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

Criminal Appeal No. AAU 38/2004
(High Court Criminal Case No. HAC 3/004S)

BETWEEN:

SAMUELA LEDUA

Appellant

AND:

THE STATE

Respondent

Coram: **Ward, P**
Scott, JA
McPherson, JA

Hearing: **21 November 2006**

Counsel: **Appellant in person**
D.D. Gounder for the Respondent

Judgment: **24 November 2006**

JUDGMENT OF THE COURT

INTRODUCTION

[1] On 28 June 2004 after trial by the High Court (Winter J and assessors) the Appellant was convicted of one count of incest with his daughter T, then aged 14 and one count of attempting to murder her. He was sentenced to six years imprisonment for the incest to be served concurrently with ten years imprisonment

for attempted murder. He now appeals against his convictions and sentence.

BACKGROUND

[2] The Appellant was a 37 year old professional soldier, married with three daughters. Owing to unhappy differences the Appellant and his wife had been living apart for about two years. The Appellant was living at Tovata while his family were living at Livaliva Street, Makoi.

[3] It is not disputed that on 2 October 2003 the Appellant went to Livaliva Street. He had a bayonet with him. He told the court that he kept this bayonet at home in connection with his duties as an undercover operative. Four residents of Livaliva Street gave evidence. The court was told that the Appellant had been seen entering the house where his wife was staying. Shouts were heard coming from the house and the Appellant was then seen to emerge from the house carrying a knife. When the neighbours went into the house the Appellant's daughter T was found lying on a bed in the bedroom bleeding from a wound to her chest.

[4] Two doctors gave unchallenged evidence. The court was told that T was admitted to the CWM Accident Emergency Unit on 2 October. She had suffered a sharp instrument cut in the region of her second and third ribs. She was in a "state of depressed breathing which is life threatening". An emergency operation was performed. She was hospitalized for seven days and given one month's sick leave.

[5] The first police witness was an acting inspector. He told the court that on 2 October 2003 he was on duty at Nabua Police

Station. At about 10.30 a.m. the Appellant came to the police station. He came into the inspector's office carrying a red bag. He gave his name and sat down. He began to breathe heavily and then told the inspector that he had come to give himself up: he just killed his daughter T. The bag was opened and found to contain a bayonet. After enquiries were made and the CWM Hospital confirmed that they had admitted a girl named T who had been stabbed, the Appellant was locked in a cell. Shortly after he was taken to Nasinu Police Station. The inspector's evidence was not challenged.

FIRST CAUTIONED INTERVIEW

[6] The second police witness was DC Aminiasi Vuli who told the court that he had interviewed the Appellant under caution at Nasinu Police Station on 2 October 2003. At this point the Appellant objected to the admissibility of the statement. In the absence of the assessors the judge heard argument from the prosecutor and the Appellant. The Appellant expressed his objection in this way:

> "I don't want my statement to be read because the statement that I gave at the time, I gave this statement when I was in an out state of mind. It resulted after seeing the injury that happened to my daughter, the blood that came out from her and also the false allegations that have been given to me."
>
> "I want to say that what the prosecutor is saying that I did not give a good reason that I was not in a good state of mind during the time I gave my statement."

[7] The judge ruled that the statement which constable Vuli wished to read was admissible. He said:

> "During a course of pre-trial conferences convened earlier this year and again re-convened yesterday in my chamber, I discussed with unrepresented accused the nature of objection to the introduction of confessional statement. I gave him sufficient information I believe to empower him to make a decision about whether or not to object to the introduction of those statements. His position throughout those pre-trial conferences and his position stated in court today has remained the same. In respect of the cautioned interview he does not challenge the content of the statements. He does not challenge the method of interview. He does not criticise the statements as being unfairly obtained or involuntarily made. Rather he asked to place the statements he made to the police in context.
>
> In my view there are no proper grounds ... advanced to object to the reading of the interview.
>
> The matters he raises are all matters that he will, if he so chooses, address in evidence. They are not matters that go to the admissibility of the statement nor indeed did they go to the appropriateness of reading the statement to the assessors. They go more to the assessment of weight of the content and in that regard effectively the [Appellant] does not dispute questions put to him nor the answers he gave. He rather challenges the content of them. He'll have that

opportunity when he decides whether or not to give evidence."

