IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Goldsbrough, J.)
COURT FILE NUMBER:	Criminal Appeal Case No. 8 of 2009 (On Appeal from High Court Criminal Case No. 255 of 2008)
DATE OF HEARING:	Thursday 18 March 2010
DATE OF JUDGMENT:	26 March 2010
THE COURT:	Auld, P McPherson, JA. Williams, JA.
PARTIES:	**Regina** Appellant **-V-** **Jimmy Nako Tiko** Respondent
ADVOCATES:	
Appellant:	Mr. Ronald B. Talasasa with A. Kesaka for the Crown
Respondent:	Douglas Hou for Respondent
KEY WORDS:	Young person – manifest inadequacy of sentence of 4 years imprisonment for murder – no identifiable pattern of sentences for circumstances of offence – sentencing considerations
EX TEMPORE/RESERVED:	
ALLOWED/DISMISSED:	Dismissed

JUDGMENT OF THE COURT

Introduction and the facts

1. On 19th June 2009, Goldsbrough J convicted the Respondent, Jimmy Nako Tiko, then aged 16, of murder, contrary to section 200 of the Penal Code. On 23rd June 2009, the Judge sentenced him to four years imprisonment with effect from 13th April 2008, the date of Tiko's first remand in custody. He so sentenced him pursuant to section 16(j) of the *Juvenile Offenders Act*.

2. The Crown appeals, pursuant to section 21(1)(b) of the *Court of Appeal Act*, on the ground that the sentence is "manifestly inadequate".

3. The facts are that Tiko, in the course of a street dispute between two groups of youths near a nightclub in the early hours of the morning of 12th April 2008, fatally stabbed a youth in the chest with a screw-driver that he had obtained shortly before from a security guard at the club. There had been some swearing immediately before the stabbing, but not by the victim. Tiko's evidence at trial, in which he had raised the defence of provocation, was that he had stabbed the deceased because the swearing made him very angry.

4. Goldsbrough J, in convicting him of murder, rejected his defence of provocation.

The Judge's sentencing approach

5. In sentencing Tiko, the Judge stated that, as he was under the age of 18, he fell to be sentenced as a juvenile, by which he more precisely meant a "young person" as defined in section 2 of the *Juvenile Offenders Act*, namely a person over 14 and under 18 years. In his sentencing remarks the Judge made plain that he had regard to the special sentencing regime for young persons established by the Act, in particular section 12, which required him not to send Tiko to prison if he could be "suitably dealt with in any other way specified in section 16.. Section l6 lists a variety of alternatives to imprisonment, including committing him to the care of a relative or other fit person, committing him to custody in a place of detention and, interestingly in paragraph (j), "sentencing him to imprisonment".

6. The Judge, in his sentencing remarks, indicated that he had taken into account the above and all other potentially relevant options available to the Court. He said:

> *... The Court has considered all alternative methods of dealing with you and, in particular, the Court has considered whether you should be committed to the care of your parents or your brother as guardian. That does not seem as if it would be a useful thing to do because ... you were in the care of your parents and your brother when this offence was committed. It seems that neither your parents nor your brother had any concerns about a 16 year old [being] out all night visiting clubs and drinking beer. .... Putting you back into their care is not going to achieve a great deal. So the Court is going to sentence you to a period of imprisonment.*

7. In fixing on a period of four years imprisonment, the Judge expressly took into account: Tiko's age; his lack of previous convictions; that he had formed his intention to kill or cause grievous bodily harm to the deceased only at a late stage when affected by the swearing in course of the dispute; and that his family and that of the deceased had become fully reconciled

in the customary way by, among other matters, the payment of compensation. He concluded his sentencing remarks by saying:

> *... if you were an adult, you would receive a life sentence. Given your age, it is hoped that a short sentence will permit you to come out of prison and start your life as an adult. The Court is obliged to mark your offence which was taking the life of another person with a sentence that reflects the gravity of that crime, but also takes into account the sentencing philosophy contained in the Juvenile Offenders Act. ...*

The submissions

8. The only challenge by the Crown to the sentence of imprisonment is to the adequacy of the length of the term of imprisonment imposed. There is no issue between the parties as to appropriateness in the circumstances of this case of a sentence of a fixed term of imprisonment, as allowed by section 16(j), given this Court's recent clarification in *Kelly v R* [2006] SBCA 21 that a mandatory life sentence is not possible.

