

STATE v SAMUELA LEDUA (HAC0003 of 2004)

HIGH COURT — CRIMINAL JURISDICTION

5 WINTER J

7–11, 28 June 2004

Criminal law — sentencing — attempted murder — stabbing — most serious offence — starting point of 10 years' imprisonment — aggravating and mitigating factors —
 10 **Penal Code s 214(a).**

Criminal law — sentencing — incest — sexual relationship of father with daughter — most serious offence — starting point of 6 years' imprisonment — aggravating factors — mitigating factors — totality principle — Penal Code ss 178, 214(a).

15 Samuela Ledua (the Applicant) was convicted after trial on one count of attempted murder and one count of incest.

The Applicant admitted to the police that on one occasion, he had sexual intercourse with his daughter. Later, his daughter told her mother (the Applicant's wife) of the sexual intercourse with the Applicant.

20 The Applicant convinced his wife and daughter to withdraw the allegations against him but they did not do so. As a consequence, the Applicant went to the house where his wife and daughter resided, confronted and stabbed her daughter in the chest. The Applicant's daughter sustained a large chest wound. The Applicant surrendered and admitted the stabbing.

25 The Applicant was arrested and reconciled with his family while in prison. His daughter withdrew her allegation that they had sexual relationship and said that she was the one who caused the wound in her chest and not his father.

Held — (1) Section 214(a) of the Penal Code (the Code) imposes life imprisonment as the maximum available penalty for the offence of attempted murder. The evidence
 30 established that the Applicant freely admitted the charges to the police and even commented that he was satisfied with stabbing his daughter in the chest. Thus, the starting point for the offending was a term of imprisonment of 10 years with the following aggravating features: (a) complete lack of remorse; (b) degree of premeditation and planning in attempting to kill the Applicant's daughter; (c) the life threatening injury
 35 suffered by her; (d) the complete betrayal of trust between the Applicant and his daughter; (d) the Applicant not being a first offender; and (e) presence of previous convictions. For the aggravating features mentioned, the sentence was increased by 4 years for a total sentence of 14 years' imprisonment. However, the mitigating factors were taken into account especially the Applicant's dedicated service to the Fijian Military Forces and peacekeeping roles for other nations. Thus, the sentence was discounted by 4 years making
 40 an effective term for imprisonment of 10 years in jail.

(2) Section 178 of the Code imposes a penalty of 20 years' imprisonment on the offence of incest. However, prior to June 2003, the maximum term of the offence was 7 years' imprisonment. Thus, even if there was amendment, sentencing principles prior thereto should still be taken into account but as there was an increase, the maximum available
 45 sentence, starting points and overall duration likewise increases. Thus, the following starting points: (a) 4 years' imprisonment: where the victim is 16 and special circumstances exist with a need to keep the family unit intact particularly for counselling and therapy in situations where there has been genuine remorse showed by a contrite offender; (b) 7–10 years' imprisonment: where the victim 13–16 years old, depending on
 50 the level of harm to the child and the degree of corruption involved; (c) 10–15 years' imprisonment: where the victim is subjected to long-term sexual abuse from a young age with complete corruption of her life and development (this offending requires a starting

point of 6 years' imprisonment). As to aggravating factors, the following were considered: (a) the complete lack of remorse; (b) gross breach of trust between the father and daughter; (c) the fact that the Applicant beat his daughter up before sexual intercourse; (d) the level of corruption of the daughter as she was led into believing that her sexual relationship with the Applicant was normal to such an extent that she was completely blinded by the Applicant's influence over her life. Moreover, as to mitigating factors: (a) that the Applicant had a genuine affection to his family; (b) no previous sexual offending; (c) other contributions to society; (d) an apparent reconciliation of the family with the Applicant. Thus, the aggravating features were balanced out by the mitigating features and sentenced the Applicant to 6 years' imprisonment.

10 Sentence of 10 years imposed.

Cases referred to

State v Manieta Navonovono (unreported, HAC0017/2001L), approved.

Sikeli Koro v State [2002] FJHC 161, cited.

State v Viliame Tamani [2003] FJHC 168, considered.

15 *P. Madanavosa* for the State

Accused in person

Winter J. Samuela Ledua, by the unanimous opinion of the three assessors, you have been found guilty after trial on one count of attempted murder and one count of incest. I have concurred with these opinions and you have accordingly been convicted.

