts as to the guilt of the Accused which arose from the evidence and it should not be an imaginary or trivial or a merely possible doubt. The doubt, if the Accused is going to have any benefit, should be based upon reason and common sense grown out of the evidence.

[3] **THE INFORMATION**:

(i) You have been provided with a copy of the information. Please read it now.

> "**K.R.A.K.** is charged with the following offence:
>
> *Statement of the Offence*
>
> **MANSLAUGHTER**: contrary to section 239 of the Crimes Decree No. 44 of 2009.
>
> *Particulars of the Offence*
>
> **K.R.A.K** on the 26th day of January, 2013 at **NADI** in the **WESTERN DIVISION**, unlawfully killed M.K.S.K.

[4] **ELEMENTS OF THE OFFENCE**:

(i) **Section 239** of the **Crimes Decree** states as follows:

"A person commits an indictable offence if—

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person—

(i) intends that the conduct will cause serious harm; or

(ii) is reckless as to a risk that the conduct will cause serious harm to the other person ".

(ii) Therefore the Prosecution has to prove following elements beyond reasonable doubt to bring home a charge of Manslaughter successfully.

- The Accused;
- Engaged in a conduct;
- Which causes the death of another person;
- With the intention or;
- Reckless to a risk that such conduct will cause serious harm to the other.

(iii) Guilty mind in the form of knowledge, willingness, negligence or recklessness is essential to prove an offence. Those elements can be adduced by inference or circumstantial evidence. A crime is not committed if the mind of the person so doing the act in question be innocent. The **intent** and **act** must concur to constitute the crime. To assess one's intention both previous and subsequent acts to the relevant date can take into consideration.

(iv) '**Conduct'** means an act or an omission to perform an act or state of affairs. **'Engage in conduct'** is doing an act or 'omit to perform an act'. If applied the simple meaning of 'conduct' to this instance, firing a fire arm fits into the description of an act.

(v) A person is said to be **'reckless'** in a given scenario, if he is aware of a substantial risk that the circumstance exists or will exist and whilst been knowing that, takes such a risk in an unjustifiable manner. In that context, the person who unjustifiably takes such a substantial risk is aware that the result of his conduct will take place.

The simplified version of recklessness is taking an unjustifiable risk.

(vi) The risk that the person is going to take should be obvious and a serious risk. After having recognized such a risk to exist or present, nevertheless, deliberately chooses to run the risk without doing nothing about it, is recklessness. On the other hand, it can be said that the Accused was reckless, had he been indifferent to an obvious or substantial risk and runs the danger to the health or welfare of the victim occurring the result of his act. In advertence or unintentional act wasn't enough to be reckless. The Accused should foresee the risk but have determined to run it.

(vii) When applying the concept of recklessness to this instance, it can be said that a person who causes another's death does so recklessly when he is aware of and consciously disregards a substantial and unjustifiable risk that death will result from his conduct. The nature and the degree of that risk must be a disregard of such risk and a gross deviation from the standard of conduct that a reasonable and ordinary man would perform in the same situation.

In another words, you must be sure that Accused was aware of and consciously disregarded the risk of causing death of the deceased.

(viii) Now I will turn to address you on another legal issue. There needs to be a clear picture as to the age of the Accused child and the criminal

responsibility attached to a child of such age. It has been agreed by the Prosecution and the Defence that the Accused was born on 20th June 2002. The alleged date of offence is 26th of January 2013. Roughly, the Accused was 10 years and 07 months of age at the time of the alleged commission of the offence.

(ix) According to our law, a person who has not attained the age of 14 years is a child. It is conclusively presumed that a child under 10 years is not criminally responsible for an offence and cannot be guilty of any offence.

(x) When the child is over the age of 10 years and under the age of 12 years, he is not criminally responsible for an act or omission **unless it is proved beyond reasonable doubt** by the Prosecution, that the child at the time of the commission of the offence had the **capacity** to know that he ought not to do the act or make the omission.

