IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0035 OF 2003S
(High Court Criminal Action No. HAC001 of 2003S)

BETWEEN:

NEORI TAMANIVALU

Appellant

AND:

THE STATE

Respondent

Coram: Ward, P
Eichelbaum, JA
Penlington, JA

Hearing: Friday, 9 July 2004, Suva

Counsel: Ms M Waqavonovono for the Appellant
Mr J Rabuku for the Respondent

Date of Judgment: Friday, 16 July 2004

JUDGMENT OF THE COURT

This is an application for leave to appeal against the sentence imposed on a juvenile for murder.

Background

In brief, the facts were as follows. The deceased and her husband lived on and grew crops on a piece of land at Batiki Settlement at Waibau. On 12 September 2002 the appellant, then aged 14, broke into the house where the deceased lived with her husband and

children. At the time, it was unoccupied, as the deceased was working on the farm nearby, and her husband had gone to the market. The appellant was looking for things to steal when the husband returned. After hiding outside until the husband left, the appellant re-entered the house to resume his search. He was disturbed a second time when the deceased came inside. When the deceased tried to give the alarm, the appellant stabbed her violently, several times, with a knife he had brought with him. He escaped, taking cash and other stolen items.

The deceased suffered serious injuries: a large open wound on the head, a long wound in the neck, and serious injuries to one hand, including the severing of 3 fingers. She died in hospital 4 days later, the cause of death being the wound to the head.

The appellant was arrested on the day of the offence. He was co-operative with the police. After he had been committed for trial, for purposes of giving consideration to a plea, his counsel requested a psychiatric report. As a result of delay in obtaining a satisfactory report, initially the appellant was not in a position to enter a plea. Then he offered to plead to manslaughter, but the prosecution was not prepared to accept that. Eventually, on the day fixed for trial he pleaded guilty to murder. Although we accept the delay was not within the appellant's control, this cannot be treated as if there was a prompt plea of guilty. Further, although the confessional evidence would have been challenged had the case gone to trial, the Judge may well have regarded it as one where the evidence of guilt was strong.

Normally in cases of murder an appeal against sentence is not available because of the mandatory life sentence, but Section 31 of the Juveniles Act creates a special statutory regime for juveniles, that is persons under the age of 17 at the date of the offence, who are convicted of murder and certain other serious offences. The Section provides:

> 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.

(2) A juvenile detained pursuant to the directions of the Minister under the provisions of this section shall, while so detained, be deemed to be in lawful custody.

(3) Any person so detained may, at any time, be discharged by the Minister on licence which licence may be in such form and may contain such conditions as the Minister may direct, and may at any time be revoked or varied by the Minister.

(4) Where a licence has been revoked under the provisions of subsection (3), the juvenile to whom the licence related shall return to such place as the Minister may direct, and, if he fails to do so, may be apprehended without warrant and taken to that place.

Section 2 of the Penal Code (Penalties) Amendment Act 2003 is also relevant:

> Where an offence in any written law prescribes a maximum term of imprisonment for ten years or more, including life imprisonment, any court passing sentence for such offence may fix the minimum period which the court considers the convicted person must serve.

We also note that section 30 of the Juveniles Act provides that children shall not be imprisoned for any offence, and that "young persons" (meaning persons who have attained the age of 14 but are under 17) shall not be imprisoned unless the Court certifies that they are of so unruly a character that they cannot be detained in an approved institution. Further section 19 provides that in dealing with a person under the age of 17 the Court shall have regard to his welfare. These provisions, as the Judge pointed out, are consonant with international law as embodied in international instruments.

We note two features of the legislation as it applies to juveniles. First, the Court may impose a term of imprisonment or detention of any length, including life imprisonment. Thus in the case of a juvenile convicted of murder, the length of the term becomes a matter

of discretion for the sentencing court. Second, regardless of the length of the term imposed, the Minister may release the offender on licence at any time.