20 The facts briefly stated are these. Your marriage relationship with your wife deteriorated and you turned to your daughter for the social and physical intimacy normally reserved for a marriage relationship. You described that life is like a husband and wife.

25 You admitted to the police that on Tuesday 30 September last year you had sexual intercourse with her. You justified that to the interviewing policeman by saying:

30 We both know what was happening because once I told her that what we were doing is wrong and she replied "its okay it's too late". It's already happened. She further stated that for me to look after her education well and that we will migrate overseas. She also said that "she will then look after me there and we will be having two children when she have attained the age of twenty-seven (27)".

35 It was clear from your police interview that you had a long standing intimate relationship with your daughter. In your own mind at least you thought that secret was safe as no one would ever reveal your relationship as it was "founded both in agreement and founded in truth".

40 As for the attempted murder charge the sad fact is that your daughter unburdened herself and disclosed your relationship with her. You tried to convince your wife and daughter to withdraw that allegation but they did not do so to your satisfaction. You had little sleep and little to eat over the next few days. You became desperate over your daughter's disclosure and the loss of your relationship.

45 As an undercover military operative you had long since armed yourself with a bayonet that you kept for protection. You took this bayonet, ran with it to a house where your wife and children were sheltering. Made your way into their bedroom. Confronted your daughter and stabbed her in the chest.

50 You later surrendered to the police and told acting inspector Tui that you had stabbed your daughter to death. You gave us the reason you stabbed her, an allegation by your daughter that she had been raped by you. You commented that you were quite satisfied with what you had done.

Your daughter was rushed to hospital. It was discovered she had a large chest wound. She survived your attack.

You were arrested and held in prison on remand awaiting trial. While in prison you and your family reconciled. Your daughter recanted her allegation that you had a sexual relationship with her and said that the knife wound in her chest was somehow caused solely by her and not you.

Given these circumstances the State could not call either your wife or your daughter. They were however available witnesses. They were not called by you at the trial. You have sought to explain why in your mitigation.

10 I have to sentence you on the basis of the facts displayed in evidence not the facts as you or your family would wish them to be.

In accordance with that principle the simplest sentencing background to this matter is that you had a sexual relationship with your daughter that you knew was wrong and forbidden. Your daughter told the police. The fact that she broke your unspoken bond angered you; rather than live with that shame you decided to kill her.

These facts speak for themselves. No amount of reconciliation or late conversion can take away the stain of your ugly and deplorable actions.

20 **Background**

You are a mature man 37 years old. You are married and have three girls aged 8, 11 and 15 attending primary and secondary school. You are an articulate and intelligent man. You joined the Republic of Fiji Military Forces as a soldier on 13 November 1987 and have served a total of 17 years to date. That service has been with merit. You have served in peacekeeping forces overseas. You are a trained intelligence operative working undercover in the Suva community.

You have two previous violence-related convictions.

Your mitigation

30 You provided the court last week with a comprehensive letter written in the Fijian language which has been translated by the court. This letter was supplemented by correspondence from the Fijian Prison Fellowship, a report from your commanding officer in the Army and letters from your wife and children. I have considered all of these materials.

35 **The attempted murder**

Section 214(a) of the Penal Code provides life imprisonment as the maximum available penalty.

In the *State v Manieta Navonovono* (unreported, HAC0017/2001L) my brother Govind J in sentencing an accused on an attempted murder charge emphasised that apart from punishment for this crime the courts must sternly sentence offenders to deter others. I agree.

This is a most serious offence. There is no mitigating remorse. You freely admitted these charges to the police. You even commented that you were satisfied with what you had done in stabbing your daughter in the chest. That is a terrifying indictment on your character.

45 The starting point for this offending in my opinion is a term of imprisonment of 10 years.

The aggravating features are:

- 50 (1) Your complete lack of remorse.
- (2) A degree of premeditation and planning in your attempt to kill your daughter.

