

**IN THE SUPREME COURT OF THE FIJI ISLANDS**

**AT SUVA**

**CRIMINAL APPEAL CAV0004 OF 2007**

(Fiji Court of Appeal No AAU 38/2004)

**BETWEEN:**

**SAMUELA LEDUA**

**Petitioner**

**AND:**

**THE STATE**

**Respondent**

**Coram:**

**The Hon Justice Keith Mason, Judge of the Supreme Court  
The Hon Justice Robert French, Judge of the Supreme Court  
The Hon Justice Mark Weinberg, Judge of the Supreme Court**

**Hearing:**

**20 February 2008**

**Counsel:**

**Petitioner in Person  
A Driu and S Puamau for the Respondent**

**Date of Judgment:**

**Monday, 25 February 2008, Suva**

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**JUDGMENT OF THE COURT**

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**Introduction**

1 Samuela Ledua seeks special leave to appeal against a decision of the Court of Appeal, which dismissed his appeal against a conviction for attempted murder. Mr Ledua has raised a number of grounds in support of his petition. For the reasons that follow we were of the view at the hearing that special leave should be granted on the question whether his

conviction should be quashed on the basis that he was not legally represented at trial. Special leave was also granted on the related ground whether the decision of the Court of Appeal quashing his conviction on a count of incest, which was tried at the same time as the attempted murder charge, had the consequence that the admission of evidence relating solely to that count caused the trial on the count of attempted murder to miscarry. We now publish our reasons for the orders made.

2 The Court is of the view that the legal representation issue raises a matter of general public importance. There are obviously practical and economic limitations upon the implementation of any general right to legal representation for persons facing serious criminal charges. The Court therefore will be seeking wider information relevant to those matters from the prosecutor and also from the Legal Aid Commission. The petitioner, who was unrepresented at trial and in the Court of Appeal, should be represented in this case so that the Court has the benefit of full argument on these important issues.

3 The Court decided that, special leave having been granted, the appeal should be stood over for hearing later this year.

#### **Factual and procedural background**

4 On an amended information presented by the Acting Director of Public Prosecutions on 24 February 2004, Samuela Ledua was charged with the following offences:

“1. **INCEST**: *Contrary to section 178(1) of the Penal Code, Cap 17.*

#### ***Particulars of Offence***

***SAMUELA LEDUA on the 30<sup>th</sup> day of September 2003, at Nasinu in the Central Division, had carnal knowledge of TALICA WAQA LEDUA who was to his knowledge his daughter.***

2. **ATTEMPTED MURDER**: *Contrary to Section 214(a) of the Penal Code, Cap 17.*

#### ***Particulars of Offence***

***SAMUELA LEDUA on the 02<sup>nd</sup> day of October 2003 at Nasinu in the Central Division, attempted unlawfully to cause the death of TALICA WAQA LEDUA.***”

5 After a trial in the High Court before Winter J and assessors, Mr Ledua was convicted, on 28 June 2004, of the count of incest with his daughter, who was then aged 14, and of her attempted murder. He was sentenced to six years imprisonment for the incest offence to be served concurrently with ten years imprisonment for the offence of attempted murder.

6 On 15 July 2004 Mr Ledua lodged an appeal against the convictions and against the sentences in the Fiji Court of Appeal. His letter set out some 20 grounds of appeal, some of which overlap. On 24 November 2006 the Court of Appeal allowed his appeal against the conviction for incest and quashed the conviction. His appeal against the conviction and sentence for attempted murder was dismissed. The conviction for incest was quashed on the basis that it had not been satisfactorily proved that the requirements imposed by s 181 of the Penal Code Cap 17 had been met. That section reads:

***“No prosecution for an offence [of incest] shall be commenced without the sanction of the Director of Public Prosecutions.”***

7 The Court of Appeal set out the factual background to the case. Mr Ledua was a 37 year old professional soldier, married with three daughters, but separated from his wife and family. It was not disputed that on 2 October 2003 he went to the residence occupied by his wife and daughters. He carried a bayonet. He was seen entering the house. Shouts were heard from the house and Mr Ledua was seen leaving the house carrying a knife. His daughter was found lying on a bed in the house bleeding from a wound to her chest. She was taken to hospital and emergency surgery performed. She was hospitalised for seven days. There was evidence from a police witness that on the same day, 2 October 2003, Mr Ledua came to the police station carrying a red bag and told the witness that he had come to give himself up as he had just killed his daughter. The bag was found to contain a bayonet. He was then taken into custody. The evidence of the police witness was not challenged.