(xi) On the other hand, a child aged 10 years or more but under the age of 14 years can be held criminally responsible for an offence only if he **knows** his conduct is wrong.

(xii) In this background, I am directing you **as a matter of law**, the Prosecution must prove beyond reasonable doubt that the Accused child been 10 years and 07 months of age at the time of the incident, did have the **capacity** to know that he should not have done the act or more precisely firing the gun and **knew** his conduct of firing the gun is wrong.

(xiii) As I directed you earlier, it is not enough to prove beyond reasonable doubt that the Accused child had the **capacity** and the **knowledge** of his conduct or firing the gun. That conduct or physical part of the

offence then must be collaborated with the mental part, "**intention**" or '**recklessness' to constitute the offence**. When you are deliberating whether the Accused child was '**reckless'** or not in his conduct and how would a reasonable person would act or perform in such a situation, you should consider that the Accused child was 10 years and 07 months of age at the time of the incident. Therefore, the reasonable appreciation of risk or foreseeing the risk should be on par with a child of the same age. As it is quite understood, one has to be mindful the incapabilities of appreciating the risk by a child of this age comparing to an adult or a reasonable man. You need to get into the shoes of a 10 or 11 year old child to assess the exact mental condition and behavioural patterns of a child. I remind you, once again, your duty of the day is to use your common sense and experience in life.

[5] **THE CASE OF THE PROSECUTION**:

(i) The first witness called by the Prosecution was Mohammed Nabil Khan. He is a cousin of the Accused child and the deceased child. In another words, all three boys are the sons of the brothers of one family. He had gone to one Faizal's house, who is the father of the deceased child, around 5.00pm and started playing with the deceased child and the Accused child. When Nabil was about to start playing '**Tag'** with the deceased child by giving his hand to touch, he had heard a 'big boom' noise and he had fell on the ground.

(ii) Nabil had managed to stand up after a short while and seen the Accused child holding the gun beside the vehicle of one Rizwan. Nabil had seen a movement of the gun, either upwards or downwards, when it was in the hands of the Accused child. He identified the gun in court as a similar one held by the Accused child and positively identified the Accused child in open court.

(iii) In cross-examination, Nabil admitted that certain portions of his statement given to the police in January 2013 are not correct. He admitted that he saw the gun for the first time after he heard the firing sound. He said that the Accused child was sad after the incident and there was no fight between them before the incident.

(iv) Mohammed Nasim Khan, the father of Nabil, in giving evidence said that he was not at the place of shooting at the time in issue, but rushed there upon hearing the loud noise of firing. He praised both the deceased child and the Accused child as well disciplined, lovable religious and good boys.

(v) The next witness to call by the Prosecution was **Cpl. 3049 Josete Seuseu**, Cpl. Josete had visited the scene of the crime and seen a shot gun and an empty cartridge (which you saw during the course of the trial) and a "bullet case" which was never an exhibit in this case. He had taken photographs of the crime scene and the post mortem. The booklet contained certain photographs are already in your possession for your convenience.

(vi) **Mr. Inia Daunikama**, a soldier of 28 years of Military service and served in overseas missions over 16 years, claimed that he is well conversant with fire arms. He had examined the "alleged gun" on 27th January 2013. He demonstrated you how a gun is operated. Mr. Inia said that a "cartridge" which was produced in court contains 100 small pellets. Mr. Inia said soon after the pellets leave the gun, the gun will move a little upwards. He opined that if the gun is slipped, the pellets should go to the ground. After observing the injuries of the deceased, he said that this is not an accident, but an aimed shot. After firing 04 bullets on last Saturday (27th June) at the scene of crime, Mr. Inia said that in the

distance of 5 – 7 metres pellets begin to spread and by 15metres all pellets start to scatter.