9. Mr. Ronald Talasasa, the Director of Public Prosecutions, suggested a bracket of 8 to 12 years as the appropriate period of sentence for Tiko in the circumstances of the case. In doing so, he drew attention to three reported authorities where the effective sentence of imprisonment was 4 years or less, but only to dismiss them as unrepresentative because they concerned offences committed during the period of tensions. The first was *Kelly* itself on remission by this Court to the High Court, in which Palmer CJ imposed an effective prison sentence of 3 years, coupled with release for a further four years to the care of a relative or other fit person – *R v K* [2006] SBHC 53. The second was *R v SK* [2007] SHBC 141, in which the Palmer CJ imposed a sentence of 7 years imprisonment on a young person, dividing it between 2 ½ years in custody and the remainder by way of conditional release to his grandparents. The third was *Pese v R* [2009] SBHC 6, in which Mwanesalua, J imposed a sentence of 7 years imprisonment on a young offender who had been in custody for about 3 1/2 years, coupled with an order for his immediate release to relatives for supervision. It is to be noted that in all three cases, the element of rehabilitation and reintegration into society was regarded by the court as capable of provision in the form of release to the care and supervision of relatives, for which section 16(d) of the *Juvenile Offenders Act* provides.

10. Although Mr Talasasa maintained that that those decisions do not demonstrate what he called "a proper range of sentences" for cases such as this, he sought comfort in the fact that each of them suggested a period 7 to 8 years imprisonment as a starting point.

11. He suggested a more suitable Solomon Islands comparator as a pointer to a higher starting point in this case in the decision of this Court in *R v Dada, Lulumae and Moon* [2008] SBCA 9, which concerned convictions on their pleas of guilty of grievous bodily harm with intent and burglary, each of which carried a maximum term of life imprisonment. It was a carefully premeditated, armed and extremely violent burglary of an occupied dwelling house by a group of youths, to which, Dada and Loulumae, both carrying knives, were parties. It resulted in two of the occupants being so seriously knifed and injured that they were confined to wheelchairs, requiring constant care and medical attention for the rest of their lives, equivalent, as the Court put it, to "life sentences of horrendous suffering".

12. The trial judge had sentenced Dada, 18 at the time of the offence, and Lulumae, 16 at the time, to 4 1/2 years imprisonment for the offences of grievous bodily harm with intent and burglary, the sentences to be served concurrently. On appeal by the Crown against the

sentences as manifestly inadequate, the Court substituted 11 years imprisonment for Dada and 7 year for Lulumae, terms that Mr. Talasasa suggested were useful indicators of the range of sentencing that he was commending to the Court in the present case.

13. Our brief summary of the facts and of Dada's and Lulumae's role in the planned cumulative horror, potentially fatal injuries and permanent disablement to which they were parties, is enough to indicate how inappropriate it is as a marker for a sentencing range in the present case. However, it shares with this case, the feature that there were no broadly similar cases in this jurisdiction capable of giving guidance, as the Court observed in paragraph 15 of its judgment.

14. Mr. Talasasa resorted, however, to many authorities from other jurisdictions, suggesting, he submitted, a broadly accepted higher range of substantially longer custodial sentences than 4 years for juveniles convicted of murder. These included sentences of minimum detention in England and Wales and determinate sentences in other jurisdictions. We say straightaway that we do not find comparison with sentencing regimes and traditions in other jurisdictions a useful vehicle for comparators when looking for an appropriate range or tariff for the Solomon Islands. That is especially when it runs largely counter to such reported jurisprudence as there is within the jurisdiction, as in this case.

15. In the result, and pending the development in the Solomon Islands of a pattern or accepted range of sentencing in such a case as this, Mr. Talasasa took us to the important analysis of Palmer CJ, in paragraphs 14 - 16 of its judgment in *Dada & Ors,* assessment of the objective gravity of the offence in the light of *the extent of the injury and the intention and motive of the offender.* The main thrust of his argument was that the Judge here did not consider or give sufficient weight to matters of importance affecting the objective criminality of the offence in that he did not:

(1) spell out in his sentencing remarks general, obvious and, sometimes overlapping, principles, of sentencing applicable to many offences of varying seriousness of violence and otherwise – principles that he maintained, included needs for condign punishment, general deterrence and protection of the community, and value judgements on the level of criminality;

(2) mention the criminal intention of Tiko in committing the offence or any relevant authorities as to sentencing of juveniles;

(3) did not rehearse relevant parts of the evidence; and in consequence

(4) gave disproportionate weight to matters of mitigation, including compensation and reconciliation.