The record of the interview was then read out.

[8] In answer to questions 70 the Appellant replied: "I then recalled all good things I used to do to T and when I left the school I was planning to kill this child."

Answer 75 was : I packed my knife

Answer 85 was: I started to run down across and jumped over the fence and entered the room. My wife and T were present. I got hold of T and put her on the bed and told her goodbye my daughter and then stabbed her chest. My wife and kids were all present and sitting on the same bed.

Answer 86 was: After I stabbed her I did not know if she was alive or dead.

Question 89 was: What happened when you reached Nabua?

Answer 89 was: I asked for inspector of police and I was taken there. I then informed him that I did something terrible and I am giving myself up to the police because I have murdered someone."

[9] After reading out the record of the interview conducted on 2 October the police officer was asked if he recalled conducting a second interview on the 5th. The Appellant then again objected

to the evidence of the interview being admitted. The basis of the Appellant's objection was very similar to that raised against the admissibility of the first interview. He argued that such was his obvious state of distress, the police should have realised that he could not fairly be interviewed. In view of the emotional turmoil which he was suffering, the answers which he gave should be discounted and the entire contents of the interview rejected.

PENAL CODE – SECTION 181

[10] After hearing the Appellant, the judge ruled that a trial within a trial would have to be held. Before, however, this took place the prosecutor very properly raised an important procedural matter. This was whether section 181 of the Penal Code had been complied with. The section reads as follows:

> "No prosecution for an offence [of incest] shall be commenced without the sanction of the Director of Public Prosecutions."

[11] In Price v. Humphries [1958] 2 All ER 725, a case involving prosecution subject to the consent of an authorised person being obtained, Devlin J explained at page 727B:

> "Proceedings in summary jurisdiction of this sort are instituted by the laying of an information and the issue of a summons and when the summons is issued that is the institution of the proceedings. The point therefore at which the consent or authority must be *proved* is at the point before the summons is instituted and it is the duty of the clerk to the justices, if application is made to him, as it generally is, for the laying of the

> information or the issue of the summons to see that the requirements of the [Act] are complied with, otherwise the summons will be a bad one." (emphasis added)

[12] Section 78 (1) of the Criminal Procedure Code (Cap. 21) provides that proceedings are commenced ("instituted"):

> "either by the making of a complaint or by the bringing before a Magistrate of a person who has been arrested without warrant."

We were not told by which of the two means the proceedings in incest were instituted against the Appellant. In Fiji we do not have lay justices presiding in court and we do not have legally qualified clerks to the justices. In these circumstances it is clear to us that the duty, whichever way the proceedings are instituted, to see that the requirements of Section 181 have been complied with rests on the Resident Magistrate before whom the accused first appears.

[13] We emphasised the word "proved" in paragraph [11]. In Dhansukhlal & Ors v. Reginam (Cr. App. 21/78 – FCA Bnd Vols. 78/256) this court explained how that proof was to be undertaken. The first ground of appeal in that case was that the consent of the Director of Public Prosecutions had to be formally proved and that the mere tendering of written directions to prosecute signed by the DPP was insufficient. In rejecting that argument the Court quoted from a further passage in Price v. Humphries (supra 727c):

"The usual practice is for the prosecution to produce the formal document about which, as I said, the clerk and indeed the justice, who issued the summons ought to satisfy himself to show that the summons was properly issued."

[14] The consequences of not obtaining consent are severe: the whole proceedings, including the committal proceedings (now transfer proceedings) are a nullity and the conviction must be quashed (R v. Angel [1968] 1 WLR 669). In our view the result must be the same if the prosecution is unable to satisfy the court that consent had in fact been obtained. (and see also Faiz Mohammed v. Reginam (1963) 9 FLR 98).

[15] In the present case we have examined the exchanges between the prosecutor and the judge prior to the ruling that the requirements of Section 181 had been satisfied. With respect, we find those exchanges somewhat confusing with a number of terms such as "charge", "information" and "formal charge" each of which has a distinct meaning, being used interchangeably. The prosecutor also told the court:

"we can say that there was no formal sanction by the DPP Office in terms of a sanction in writing that I hereby sanctioned the laying of charges but from what we can see in the exchanges that the case officer in charge and the DPP were having we could imply that there was a sanction. There was an instruction from the DPP to the officer in charge to lay the charges of incest." (sic)

[16] No copies of these exchanges appears in the record and neither is there any record of the transfer proceedings in the Magistrates' Court. No copy of any written sanction by the DPP was tendered, even though the luncheon break provided ample opportunity for a copy of any such written sanction to be obtained.