(vii) **Mr. Aisea Livalivailagi**, a half brother of the father of the deceased, testified to the effect that one Rizwan came by the vehicle registered number "FLYING" with two kids to the house of Faizal, the father of the deceased child. He referred to a boy called "Ali" and said that when "Ali" took a "gun" from Rizwan's vehicle, Faizal's father-in-law (Kibi) and Rizwan scolded him and Rizwan took the gun back, put it inside the cover and kept back in the vehicle. Though the vehicle was locked by Rizwan after doing so, Mr Aisea had heard the remote sound of the vehicle again and a little while later he had seen this "Ali" coming out of the vehicle with the gun. The boy had approached Mr. Aisea and pulled out a bullet from his trouser pocket and showed him how to load the gun and how to use it. He said, that, in fact he told the boy to keep the gun back in the vehicle. Without taking the gun back from the boy, Mr. Aisea had gone to the toilet and after a little while he had heard a gun explosion. After the injured were taken to the hospital, Mr. Aisea had seen the said boy again and in fact the boy had told him "slap me Wise, it is all my fault". Mr. Aisea said that he hugged the boy who was shaking at that time, and said "not to worry".

(viii) **Sgt. Harish Prasad**, the second Investigating Officer of this case told that he took over this case on 08th April 2013 and carried out further instructions of the Director of the Public Prosecutions or the Prosecution. He was the officer who had recorded the statement of the Accused. He had observed the Accused to be an intelligent boy. Sgt Prasad told that he was of the view that Mr. Inia, the Military Officer is helpful of finding out distance of the shooter and the deceased. Thus, he had engaged with Inia on last Saturday in the process of "proofing" to find this out.

(ix) **Dr. Ramswamy Ponnuswamy Goundar**, a Forensic Pathologist, who had performed over 5000 autopsies and graduated with a MBBS qualification in 1968 said that the cause of death of the deceased was gunshot injuries. He had observed 21 injuries on the body of the deceased boy. Dr. Goundar did not express any opinion about the distance of the shooter and the deceased, but said that it is something to be left to an expert on Ballistic.

(x) Next witness for the Prosecution was **Mr. Avinesh Kishor.** He had not seen the incident of shooting. **Detective Corporal 2061, Salen Kumar**, the Investigating Officer at the beginning of the investigation and he had visited the crime scene with fellow officers.

[6] **THE DEFENCE CASE**:

(i) The approach of the defence was simple and straight forward. They take up the defence of "accident". The case theory of the defence has to be elicited through the line of cross-examination of the Learned Defence Counsel as the defence did not call any witnesses or the accused to testify from the witness box.

(ii) Defence tried to establish that **Mr Inia** the Military officer who examined the gun, **Mr Aisea Livalivailagi** and **Mr Avinesh Kishore** have changed their original versions given to the police when their statements were recorded in January 2013. Thus, the suggestion of the defence was that those witnesses are not credible and truthful.

(iii) Further, defence highlights the fact that **Mr Inia** is not an expert on Ballistic issues and his opinion should be disregarded.

(iv) Another argument of the defence is that though the evidence of **Mr Aisea** offered from the witness box is accepted, he never identified the Accused positively in court as the "boy" or "Ali" who loaded the gun in front of him and demonstrated his competency on guns.

[7] **ANALYSIS**:

(i) The following facts are been agreed by both parties and therefore the Prosecutor need not to prove those again.

1. K.R.A.K. is 10 years old. He was born on 20 July 2012.
2. K.R.A.K is a citizen of the United States of America and prior to this incident was ordinarily resident with his parents in HONOLULU, HAWAII.
3. K.R.A.K as a citizen of the United States of America and resident of HONOLULU, HAIWAII received the bulk of his education, prior to this incident, in schools in HONOLULU, HAIWAII, the USA.
4. On 26 January 2013, KR.A.K and his parents were present in Fiji.
5. M.N.K is 14 years old. He was 14 years old at the time of the incident.
6. M.N.K is related to K.R.A.K and was related to M.K.S.K. They are/were cousins.

