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 Sentence : **17 July 2013**

SENTENCE

The Order of the court to suppress the name and the identity of the juvenile offender is still in force. In furtherance to that order, it is hereby ordered that the names and addresses of his parents be suppressed until otherwise ordered by court.

[1] K.R.A.K, you stand guilty before this court for a charge of **Manslaughter**. The information reads as follows:

Count

Statement of Offence

MANSLAUGHTER*: Contrary to Section 239 of the Crimes Decree, 2009.*

Particulars of Offence

K.R.A.K, on the 26th day of January 2013, at ***Nadi*** *in the* ***Western Division****, unlawfully killed M.K.S.K.*

[2] Before proceeding to deliver the "**Order**" after **"finding of guilt**" (the terminology is used in accordance with **Section 20** of the **Juvenile's Act**) of the juvenile offender, I wish to record that the entire trial process was conducted in accordance with the special procedures laid down in the Juvenile's Act and the said procedures do echo the sentiments highlighted in **Article 40** of the **United Nations Convention on the Right of the Child**. At the final lap of the proceedings of the trial, this court is mindful that the "**order**" should reflect that the juvenile offender is dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence, as stipulated in **Article 40 (4)** of the **United Nations Convention on the Rights of the Child.**

[3] It was after a full trial the assessors came out with a unanimous verdict of "**GUILTY**" of the juvenile offender to the charge of "**Manslaughter**". This court concurred with the finding of the assessors.

[4] The facts of the case, as revealed during the trial can be summarized as follows. The juvenile offender, the deceased boy and **one Rizwan**, their uncle, had returned to the compound after shooting pigeons from the gun, alleged to have produced in court. Upon returning, the boys had

started playing. Nabil, a witness of this case and a cousin of the two boys had also joined them in playing.

[5] It was in the course of this "playing" the juvenile offender had approached the gun. A positive inference was drawn by the Prosecution that the alleged gun was laying on the back seat of "**FLYING**", Rizwan's vehicle, before it came to the hands of the juvenile offender. What had happened after that was well demonstrated in court. The gun had fired causing injuries to Nabil and the deceased boy. The deceased had succumbed to the 21 injuries reflected on the corpse. At the time of the offence, the juvenile offender was 10 years and 07 months old and the deceased was only 06 years of age.

[6] The maximum sentence for the offence of manslaughter is 25 years imprisonment. The tariff ranges from suspended sentences to 12 years imprisonment. [**Sen v The State** [2008] FJSC 42; CAV 0014.2007 (26th February 2008)]. In the case of **Navamocea v The State** [2007] FJCA 38; AAU0002.2006 (25th June 2007) the Court of Appeal took up the position that higher sentences might be warranted in the cases of death arising out from the commission of another violent offences.

[7] In the light of this background, I now turn to see the **"Restrictions on punishment of juveniles"** as depicted in **Section 30** of the **Juvenile's Act** as **Section 3(2)** of the **Sentencing and Penalties Decree 2009** expressly provides that it should operate subject to the requirements of the Juvenile's Act [Cap 56]. According to **Section 30(1)**, a child offender shall not be ordered to be imprisoned for any offence. The juvenile offender in this instance falls within the definition of a "**child**" as he has not reached the age of 14 years.

[8] **Section 31** of the **Juvenile's Act** focuses on **"Punishment on certain grave crimes"** inclusive of manslaughter.

"***31.****-(1) Where a juvenile is found guilty of murder, of attempted murder or of manslaughter, or of wounding with intent to do grievous bodily harm and the court is of the opinion that none of the other methods by which the case may legally be dealt with is suitable, the court may order the offender to be detained for such period as may be specified in the order, and, where such an order has been made, the juvenile shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and on such conditions as the Minister may direct.*"

[9] The legislation had a marked difference when **Section 30(1)** states about "**imprisonment**" whilst **Section 31(1**) focuses on "**detention**". **Section 53(2)** of the **Children and Young Persons Act (1933)** of the **United Kingdom** differs only in two major aspects with **Section 31(1**) of the Fiji Juvenile's Act. In the United Kingdom the offence of murder is covered by Section 53(1) of the said Act and instead of "**Order**", Section 53(2) contains "sentence". The two sections are otherwise almost similar in context. **Section 53(2**) reads as follows:

> *"Where a child or young person is convicted on indictment of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence".*

[10] As noted by **Justice Shameem** in the case of **State v NT** [2003] FJHC 339; HAC 001 2003S (31st of July, 2003) while citing **R. v Bosomworth**

(1973) Crim. L.R. 456, the detention referred to in Section 53 of the Children and Young Persons Act 1933 is "a wholly different form of sentence to a sentence of imprisonment". (It has to be noted that Section 53 of the Children and Young Persons Act 1933 was repealed by **Powers of Criminal Courts (Sentencing) Act 2010** and Section 90, 91, 92, 93 and 94 of the Act are dealing with the relevant subject matter).