8 The reasons for judgment of the Court of Appeal recorded that in July 2004 Mr Ledua filed 20 grounds of appeal against conviction and sentence. Additional grounds were filed in May 2005 at which time he first raised the question of compliance with s 181 of the Penal Code in relation to the incest conviction. In July 2005 a further 65 pages of closely written submissions were received. They were characterised by the Court of Appeal as largely

argumentative and repetitive.

9 The Court of Appeal took the view that there were only two substantially arguable grounds raised, apart from the s 181 ground relating to the incest charge. The first was Mr Ledua's complaint that he was not legally represented. The second was that confessions he made to the police were wrongly admitted in evidence. These were the only grounds of appeal upon which Mr Ledua addressed the Court of Appeal at the hearing.

10 In relation to the lack of legal representation, the Court of Appeal was told that Mr Ledua had tried to obtain counsel privately but had not been able to afford the fees. His application for legal aid had been declined. On the morning of the trial the judge asked whether he wanted to make any application to adjourn the trial to enable him to get a lawyer. He is recorded as having said:

***"Sir, if I can get bail to get a lawyer but if not I think its okay for me now."***  
[sic]

Mr Ledua denied, in this Court, that this meant he was happy to proceed to trial without representation.

11 Mr Ledua submitted to the Court of Appeal 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. He also contended that the admissibility of the confessions would have been challenged more effectively, possibly leading to their exclusion. The Court of Appeal viewed these and many other grounds advanced by Mr Ledua in the context of what it found to have been "a very strong, indeed overwhelming prosecution case". The Court of Appeal was unable to accept the suggestion that the fact he was not represented deprived him of a prospect of acquittal.

12 In connection with the admissibility of the records of interview, Mr Ledua did not deny giving the interviews as recorded. He contended, however, that his state of mind was such that his answers were worthless. The trial judge rejected that submission on a *voir dire*. Mr Ledua evidently did not allege any improper or unjustified conduct going to the voluntariness of his confession. On the question whether the balance of his mind was so

disturbed that his answers were completely unreliable, the Court of Appeal said (at [28]):

***“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.”***

13 In relation to the appeal against sentence, the Court of Appeal held shortly that a sentence of ten years imposed on a man who had attempted to murder his daughter with a bayonet was “clearly not excessive”. Neither the trial judge nor the Court of Appeal appears to have taken account of the fact that Mr Ledua had spent some nine months in custody awaiting trial.

14 An application for special leave to appeal to this Court was filed on 30 November 2006. Three principal appeal grounds were identified in a letter from Mr Ledua to the Registrar. They were:

***“1. That the Judge erred in Law and fact in chambers when he wanted to empower the accused to represent himself.***

***2. That the trial Judge erred when he misdirected the assessors on his summing up.***

***3. That the FCA erred in fact that the statement of October 2<sup>nd</sup> was taken without any misconduct of the Police.”***

These were considerably elaborated in written submissions. In the course of those submissions Mr Ledua indirectly raised the general ground whether the trial judge should have proceeded with the trial at all given the absence of legal representation. He referred to the decision of the High Court of Australia in *Dietrich v The Queen* (1992) 177 CLR 292. His reference to that case raised the question whether there is any general principle applicable in Fiji that a person should not go to trial on a serious criminal charge without legal representation. Plainly such a principle, if implemented, could have serious practical implications for the criminal justice system in this country as there are a significant number of offences which carry long maximum terms of imprisonment, including life imprisonment.