(ii) As we all are aware, the Accused was 10 years and 07 months old at the time of the incident. The Prosecution, before proceeding ahead to the charge of Manslaughter, has to prove beyond reasonable doubt that the Accused had the **knowledge** and the **capacity** to understand his conduct of firing the gun was wrong. If you are of the view that he didn't have such **knowledge** and **capacity**, to understand that his conduct was

right or wrong due to him being a child just passed 10 years, matter ends there.

(iii) Ladies and Gentleman assessors, next step for you to decide in this case is whether this alleged "firing" was an **accident or not**. **As a matter of law** I am directing you that an "**accident**" is a result of an unintentional or involuntary or unwilled act of the Accused. If the act is not the result of Accused's will, that act cannot be used to impose a criminal responsibility on the Accused. Therefore, it is the burden of the Prosecution to prove beyond reasonable doubt at the very outset, that an ordinary person, rather a child of 10 years and 07 months in this instance, in the position of the Accused, could have foreseen the death as a probable or likely consequence of his action. If, with the evidence you saw and heard, you decide that the Prosecution has not proven this fact beyond reasonable doubt or for you to be sure of it, you have to conclude that the alleged shooting incident was an accident. In such a situation, this matter rests there. In another words, if, in your opinion this is an accident, you must come out with a verdict of "**Not Guilty**".

(iv) In reaching to the conclusion whether the act or handling the gun was "reckless" or not, you can look at the evidence of witnesses like Mr. Nabil Khan, Mr. Inia Daunikama (the Military Officer) and Mr. Aisea Livalivailagi. Mr. Nabil, in cross-examination accepted the suggestion put by the learned defence counsel that he saw the Accused cousin holding the gun and when he tried to pick it up, after fell down, it got fired. In re-examination, Mr. Nabil said that what he saw was a movement of the gun upwards or downwards. It is entirely up to you, ladies and gentleman assessors, to believe Mr. Nabil's evidence or not.

(v) When it comes to Mr. Inia (the Military Officer) and Mr. Aisea, the learned defence counsel suggested that they are testifying something totally new

to their initial statements that they made in January 2013, soon after the incident. The Prosecution suggested to you that there is no inconsistencies in their statements but those are extended versions of their statements. The defence suggested that those are inconsistent versions comparing to the previous.

(vi) In law, a prior statement which is been denied or does not distinctly admit by a witness when giving evidence in court is called an inconsistent statement. In this instance, none of the above two witnesses denied them making their prior statements to police and disputed the contents of those statements. Thus, the evidence of Mr. Inia and Mr. Aisea can be described as extended or reconstructed versions of their prior statements made to police.

(vii) The police statements made by Mr. Inia and Mr. Aisea are been provided to you as defence exhibits. But, those are not evidence. What the two witnesses testified from the witness box is evidence. Both witnesses provided reasons as to what made them to extend their earlier position. If you are satisfied with the reasons given by the witnesses or the new developments are true and genuine you can accept and act upon their testimony. If you are not satisfied with their explanations for the extended versions to be sound and convincing especially after 05 months of their initial police statements, that you can use to assess their truthfulness and credibility. Therefore, ladies and gentleman assessors, you have to decide what weight that you are going to attach to evidence of Mr. Inia and Mr. Aisea, in the light of the new developments.

(viii) On the other hand, Prosecution claimed that Mr. Inia, being a Military Officer for 28 years, is an expert of fire arms and his opinion can be accepted as true and accurate. **As a matter of law**, I am directing you

that for a person to be an expert he must have a specialized knowledge in the field that he claims to be an expert. Such knowledge can be obtained by specified training, study or experience. There should be a proper foundation for an opinion of an expert. Thus, **Mr Inia,** having being served as a Military Officer for over 28 years, can formulate an expert opinion on issues focus on firearms. In the same vein, you would recall that **Mr Goundar** formulated his expert opinion on cause of death of the deceased boy and refrained from expressing any views on shooting range as "Ballistic" is not his area. It has to be remembered, though Mr Inia and **Mr. Goundar** formulated opinions in the areas of their own expertise fields and those can be admissible in law, it is you who have to decide whether you are going to accept those opinions or not.