- (3) The life threatening injury suffered by her.
- (4) The complete betrayal of trust between you and your daughter, you should have been her protector not her killer.
- (5) You are not a first offender. You have previous convictions.
- 5 Against these aggravating features are the mitigating factors:
- (1) You have served your country well. You are a decorated soldier.
- (2) Although not remorseful you couch your mitigation in terms of your children's needs and not your own selfish desire to avoid imprisonment.
- 10 That small comfort stands to your credit.
- Although not determinative of sentence I take into account the heartfelt plea of your daughter victim that you not be sent to jail. This plea is supported by her two younger sisters and your wife. While I accept their pleas for clemency they must realise that my obligations go beyond adherence to their needs only.
- 15 For all of the aggravating factors I consider the sentence should be increased by a further 4 years making a sentence of 14 years' imprisonment. However, against that total term I must take into account the mitigating features and properly acknowledge all of them but especially your dedicated service to the
- 20 Fijian Military Forces and peacekeeping roles for other nations. Taking the mitigating features into account I would discount the sentence by 4 years making an effective term for imprisonment of 10 years in jail.

The incest

- 25 Section 178 of the Penal Code now provides a penalty of 20 years' imprisonment for incest. Prior to June of 2003 the maximum term for offences of this kind was 7 years' imprisonment.

The State have indicated by increasing the penalty that this is a most serious offence. Sentencing principles applicable prior to the amendment should still be

30 taken into account but as a result of the increase in the maximum available sentence starting points and overall duration of sentences will naturally increase.

My sister Shameem J had occasion to consider sentencing tariffs for incest in various appeals including *Sikeli Koro v State* [2002] FJHC 161 and *State v*

35 *Viliame Tamani* [2003] FJHC 168 (*Tamani*), a State Appeal found in Criminal Case 007 of 2003S.

In *Tamani* at 5 of her judgment her Honour after consideration of the English Court of Appeal in *Attorney-General's Reference (No 1 of 1989)* [1989] 1 WLR 1117; [1989] 3 All ER 571; (1990) 90 Cr App Rep 141 laid down

40 guidelines for sentencing in such cases which she considered to be useful in Fiji.

At p 7 her Honour said:

Where the victim is aged between 13 to 16 years, sentences between 5 years and 3 years imprisonment would be appropriate depending on the level of harm to the child and the degree of corruption involved. Where the victim is under the age of 13 a term

45 of 6 years imprisonment would be appropriate. The younger the victim the more likely it is that her will was overborne and the more serious the offending.

Her Honour did comment that where the victim was over the age of 16 years and in special circumstances sentences could range from a nominal penalty to

50 3 years' imprisonment depending on whether there was a degree of force and consideration such as the need to keep the family in tact.

In the light of the statutory amendment I would suggest the following starting points:

- (1) Where the victim is over the age of 16 and special circumstances exist with a need to keep the family unit intact particularly for counselling and therapy in situations where there has been genuine remorse showed by a contrite offender. Four years' imprisonment.
- (2) Where the victim is aged between 13 to 16 years sentences should find a starting point of 7 to 10 years' imprisonment, depending on the level of harm to the child and the degree of corruption involved.
- (3) Where the victim is subjected to long-term sexual abuse from a young age with complete corruption of her life and development. Offenders must expect a starting point of 10 to 15 years' imprisonment.

In my view this offending requires a starting point of 6 years' imprisonment. I find that you had a long standing intimate relationship with your daughter.

- 15 However, you are to be sentenced for one act of incest.

Aggravating the offending is:

- (1) the complete lack of remorse;
- (2) gross breach of trust between the father and daughter;
- (3) the fact that you beat your daughter up before you had sexual intercourse with her; and
- (4) the level of corruption of the daughter victim as she was led into believing that her sexual relationship with you was normal to such an extent that she is still now completely blinded by your influence over her life.

- 25 In terms of mitigating features it is clear:

- (1) that you have a genuine affection for your family;
- (2) no previous sexual offending;
- (3) other contributions to society; and
- (4) an apparent reconciliation by your family with you.

- 30 The aggravating features, in my mind, are balanced out by the mitigating features. I, therefore, order an effective sentence of 6 years' imprisonment.

The totality principle

- 35 This offending, although part of a continuing course of conduct, related to two quite separate crimes. You had sex with your daughter then you tried to kill her. I am obliged to consider sentencing you consecutively for each crime.

- 40 I would normally have done so, but for the heartfelt pleas of your family and the hope that your 8, 11 and 15-year-old may have some realistic prospect of maintaining a relationship with you into their adult lives. I have decided that for them but not you consecutive sentences would be excessive in total. I accordingly order that both sentences be served concurrently. The result is that you go to jail for 10 years.

Sentence of 10 years imposed.