[17] The statutory requirement that the DPP sanction a prosecution for incest reflects the fact that there are especially important public policy and private considerations which must be taken into account before the decision to prosecute for this very serious offence is taken. The consequences of failing to obtain the sanction have already been explained. In our view the "usual practice" referred to by Devlin J almost amounts to a necessary requirement.

[18] We are unable to accept Mr. Gibson's suggestion that the DPP 's sanction to the commencement of the incest proceedings had in this case been satisfactorily proved. Whether or not the Appellant was prejudiced by the lack of sanction is not, in our view, a material consideration. It follows that the conviction entered in respect of count one of the amended information must be quashed.

UNSWORN STATEMENT BY THE APPELLANT

[19] At the conclusion of the prosecution case the Appellant elected to give an unsworn statement. This was quite lengthy and not always at all easy to follow. Much of it related to the charge of incest. In relation to the injuries suffered by T, the Appellant told the court:

"I decided to go down and ask T about her right position in school examinations. As I entered the room I saw my family sitting on the bed talking. T was lying down when she saw me entered the room. She made myself to sit down and I asked her to school examination result. During that conversation when she made an attempt to grab the knife from my right hand side. What I want to tell the court that she grabbed the knife at the first place and no one knows for what intention. For me I thought that she maybe trying to harm me so then I defence myself in the attempt to get hold of her hands. First I grab the seal of the blade which then slipped way and fell on the floor. Although I did my best to hold her hand but at the same time I tried to avoid injuring myself. I could see that it was not easy for me because she is holding the handle. During our scuffle that resulted in injury to her eye socket and wrist. It ended up to the point when she has been inflicted with injuries sitting on the bed before I lay her down, positioned her properly and took away the knife from her chest."

THE SUMMING UP

[20] In the course of a careful and comprehensive summing up the judge correctly explained the elements of the offence of attempted murder. The assessors were told that they had to be satisfied beyond reasonable doubt that T was injured, not accidentally or while the Appellant was defending himself, but deliberately and that he injured her by stabbing her with the intent of killing her. The judge reminded the assessors that the

Appellant had told the acting inspector that he had stabbed his daughter to death and that he had admitted stabbing his daughter when he was interviewed under caution. The judge reminded the assessors that the Appellant maintained that his apparent confession to the offences was unfair because he was tired, hungry and unstable: the assessors were told to consider the value of his confession statement in the light of that submission. They were also reminded to consider the contents of his unsworn statement.

GROUNDS OF APPEAL

[21] In July 2004 the Appellant filed 20 grounds of appeal against conviction and sentence. The sentence was said to be excessive and to have been passed without proper consideration being given to the welfare of the Appellant's family and without taking into account the fact that T made a rapid recovery from her injury.

[22] In May 2005 additional grounds of appeal were filed. The Appellant raised the question of compliance with Section 181 of the Penal Code. He also presented fresh arguments in support of his original grounds of appeal. He argued that as a military man he would not have failed to kill his daughter if in fact that had been his intention.

[23] In July 2005 a further 65 pages of closely written submissions was received. We had these submissions typed up in order to be able to give them proper consideration. The submissions are largely argumentative and repetitive. In many cases they are based on a misunderstanding of the law. Having perused all the grounds of appeal and all the arguments presented in support

we are of the view that only two substantially arguable grounds (apart from the Section 181 ground) were raised. The first is the Appellant's complaint that he was not legally represented. The second is that the confessions were wrongly admitted. These were also the only two grounds of appeal upon which the Appellant addressed us at the hearing.

[24] LACK OF LEGAL REPRESENTATION

This court has on several occasions explained the practical limits which must be imposed on the constitutional right to be legally represented. Where a person is unable to pay for his own legal representation, as was here the case, then the right to be provided with representation under the Legal Aid scheme must depend on the interests of justice so requiring (see Constitution, Section 28 (1) (d)). Although, as we observed in Asesela Drotini v. The State Cr. App. AAU 1/05, 24 March 2006:

> "it is preferable that anyone facing a serious charge should be able to be represented by counsel."
>
> "the question for the court is whether there is a possibility that [the Appellant] was adversely prejudiced by the lack of representation."