[11] While proceeding to finalize the "**order**" of court against the juvenile offender, it has to be borne in mind that the primary concern of such a move is to prevent offending by juveniles whilst securing the welfare of the juvenile offenders as well. The sentence must be proportionate to the culpability of the offender in committing the crime and the seriousness of the crime.

[12] This court, in delivering the "**order**" will be mindful of the fact that the juvenile offenders might not understand that they should hold the responsibility of their own action, if such act was not acceptable to the law. Criminalization of the juvenile or imposing greater restrictions to his liberty disproportionate to what he had done will only harm the best interests or the well being of the child by alienating him from the society.

[13] The juvenile offender in this case, being 10 years and 07 months at the time of the commission of the offence, is at the lower end of the "age category" of a child. This court will have to seriously consider whether the juvenile offender had the full maturity to apprehend the aftermath of his conduct or was simply been motivated or impulsive with his inchoate life experiences or negative influences by people or things around and catalyzing factors which would have nurtured the offending environment. For instance, leaving a gun either loaded or not, along with the bullets within a very easily accessible place will undoubtedly arouse the temptations of a juvenile to engage with "some experience" that he has

seen in a movie or read in a newspaper. Thus, it is not proper to attach the full responsibility only to a reckless act of a child, after him being placed in a platform to commit the act.

[14] The **Social Welfare Report** of the juvenile offender is made available to the court and which was really helpful in coming to a conclusion on the "**Order**". The Report has highlighted that the juvenile offender, being a 11 year old child, 'walks around like an old man, who has, the weight of the world on his shoulders' and he is mentally "blocked out" about the events surrounding the tragic incident. It says that the child has to live with the knowledge that he caused the death of his playmate, friend and cousin. The Senior Welfare Officer is of the view that it is an added pressure to the child for 'not being allowed to be surrounded with friends he grew up with and a familiar environment'. It is said that it is a "sensitive issue" how the child is going to cope with, if he is kept away from the family. The Report strongly recommends the child to attend "trauma counseling" and "to be around friends and family that is familiar to him".

[15] The learned Prosecutor submitted a comprehensive sentencing submission with relevant authorities. The learned prosecutor submits that the Director of Public Prosecutions is not calling for "a period of detention" and "any conditions that would require the child and his parents continued stay in the Republic of Fiji". State suggests the parents of the juvenile offender should undertake the following for a better supervision of their son:

i. Enroll the juvenile offender into a gun safety/the dangers of guns workshop or program;

ii. Father of the juvenile offender to provide to the High Court of Fiji the particulars of such course and proof that the juvenile offender had successfully completed the same within the next 06 months;

iii. Prohibit and not handle, shoot or no dealings with any arms and ammunitions until the juvenile reaches 21 years;

iv. Father of the juvenile to be appointed as the probation officer of the juvenile offender to ensure the above requirements are fulfilled.

[16] In response to that, the learned Defense counsel also made a detailed submission in mitigation with number of decided case authorities. The juvenile offender is a grade 05 student in Hawaii, the United States of America. He has already lost one year of education as he had to stay in Fiji until this case is been finalized. He was awarded the safest and respectful person of the school and the best student in Sunday School of Islamic Studies. He captains the school soccer team. As testified by Mr. Mohammed Taiyab Khan, the juvenile's uncle, he is with a good cheerful character with a religious background. Undoubtedly, he is a first offender. The mitigation submission elaborates the pain and sufferings that the juvenile offender and his family underwent. The learned counsel urges to consider a discharge of the juvenile offender in terms of **Section 32(1) (a)** of the **Juvenile's Act**. Alternatively, the learned counsel suggests to act under **Section 32(1) (d) or (h)** of the said Act. The evidence of Mr Mohammed Taiyab Khan and the References of Mr. Hakim A. Quansafi (The Board Chairman of Muslim Association of Hawaii) and Mr. Abdul Wahib (Managing Director and Chief Executive Officer of Sunbeam Transport) are viewed with much concern along with the other mitigating factors urged by the learned counsel.