The Sentence

For sentencing the Judge had a report from Welfare, showing the appellant had had a difficult childhood which featured poverty, abuse by his father, truancy and substance abuse. He left school at an early age. Recently his parents had separated, and it is clear that at the time of the offence, the appellant lacked family support and direction.

The Judge also received oral evidence: from a pastor who worked with children at the Spirit Growth Centre at Samabula, which the appellant had been attending; the Welfare Officer responsible for the preparation of the report, who worked at the Boys Centre where the appellant lived; the senior Social Welfare Officer in charge of the boys at the Centre; another Welfare officer who had worked with the appellant at the Centre, and finally the appellant himself. Not only was there this substantial body of evidence, the Judge reserved judgment and then delivered a most comprehensive and thoughtful sentence. The Judge, with the assistance of counsel, more than fulfilled the statutory requirement, reinforced by international law, to have regard to the welfare of the appellant as a young person.

At the date of sentencing, the appellant had been at the Boys' Centre for 10 months. According to the report, he had responded well to training and counselling. He had become a born-again Christian, and was now trusted, and seen as a model student. He had not been in any trouble, and was no longer regarded as a danger to the community. The Judge while recording these matters did not over emphasise the appellant's reformation, and of course, while the signs are highly encouraging, it is early days yet. The Judge was in a much better position than this Court to assess the weight to be given to these aspects and we do not wish to place any greater emphasis on them than she did.

Other mitigating factors (in addition to the pre-eminent factor of the appellant's youth) included his remorse and the good prospects of rehabilitation. By way of aggravation,

factors the Judge took into account were the planning of the theft, the fact that the appellant took a knife with him and the degree of violence used.

The sentencing Judge made a comprehensive survey of cases in other jurisdictions, but given the differing statutory regimes, we do not find any of them of direct guidance. The Judge properly gave consideration to the possibility of imposing a sentence of life imprisonment. However, emphasising that the killing in this case, although amounting to murder, was not planned, the Judge concluded that this was not an appropriate case for the imposition of a life sentence, whether as a term of imprisonment or by way of detention.

The Judge therefore decided that the proper approach was to order a period of detention, which when accompanied by the discretion given to the Minister under section 31 to release the appellant on licence at an appropriate stage, satisfied the need to take into account the appellant's welfare. Bearing in mind that the highest end of the scale for manslaughter offences in Fiji appeared to be 12 years, the Judge selected a starting point of 15. After taking into account the aggravating and mitigating factors, and also the 10 months already spent in custody, the Judge imposed a sentence of 12 years detention. She declined to recommend any minimum term. The Judge foresaw as a real possibility that eventually, the appellant would have to serve part of his term in an adult prison. The Judge recommended that the appellant should be given vocational training and education even after transfer to an adult facility.

Grounds of Appeal

In brief, these were that:

1. the Judge did not take appropriate account of the mitigating factors;
2. the Judge took into account a psychiatric report which had not been tendered to the Court;
3. the sentence was manifestly excessive.

It is convenient to dispose first of Ground 2. The point was that the psychiatric report incorporated some information unfavourable to the appellant, sourced from a statement which the defence would have challenged had the case gone to trial. When the appellant entered his plea of guilty, the challenge was unresolved. In the circumstances, we agree with appellant's counsel that the information should have been ignored, and we have ignored it. In fact the Judge made only a passing reference to it and we do not think for a moment it could have played any decisive part in her decision.

We come to the merits, addressed in Grounds 1 and 3.

In support, counsel for the appellant tendered a number cases, mainly from overseas jurisdictions, where sentences ranging from a good behaviour bond to 7.5 years detention were imposed on juveniles for manslaughter. Counsel also canvassed sentences imposed on juveniles in murder cases, all from overseas. Here the range of sentences was from 15 years to life imprisonment, subject to a variety of non parole periods. We are grateful to counsel for the research but unsurprisingly none of the cases, whether involving murder or manslaughter, are at all closely analogous. Individual cases tend to vary so much in the circumstances of the offence and of the offender that their usefulness tends to be confined to establishing a range. In this respect the cases confirm the impression that a starting point of 15 years is unremarkable. Our attention was not drawn to any previous case in Fiji that would provide a helpful guide.