15 In this case, despite the strength of the prosecution evidence against Mr Ledua, there are real questions about the prejudice he may have suffered as a result of the lack of legal

representation. Of particular significance was the role of evidence relating to the incest charge which was tried concurrently with the charge of attempted murder. Competent counsel might well have:

- (i) successfully challenged the validity of the incest charge on the basis of want of prior sanction by the Director of Public Prosecutions;
- (ii) alternatively, sought a separate trial on the incest charge;
- (iii) in either event, limited the extent of the evidence about a sexual relationship between Mr Ledua and his daughter so that only such evidence as was relevant to the offence of attempted murder was offered. As it was, the Prosecution case did not make clear the connection, if any, that was said to exist between that sexual relationship and the alleged attempted murder.

This is not to say that any of these matters was critical to the outcome of the trial, or that this Court would necessarily be persuaded to quash the conviction for attempted murder on that basis. Suffice it to say that the question whether, and in what circumstances, a criminal trial should be regarded as inherently unfair or unsafe where there is no legal representation for an accused, is a question of general legal importance. It also raises a substantial question of principle affecting the administration of civil justice.

#### **Whether special leave should be granted**

16 In considering whether special leave should be granted the Court must bear in mind the provisions of s 7(2) of the *Supreme Court Act 1998* which provides:

***“In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless –***

- (a) a question of general legal importance is involved;***
- (b) a substantial question of principle affecting the administration of criminal justice is involved; or***
- (c) substantial and grave injustice may otherwise occur.”***

17 The Court is satisfied that the criteria in s 7(2)(a) and (b) are satisfied in connection with the issue of legal representation and the use of evidence relating to the incest offence at the trial. The Court therefore proposes to grant special leave to appeal on the question whether the conviction for attempted murder should be quashed because the petitioner was

not legally represented at trial. This ground will extend to the related question about the effect of the admission of evidence relating to the incest charge.

18           There is an ancillary issue about whether the sentence imposed upon the petitioner took account of time he had spent on remand awaiting trial. Had he been legally represented this is a factor which might well have been pressed upon the trial judge. In any event, the Director of Public Prosecutions concedes that no allowance was made in the case for the time on remand, and that this amounted to appellable error.

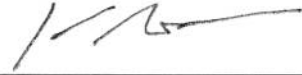
19           We are also of the view that given the public importance of the matter, Mr Ledua should be legally represented when the appeal comes on for hearing. We will also invite the parties to provide information and make submissions to the Court about the practical issues concerning the application of the *Dietrich* principle or any modified variant of it in Fiji. In that connection we will direct that a copy of the orders we make be served on the Legal Aid Commission which will be given leave to appear as *amicus curiae* to assist the Court in relation to the provision of such information.

**Orders:**

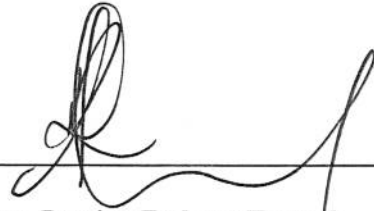
- A.    Special leave to appeal is granted, limited to the following grounds:
  - 1.    Whether the conviction should be quashed on the basis that the petitioner was not legally represented at trial.
  - 2.    Whether the decision of the Court of Appeal quashing the petitioner's conviction on the count of incest has the consequence that the admission of evidence relating solely to that count caused the trial on the count of attempted murder to miscarry.
  - 3.    Whether the sentence imposed upon the petitioner properly took account of the time spent by the petitioner in custody pending trial.
- B.    The Court recommends that, given the public importance of the issue relating to the right to legal representation, the petitioner be afforded representation on the hearing of the appeal.
- C.    The parties are at liberty to provide information and make submissions to the Court on the practical implications and limitations related to the application of the *Dietrich* principle or modification thereof in Fiji.
- D.    A copy of this order is to be served on the Legal Aid Commission and the

Commission is given leave to appear as *amicus curiae* to assist the Court in relation to C.

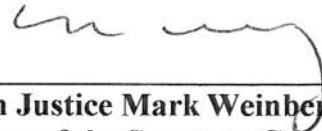
E. The appeal be stood over for hearing at a date to be fixed.



**Hon Justice Keith Mason**  
**Judge of the Supreme Court**



**Hon Justice Robert French**  
**Judge of the Supreme Court**



**Hon Justice Mark Weinberg**  
**Judge of the Supreme Court**

**Solicitors:**

**Petitioner in Person**  
**Office of the Director of Public Prosecution**