[17] Bearing the relevant provisions, the factual background, Social Welfare Report, Sentencing submissions and the Mitigation, I now proceed to determine the most appropriate "**Order**" for the juvenile offender in this instance. The Prosecution does not expect to move court to detain the juvenile offender in Fiji. Nevertheless, it is the duty of the court to determine whether a detention order should be in place or any other method by which the case may legally be dealt with is suitable in finalizing the "**order**" of the juvenile. The other methods of dealing with juvenile offenders are stipulated in **Section 32 (1)** of the **Juveniles Act**.

[18] I found three instances where the parallel courts had acted upon **Section 31(1)** of the Juvenile's Act. **Justice Sadal** in the case of **State v Rupesh Romil Goundar** (HAC 0004.95L – High Court of Lautoka, decided on 26th of Feb. 1996) dealing with a 14 year old offender who pleaded not guilty to murder but guilty to manslaughter with the acceptance of the prosecution, was ordered to be detained for 05 years as the learned Judge was of the view that the accused "committed a brutal attack". In the case of **State v N.T** (supra) **Justice Shameem** ordered the 14 year accused who was found guilty for a charge of murder to be detained for 12 years saying "your act has created a human tragedy within an industrious and peace loving community. Clearly any sentence I pass on you must reflect society's disapproval of your conduct and the need to deter".

[19] **Justice Goundar** in the case of **State v G.P.** Labasa Criminal Case No: HAC 008 of 2011) ordered a detention period of 06 years for a 14 years old offender who allegedly pleaded guilty to a charge of "murder" of a 13 year old girl, who was pregnant over the relationship with the accused. Having considered the three precedents on **Section 31** of the **Juvenile's**

Act, this court is of the view that a great amount of violence and brutality been involved in all three occasions.

[20] As mentioned earlier, **James L.J**. in **R v Bosomworth** (supra) it was noted that "detention and imprisonment were wholly different regimes". In **R v Storey**, **Faut and Duignan** [1973] Cr. L.R. 645**, Lord Widgery CJ** observed that "The period of detention should be such as to ensure that power to detain the offender will continue for long as he may remain dangerous, and may in appropriate cases be expressed as for life; where it is apparent that a shorter period will be sufficient, such shorter period should be specified. The period of detention specified should not attempt to reflect the gravity of the offence but the maximum period for which the offender is likely to remain dangerous, if this can be estimated". **Lord Parker CJ** in the case of **Regina v Abbott** [1964] Q.B 489 decided that "……a conviction of the lesser offence of manslaughter was governed by Section 53(2), under which the court, if satisfied that there was no other suitable method in which the case might legally be dealt with, might sentence the young person to detention for a specified period……." (page 490).

[21] **Justice Johnson** in **R v AH** [2011] NSWSC 1535 delivered the sentence of the Supreme Court of New South Wales and made following remarks whilst referring to certain decided authorities which were focused on sentencing of juveniles.

> "I have regard to the principles as summarized by Hodgson JA (Adams and Hall JJ agreeing) in **Al v R** [2011] NSWCCA 95 at [67]-[68]. In sentencing an offender who commits a crime at the age of 16 years and eight months, principles of retribution and general deterrence may be of less significance than when sentencing an

adult offender for the same offence. Recognition is to be given to the capacity of young persons to reform and mould their character to confirm to society's norms, with considerable emphasis to be placed on the need to provide an opportunity for rehabilitation. In considering the role of retribution on sentence, the Court will have regard to emotional immaturity or a young person's less-than-fully developed capacity to control impulsive behavior: **BP v R** [2010] NSWCCA 159;201 A Crim. R 379 at 381 [4]. However, as Hodgson JA observed in **Al v R** at [69], in relation to crimes of violence committed in the streets by groups of young persons, considerations of general deterrence should be given substantial weight, notwithstanding the youth of the Offender."