(ix) However, Mr Inia being handling various fire arms for over 20 years, can only be considered as an expert on handling fire arms. His opinion is admissible in law only for that area. Mr Inia was not at the scene when this incident occurred. Therefore, when he formulated an opinion that this is not an accident, but an aimed shot, that is not an expert opinion. He cannot express opinions about the mental conditions of others. Mental status of a person as you know cannot be seen. It has to be informed through previous and subsequent conducts of a person along with other surrounding factors. The absence of Mr Inia at the scene and his admission that there could be several other possible ways to handle the gun apart from the way he handled it, disqualifies him from formulating any opinion about the mental condition of the accused. You ladies and gentleman assessors can disregard that opinion of Mr Inia. You, after appreciating the evidence of this case should infer or come to a finding what was the possible state of mind of the Accused. In deciding whether the firing was aimed or an accident you might have to look at the previous and subsequent conduct of the Accused. You might have to

consider whether there was a motive, prior arrangement or concert in the part of the Accused or not according to the evidence.

(x) Have you decided otherwise, that this incident was not an accident, and then only you have to see whether the conduct of the Accused was intended to cause serious harm to the deceased or was reckless as to a risk which will cause serious harm to the other person. If you find that the Accused had the intention to cause serious harm with his conduct, he should be guilty to the charge of Manslaughter. If you find that the Accused was reckless as to a risk that his conduct will cause serious harm to the deceased, still you find him guilty to the charge of Manslaughter.

(xi) In deciding that, you might have to recall the answer of the Accused about guns in his Caution Interview – Question and Answer to question 73 recorded on 27th January 2013 he had told that:

> "Q. Do you know about gun?
> A Yes we are tought in school about gun and its safety".

It is your duty to come to an inference what the Accused was taught, being a Class 05 student in the USA, "about gun and its safety". Whether this covers a whole range of guns or gun safety or safety from the gun were not came into light. Whether you are going to accept that the Accused had a comprehensive knowledge of handling guns or not is a matter for you to decide.

(xii) In this instance, I direct you **as a matter of law** that the decision of the Accused to remain silent is a right provided by law to an accused person. He is entitled to remain silent or without saying anything once the defence case is called. He is not guilty because he remained silent or not

giving evidence. Indication of the defence with the silence was that the Prosecution failed to prove the charge beyond reasonable doubt. Silence of the Accused proves nothing, his guilt or prosecution's failure. Accused is simply exercising a legal right that he is permitted by law to do.

(xiii) Ladies and gentleman assessors that is all I wish to address you on facts and law. Even though I spoke about facts on certain instances, you need not to agree with my view. It is entirely up to you to come to your own conclusions.

[8] **SUMMARY**:

(i) As the court has already directed you it is still the responsibility of the Prosecution to prove the case against the Accused beyond reasonable doubt. If you have any reasonable doubt in Prosecution's case you have to find the Accused 'NOT GUILTY' to the charge of Manslaughter.

(ii) Accused is presumed to be innocent until proven guilty and he needs not to prove anything, inclusive of his innocence. If you accept the sequence of events narrated by the Prosecution and you are satisfied beyond reasonable doubt so that you are sure of the Accused's guilt, you must find him "GUILTY" as charged. If you do not accept the Prosecution version and you are not sure of the Accused's guilt due to reasonable doubts, you must find him 'NOT GUILTY' to the charge.

(iii) Your possible opinions in this instance are 'GUILTY' or 'NOT GUILTY' to the charge of Manslaughter.

(iv) You may now retire to consider your opinions. When you are ready, you may inform one of the court clerks so that I will re-convene the court. You will be asked individually for your opinion.

(v) Before you retire, I would like to ask the Counsel of both parties if there is anything that they wish me to say in addition or want me to re-direct the assessors on any matter.

J. Bandara

Judge

At Lautoka

06 July 2013

Solicitors: The Office of the Director of Public Prosecution for State.

Messrs Iqbal Khan & Associates for the Accused.