16. Mr. Douglas Hou, for Tiko, referred the Court to many authorities from this and other common law jurisdictions for the principle that this Court must not substitute a sentence that it would have passed in the exercise of its discretion, if sitting at first instance. The question for the Court, he submitted, is whether the sentence of 4 years imprisonment is outside the reasonable range of options open to the sentencing judge, having regard to accepted sentencing principles and all the relevant facts and circumstances of the case.

17. Mr Hou noted that there are few reported cases in this jurisdiction on the sentencing of juveniles for murder, and none of sufficiently comparable circumstances to indicate a pattern or

range of sentencing for the purpose of this case. It was, therefore, he maintained by reference to the reasoning of this Court in *R v Kada & Ors,* at paras 14 to 16, a matter for the Judge to exercise his own discretion. He agreed with Mr. Talasasa that that required him to assess and balance the objective gravity of the offence against the interests of, *inter alia*, of Tiko's rehabilitation and reintegration into the community - an exercise for which he was better equipped than this Court, since he had had the conduct of both trial and sentencing process.

18. Unfortunately, Mr Hou also took the Court to a large number of authorities, mostly from outside this jurisdiction, stating the same general test and broad principles in varying ways. Those authorities throw little light on the existence or otherwise in the Solomon Islands of a sentencing pattern or tariff for this case, concerned as they are with different statutory frameworks, disposal options and sentencing traditions.

19. Mr Hou submitted that, in the light of the general regime of the *Juvenile Offenders Act,* fortified by section 5, (1)(b) and (g) of the *Constitution*, and this Court's treatment of those provisions in *Kelly*, young persons require different and more flexible treatment than adults in the criminal justice system, particularly with a view to their rehabilitation and reintegration into the community. He invited the Court to approach that task by:

(1) fixing on a term of imprisonment at the bottom of what it considers the reasonable range or tariff appropriate for this case to mark its objective gravity in terms of punishment and deterrence;

(2) balancing against that objective, considerations of welfare, rehabilitation reintegration of Tiko into society and reconciliation through compensation, with the deceased's family; and

(3) adopting the approach of this Court in *R v K and R v SK*, and of Mwanesalua J in *R v Pese* in dividing the notional period of imprisonment between a period of actual custody and of release into the care and supervision of a relative.

20. Mr. Hou suggested that a proper application of that process of reasoning in this case could be achieved by taking 8 years imprisonment, as a starting point under 1), reducing it to 4 or 5 years actual custody under 2), and leaving the balance for some other method of disposal under the various options provided by section 16 of the *Juvenile Offenders Act* under 3).

Conclusion

21. The question for the Court is whether the Judge's sentence of 4 years imprisonment was, in the words of section 21(1)(b) of the *Penal Code*, *manifestly inadequate* in the sense of being outside the range of sentencing options reasonably open to the Judge on all the relevant facts of, and sentencing considerations applicable to, the case; see *Kaimanisi v Reginam* [1996] SBCA 2, per Muria CJ giving the judgment of the Court, at 3. Put another way, as Lord Bingham CJ did in *Attorney General's Reference (No 36 of 1996)* (1997) 1 Cr App R(S) 363, in relation to the same, but differently worded test of undue leniency in England and Wales, the test is whether the sentence fell short by a very substantial margin of the appropriate sentence in the circumstances.

22. In the balancing exercise for a sentencing judge between, on the one hand, the objective gravity of a case and, on the other, considerations of rehabilitation, reintegration into society and of securing reconciliation through compensation or otherwise, the younger

the offender the more importance to be attached to the latter considerations. But the extent to which, in fixing the final disposal, they and other mitigating factors should be set off against the objective gravity of the offence depends on how bad it is. The balance is essentially a matter of a value or discretionary judgement of the sentencing judge on the facts and circumstances of the case as he or she knows them.