[25] The Appellant told us that he had tried to obtain counsel privately but had not been able to afford the fees. His application for legal aid was declined. On the morning of the trial the judge asked him:

"you are unrepresented. Do you want to make any application to delay the trial to enable you to get a lawyer."

The answer was:

"sir, if I can get bail to get a lawyer but if not I think its okay for me now."

[26] In his most recent written submissions to us, the Appellant suggested that had he been represented many inconsistencies in the evidence would have been exposed. He would have been advised to give sworn evidence which would have carried more weight with the assessors. The admission of the confessions would had been more effectively challenged "possibly" leading to their exclusion. In our view these submissions and the many others of a like nature advanced by the Appellant must be viewed against the context of what we find to have been a very strong, indeed overwhelming prosecution case. In those circumstances, while the Appellant would certainly have benefited from legal representation we are unable to accept the suggestion that the fact that the Appellant was not represented deprived him of the prospect of acquittal (see McInnis v. The Queen (1979) 143 CLR 575, 583).

ADMISSIBILITY OF THE CAUTIONED INTERVIEWS

[27] We have quoted the central parts of the judge's concise reasons for admitting the record of the 2 October interview in paragraph [7]. As pointed out by the judge, the Appellant did not deny giving the interview as recorded. His complaint, however, was that he was in such a poor frame of mind that his answers were

worthless. The judge's reasons for rejecting that submission are more fully set out in his reasons for admitting the record of the second cautioned interview to which the Appellant had objected on substantially the same grounds. After reminding himself that the legal burden of proving that the confession was voluntary rested on the prosecution, the judge referred to R v. Isequilla [1975] 1 All ER 77 in which it was stated (82D):

> "... under existing law the exclusion of a confession as a matter of law because it is not voluntary is always related to some conduct on the part of authority which is improper or unjustified."

Such conduct was not alleged by the Appellant in connection with the 2 October interview and therefore exclusion was not warranted on that ground.

[28] The only remaining ground on which the confession could be excluded was that the balance of the Appellant's mind was so disturbed that his answers were completely unreliable. While the Appellant was clearly much affected by what had occurred on the morning that his daughter was injured, there is nothing to suggest that he was unfit to be interviewed or that his answers were in any way unreliable. They were, in fact, largely consistent with his unsworn statement. This ground of appeal fails.

APPEAL AGAINST SENTENCE

[29] The maximum sentence for attempted murder is life imprisonment. A sentence of ten years imprisonment imposed on a man who attempts to murder his daughter with a bayonet is

clearly not excessive. We have considered the Appellant's final and moving appeal for clemency handed to us at the hearing but are firmly of the view that the appeal against sentence must be dismissed.

PROCEEDINGS IN CHAMBERS

[30] Before leaving the matter we think it right to make a further observation. In his reasons for admitting the record of the first interview the judge referred to pre-trial conferences which had been held in chambers at which he had given legal advice to the Appellant on the options available to him if and when the prosecution sought to adduce the confession evidence. This, the judge stated, he had done in order to "empower him to make a decision about whether or not to object to the introduction of those statements."

[31] Section 29 (4) of the Constitution provides that

> "the hearings of courts (other than military courts) and tribunals established by law must be open to the public..."

Section 61 of the Criminal Procedure Code provides that the Courts are to be open to the public. In Turner (1970) 54 Cr. App. R 352 the then Chief Justice stated:

> "It is of course imperative that so far as possible justice must be administered in open court."

While it is obviously sensible to hold one or more pre-trial conferences for case management purposes, we think it unwise for a judge to give an unrepresented accused legal advice in

chambers, without, apparently, any record being taken of the advice given.

RESULT

1. Appeal against conviction for incest allowed. Conviction quashed.
2. Appeal against conviction and sentence for attempted murder dismissed.

Ward P

FIJI COURT OF APPEAL

Scott J.A.

McPherson J.A.

Solicitors

Director of Public Prosecutions for the Respondent