Counsel also referred to the English guidelines for the imposition of minimum terms on juveniles, showing that the starting point for a youth of 14 would be 8 years. Again, we appreciate having the information but do not find the comparison useful. As the Judge noted, the 8 years would be the starting point for consideration of a minimum term. Here, we are not concerned with any minimum term. The Judge declined to impose one, and neither side wanted us to reopen that conclusion.

Appellant's counsel canvassed the mitigating and aggravating features. On the former, she referred to the appellant's guilty plea, his remorse, his background and personal

circumstances, the improvement he had shown during the period of remand awaiting custody, the prospects of rehabilitation, and the time spent on remand. The point stressed most strongly was the perceived absence of an adequate discount for the appellant's age.

For the State, counsel drew our attention to long sentences imposed on youths in overseas jurisdictions. He submitted that the Judge had not made any error of law or in principle, and that the sentence was neither harsh nor excessive.

Neither side took issue with the Judge's starting point of 15 years. We too regard it as appropriate.

We have already rehearsed the aggravating and mitigating features. We do not wish to undervalue the extent of the sudden tragedy inflicted on the victim's family: she left a husband and three young children. In this case however, true aggravating factors beyond the tragedy inherent in the murder of a valued family member, are not strongly present. Although deplorable the worst feature, the violence inflicted, appears to have resulted from a growing panic on the part of the appellant that he had been discovered and would be apprehended.

Of course the weighing of aggravating and mitigating factors was pre-eminently a matter for the Judge's discretion, and within the broad band of that discretion, this Court could not interfere. Putting aside the appellant's youth, the plea of guilty and the period on remand, the Judge could have considered the other aggravating and mitigating factors as balancing themselves out. We have already referred to the circumstances of the plea of guilty. Granted that it was not a case meriting any large allowance, still some concrete acknowledgement, at least in the range of 6 to 12 months, had to be shown for the fact that the plea pre-empted the expense and stress of a trial. Then, credit had to be given for the 10 months in custody; at least 10 and arguably up to 15 months. Although sentencing is rarely if ever a matter of arithmetic alone, these two factors are inescapable. They necessarily absorb a figure in the range of 16 to 27 months.

What then remains of the allowance of 3 years in fact made by the Judge from the starting point, appears insufficient to give due recognition to what undoubtedly is the strongest mitigating aspect, namely the appellant's youth.

We accept that in some sense the Judge had already taken that factor into account. She had decided against imposing life imprisonment or detention, or imprisonment for any term. We do not detect however that the starting point of 15 years contained any discount for youth. This is apparent from the Judge's discussion of the English Practice Direction, followed by a reference to 12 years as corresponding to the highest end of the manslaughter tariff in this country, clearly meaning the adult tariff. In taking 15 years, the Judge was translating so-called life imprisonment to a finite term of years, but still treating the offence as if committed by an adult.

Because of its unique features and the absence of any guiding precedents, whether in this Court or at first instance, this was a most difficult sentencing exercise, and we pay tribute to the Judge for the care she took with it. We interfere with more than the usual reluctance. But for the reasons given, we are persuaded that there was an error of principle in the way the sentencer took the youth factor into account.

Commencing with the unchallenged starting point of 15 years, but otherwise looking at the aggravating and mitigating factors afresh, our conclusion is that the appropriate sentence would be 10 years detention.

Orders

1. Leave to appeal (given at the hearing);

2. Appeal allowed, sentence of 12 years detention quashed, 10 years substituted.

The sentencing Judge recommended that the appellant receive vocational training and education even after any transfer to an adult facility. We endorse that recommendation.

We also share the Judge's regret that presently there is no youth detention centre where offenders like the appellant may be held after they cease to qualify for the Boys' Centre.

Ward, P

Eichelbaum, JA

Penlington, JA

Solicitors:

Office of the Director of Legal Aid Commission, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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