23. When it is plain that there is no identifiable pattern or tariff of sentencing for comparable facts and circumstances of the offence against which to consider the test of *manifest inadequacy*, there is no point in resort to voluminous citation of authorities, as both parties have done in this case, still less those from other jurisdictions. So much is clear from the penetrating analysis of Palmer CJ, giving the judgment of the Court in *R v Kada Ors*, in paragraphs 15 and 16 in particular. It is, as he said in paragraph 15:

> *... for the sentencing judge to consider the sentence from first principles, bearing in mind the maximum sentence applicable to cases in the worst category of case and the objective seriousness of the offence in respect of each victim, the level of responsibility of each offender and their subjective circumstances. ...*

Such assessment - one of balance between objective gravity and mitigating circumstances and rehabilitative needs - is not capable of precise arithmetical reasoning. It is a value-judgment to be made on all the circumstances. It is, as has so often been said, an art rather than a science.

24. As the Court has stated, the main thrust of the complaint by Mr. Talasasa for the Crown is that the Judge did not conduct an adequate balance of the countervailing interests because he spelt out only the mitigating factors. This suggests, he argued, that the Judge ignored many commonplace sentencing principles of general application and all or many of the facts and circumstances going to the gravity of the offence.

25. Such a submission ignores the wide experience of the Judge in matters of sentencing in grave cases of murder and other offences of violence and also his unique familiarity with the gravity of this offence as a result of having tried and convicted Tiko. It was for him to evaluate the evidence before him on matters going to gravity, say, as to the degree of premeditation in the light of Tiko's acquisition of the screw-driver only shortly before committing the offence. It is unreal to suggest that he did not take into account such matters of objective gravity, which had sprung readily from the evidence he had heard, simply because he did not rehearse each of them in detail. Such rehearsal or itemisation by a Judge in his sentencing remarks is not, in any event, necessary, particularly where there are no residual issues as to the seriousness of the offence to be resolved at the sentencing stage. It should be remembered too that the only real issue on the evidence was as to the defence of provocation, on which the Judge had ruled against Tiko.

26. The fact that the Judge took a different course when identifying and commenting on matters of mitigation is a necessary consequence of his having to deal at the sentencing stage for the first time with matters of mitigation, which, unlike the evidence going to guilt, was largely subjective to, and emanating from, Tiko as a convicted person. If the Judge had not taken that course, his sentencing decision could well have been subject to challenge by Tiko on the ground that he had not taken those matters into account.

27. The Court, therefore, rejects Mr. Talasasa's suggestion that the Judge did not conduct an adequate balancing exercise in his consideration of the case from first principles, as required of

him in the absence of any established sentencing pattern or tariff in the jurisdiction that could serve as a pointer to a range of sentencing options.

28. As to whether the outcome of the Judge's balancing exercise, 4 years imprisonment, without any further provision for care or supervision outside prison, is so outside the reasonable bounds of his discretionary judgment, the Court reminds itself that it is not here to substitute its own sentence if it had been dealing with the matter at first instance. It cannot second-guess the Judge's view that further provision by way of release, following discharge from prison, into the care and supervision of his relatives, pursuant to section 16(d), would not, in the circumstances, be an effective option. And there is no evidence of adequate facilities in the community contemplated as possible disposals in such a case by section 16 of the *Juvenile Offenders Act*, for example, by dealing with Tiko under the provisions of the *Probation Act* (s. 16(c)); or by committing him in custody in a place of detention (s 16(i), save, it seems, to a special wing set aside for young offenders, in prison; or in any other legal manner (s 16(k)).

29. In the circumstances, the Court cannot take the view that the sentence of 4 years imprisonment fell so far short of what could have been reasonably required for this young person as to call for its intervention. True, because the stabbing resulted in fatality, it was the most serious crime in the criminal calendar. But it was committed by Tiko when aged 16 with some, but relatively brief premeditation in the course of late night street dispute, the essential facts of which he did not dispute at trial in unsuccessfully advancing a defence of provocation. And it was attended with the substantial mitigating circumstances to which the Judge referred in his sentencing remarks.

30. It may be that the Judge, given the absence of any suitable addition to the custodial sentence he had to impose, felt that it would be wrong to increase the custodial length of his sentence on that account, and that it would damage rather than help the necessary process of rehabilitation and reintegration into society so important for a young person if he is to avoid a life of crime.

31. The Court, doing the best it can in the circumstances, considers that a sentence in the region of 5 or 7 years could have been within the reasonable range of sentence for this offence. To substitute the reasonable minimum of 5 years, or a period close to it, would amount to impermissible tinkering, especially when coupled with some further allowance for the double jeopardy suffered by Tiko of facing re-sentencing.

32. In those circumstances, the Court dismisses the Crown's appeal.

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Auld, President

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McPherson, JA

Member

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Williams JA

Member