[22] Whilst bearing in mind that the only purposes for which sentencing may be imposed are, to punish offenders to an extent and a manner which is just in all the circumstances, to protect the community from offenders, to deter offenders or other persons from committing offences of the same or similar nature, to establish conditions so that rehabilitation of offenders may be promoted or facilitated, signify that the court and the community denounce the commission of such offences or any combination of these purposes as stated in **Section 4(1**) of the **Sentencing and Penalties Decree 2009**, a different approach warrants in this particular scenario as the offender is a juvenile and in particular, a child.

[23] Generally, when a juvenile is the subject of sentencing, the sentencing court should be mindful that while the juveniles bear the responsibility of their own actions or offences committed, they are in need of guidance, assistance and protection because of their state of dependency, vulnerability and immaturity. Therefore, it is prudent at least whenever possible, to allow the juvenile to remain within their family circle and the native environment and continue their education without any

interruption. The sentence should not be an obstacle for the juvenile to mingle with the society and give life to a new character who is ready to play his role in the society, leaving all the debris aside.

[24] This court would be failed in task if nothing is mentioned in this "**order**" about the parents who lost their six year old son from the tragic incident. Whilst the parents of the juvenile offender are trying to rescue him from the aftermath of the tragedy, the parents who lost their beloved son forever have nothing to look forward to. Even though there is no **Victim Impact Report** made available due to practical difficulties, it is not that much difficult to assume the serious and enduring effects this tragedy had brought upon the parents of the deceased boy.

[25] Having considered all the above mentioned factual and legal background pertaining to this particular case and the existing legal framework when sentencing a juvenile, this court concludes that this is not a fit and proper instance to keep reliance on **Section 31(1)** of the **Juvenile Act**. A "**detention**" of the juvenile offender will undoubtedly injure the wellbeing of him. Instead of detaining the juvenile offender, the court is satisfied that the juvenile can be dealt with some other method, which is potentially less harmful to the welfare of the juvenile and more focused on the specific principles of sentencing a juvenile. Hence, this court will seek the assistance of 'other methods of dealing' as stipulated in **Section 32(1)** of the **Juvenile's Act** in finalizing the "**Order**". It has to be borne in mind that though the court is seriously concerned about the betterment of the juvenile offender that does not mean he should be exempted from all the responsibilities that he should bear for his own conduct. Thus, the proposition of a **"discharge"** brought forward by the learned defense counsel has no application in this instance.

[26] This is an instance where the juvenile offender should rehabilitate rather than subject to general deterrence or retribution. Whereas **Article 14(4)** of the **International Covenant on Civil and Political Rights** states, having taken into account the age of the juvenile offender, it is more desirable of promoting the rehabilitation of him. In that event, as the Senior Social Welfare Officer suggests, it is best if the juvenile offender undertakes extensive counseling programme.

[27] It would be inevitable that the juvenile offender and his family will leave the jurisdiction of the Republic of Fiji once they are through with this court process. Thereafter even the long arm of the law of this country might not be in a formidable position to reach the juvenile offender. Therefore, imposition of the 'propositions' of the learned prosecutor to supervise the juvenile offender's behavior in Hawaii, would be far apart from the practical reality. Instead, it is the utmost responsibility of the parents of the juvenile offender to assure that their son does not repeat the same or similar acts and another victim is not derived out of such action. It is entirely up to the parents of the juvenile offender to decide what cause of action they wish to pursue to overcome this possible risk.

[28] In the final analysis, it is the view of the court that the parents and the adults who gathered at the compound where this tragic incident occurred had failed in their task to exercise due care and attention towards their children, including the juvenile offender. That was a grave negligence which created this chaotic and catastrophic environment at the cost of a life. Thus, whilst confirming the **'finding of guilt'** of the juvenile offender for committing the offence of **'Manslaughter'**, I act in terms of **Section 32 (1) (c**) and **34(1)** of the **Juvenile's Act** and order Mr. Mohammed Farad Khan, the father of the juvenile offender a cost of **$ 2,500** to be paid to court. Further, in terms of **section 32(1) (d)** and **section 34(2)** of the **Juvenile's Act**, I order both the mother and the

father of the juvenile offender to enter into a Bond of **$ 5,000** each to assure the good behavior of the juvenile offender for the next 07 years, until he crosses the threshold of a juvenile..

J. Bandara

Judge

At Lautoka

17 July 2013

Solicitors: The Office of the Director of Public Prosecutions for State

Messrs Iqbal Khan & Associates for the Accused