

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 063, 64, 68 OF 2018

BETWEEN : THE STATE

AND : ARTHUR APOROSA VUALIKU
G. D (JUVENILE)
RUSIATE ROKOBULOU
VARASIKO ADROLE

Counsel : Mr E Samisoni for the State
Ms L David for all four Accused

Date of Hearing : 11 May 2018

Date of Ruling : 20 July 2018

RULING

[1] Three adults and one juvenile are jointly charged with aggravated burglary, which is an indictable offence. The issue is whether the High Court has jurisdiction to try juveniles charged with indictable offences. Section 2 of the Juveniles Act defines juvenile as a person who has not attained the age of 18 years at the time of the alleged offence.

[2] Consistent with the objectives of the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice

(‘The Beijing Rules’), the Juveniles Act provides for special measures to deal with juveniles within the criminal justice system. It is now well recognized that children who are accused of committing offences are not be treated in the same manner as the adults in the criminal justice system.

[3] In a landmark decision in *Roper v Simmons* 543 US 551 (2005), the Supreme Court of the United States held that it was unconstitutional to impose death penalty for crimes committed by juveniles. In coming to that conclusion the Court referred to a body of sociological and scientific research that juveniles have a lack of maturity and sense of responsibility compared to adults (pp15-16). The studies referred to in the judgment also found that juveniles are more vulnerable to negative influences and outside pressures, including peer pressure and that they have less control, or experience with control, over their own environment. Studies also indicate that juveniles also lack the freedom that adults have, to escape a criminogenic setting.

[4] Similarly, in *Smith, R (on the application of) v. Secretary of State for the Home Department* [2005] UKHL 51 (28 July 2005) the House of Lords observed that juveniles are to be treated differently than the adults in the criminal justice system. The Court said at [24]:

In the Court's view, the first of these meant that a juvenile's irresponsible conduct was not as morally reprehensible as that of an adult; the second meant that juveniles had a greater claim to be forgiven for failing to escape the negative influences around them; and the third meant that even the most heinous crime was not necessarily evidence of an irretrievable depraved character.

[5] Article 40 of the Convention on the Rights of the Child states:

States parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the

child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

[6] Rule 5 of the Beijing Rules state:

The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

[7] The objectives of the Juveniles Act are:

An act to make provision for the custody and protection of juveniles in need of care, protection or control, and for the correction of juvenile delinquents and young offenders.

[8] Special measures provided by the Juveniles Act are as follows:

- Designation of a magistrate's court to sit as a juvenile court in a separate facility to hear juvenile cases (section 16).
- Juvenile proceedings are in camera (section 17).
- Juveniles are accorded due process rights (section 20).
- Identities of juveniles are suppressed from publication in the media (section 12).
- The use of the words 'conviction' and 'sentence' in reference to juveniles are prohibited (section 20).
- If a juvenile is found delinquent then a range of non-custodial options are available to deal with the delinquent behavior (section 32).
- Detention is reserved as a matter of last resort and for specified grave offences (section 31).
- Special facility is provided for the detention of juveniles away from adult offenders (section 35).

[9] While the Juveniles Act speaks of the special measures, the Act is silent as to the jurisdiction of the Juveniles Court to try juveniles charged with indictable offences under the Crimes Act. An indictable offence is an offence that the law has prescribed as an indictable offence. In the present case, a juvenile is jointly charged with three

adults with the indictable offence of aggravated burglary contrary to section 311(1)(a) of the Crimes Act.

[10] Section 21 of the Juveniles Act states that 'where a juvenile is brought before a juvenile court for 'any offence other than murder or attempted murder the case shall finally be disposed in such court'. This section appears to create a presumption that all offences, excluding murder and attempted murder, are to be summarily dealt in the Juvenile Court. However, the presumption is in conflict with section 4(1) of the Criminal Procedure Act that states 'subject to the other provisions of this Act – any indictable offence under the Crimes Act shall be tried by the High Court'.

[11] Section 4(1) of the Criminal Procedure Act is a specific provision. Only the High Court has jurisdiction to hear an indictable offence. There is no prohibition placed on the High Court to try juveniles charged with indictable offences. The only exception is provided by section 4(2) of the Criminal Procedure Act, but again, that section provides a judge of the High Court discretion to invest a magistrate with jurisdiction to try any offence, which in the absence of such order, would be beyond the magistrate's jurisdiction.

[12] In the New South Wales, Australia, a similar provision creating a presumption of summary jurisdiction is provided by section 31(1) of the Children (Criminal Proceedings) Act 1987 (NSW). Section 31(1) CCPA states:

If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence **shall** be dealt with summarily.

[13] Section 31(1) of the CCPA was considered on appeal by the High Court of Australia in *PM v The Queen* [2007] HCA 49 (8 November 2007). In that case, a child was charged with a 'serious children's indictable offence' as well as lesser offences. The

case was transferred to the District Court because the Children's Court did not have jurisdiction to deal with the 'serious children's indictable offence'. In the District Court the prosecutor did not proceed with the 'serious children's indictable offence'. Counsel for the child submitted that the District Court did not have jurisdiction to deal with the lesser charges. The primary judge held that the District Court had no jurisdiction to deal with the lesser charges and remitted the case to the Children's Court for its determination. In the first instance appeal by the New South Wales Director of Public Prosecutions, the New South Wales Court of Criminal Appeal by a majority decision allowed the appeal for the following reasons at [98]:

Section 31 does no more than direct the Children's Court as to the exercise of its jurisdiction. It does not direct the prosecuting authority or limit the jurisdiction of the District and Supreme Courts : see Bartalesi & Fragassi (1997) 93 A Crim R 274 at 276-277. It does not stipulate that indictable offences may *only* be heard and determined by way of summary proceedings, nor does it require or demand that indictable offences be dealt with only by way of committal proceedings. The disposition of the proceedings depends upon a number of variables. (per Latham J with whom Whealy J agreed).

- [14] On a further appeal by the child, the High Court of Australia in a bench of five justices (GLEESON CJ, KIRBY, HAYNE, HEYDON AND CRENNAN JJ) unanimously upheld the majority decision of the NSW Court of Criminal Appeal. The Court said at p 20:

Had it been the purpose of Parliament to provide such an exclusion (and in particular one addressed to the Supreme Court as the constitutional court of the State) it would have been expected that such exclusion would have been made explicit (in, for instance, s 7 of the CCP Act). Yet no such exclusion is stated[60]. In this context, the exclusion of the Local Court and the Drug Court can be explained on the basis that their powers and status are in general equivalent to those of the Children's Court, whereas the District Court and the Supreme Court are courts of larger jurisdiction and powers. (per Kirby J).

- [15] I reach the same conclusion regarding the jurisdiction of the High Court to try juveniles charged with indictable offences. If section 21 of the Juveniles Act was

meant to deprive the High Court power to try juveniles charged with indictable offences, then it would have done so explicitly.

[16] Section 4(1) of the Criminal Procedure Act expressly provides the High Court with the exclusive jurisdiction to try all indictable offences. There is no express provision either in the Juveniles Act or the Criminal Procedure Act excluding power of the High Court to try juveniles charged with indictable offences. Further, section 100(3) of the Constitution confers the High Court with unlimited original jurisdiction to hear and determine any criminal proceedings under any law. For these reasons, I hold that the High Court has jurisdiction to try juveniles charged with indictable offences applying special measures provided by the Juveniles Act.



A handwritten signature in blue ink, appearing to be 'D. Goundar', with a long horizontal line extending to the right.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Legal Aid Commission for all Accused
Office of the Director of Public Prosecutions for the State