PENIASI SERUKALOU

A

v.

THE STATE

[HIGH COURT, 1990 (Fatiaki J) 12 December]

Appellate Jurisdiction

B

Sentence- incest- guidelines- aggravating and mitigating factors- Penal Code (Cap 17) Section 178 (1).

The Appellant pleaded guilty in the Magistrates' Court to committing incest with his daughters whom he had not known since they were aged 11 months. On appeal against the sentence imposed the High Court discussed the matters which
C a sentencer should take into account when dealing with the offence of incest and HELD: that the sentence imposed was manifestly excessive and wrong in principle.

Case cited:

Attorney-General's reference (1990) Cr. App. R 141

D Appellant in Person
S. Senaratne for the Respondent

Appeal against sentence imposed in the Magistrates' Court.

Fatiaki J:

E On the 26th of June 1989 the appellant was charged with 3 counts of incest contrary to Section 178 (1) of the Penal Code (Cap 17) involving his two 18 year old twin daughters. He initially pleaded not guilty to the offences but finally changed his plea to guilty on the 14th of December 1989. He was convicted and sentenced to concurrent terms of 40 months imprisonment on each count.

F The facts outlined by the prosecution was that on the 1st of April 1970 the appellant's *defacto* wife gave birth to twin daughters. Sometime thereafter it appears the family broke up until August 1988 when the appellant met his daughters in Suva.

In that month whilst both daughters were staying with the appellant he had sexual
G intercourse with them both over a period of 2 weeks; several times with one and once with the other.

In mitigation the appellant said in relation to the 2nd complainant.

> "Didn't know that complainant (2) was in Suva. She called me at Tamavua. Asked her why she came to Suva. She replied that she was looking for me. We then went where I work. Went to a parked

motor vehicle.

> While I was there - Sala (complainant 2) said she had a stomach pain. After massaging her she said my hand should go lower. She told me to come closer. She told me that her mother said to her for her not to call her Father. I touched her vagina. Invited me to have sex. We then had sex. Repented later."

Furthermore although nothing was said by the Appellant in mitigation of the incidents involving the 1st Complainant, it was clear from the prosecution's outline of facts that the Complainant had gone to an aunt's home in Lami after the 1st incident and returned (one may well ask 'what for?') to the appellant 2 days later and then only did the second incident occur. Needless to say it was not she who complained to the aunt but her twin sister the second Complainant,

The learned magistrate in sentencing the appellant said:

> I have taken into account all your plea of guilty and whatever was said in mitigation. Most of it aren't relevant. Deterrent is called. Custodial sentence is a must.

With respect the above-quoted claim by the appellant unchallenged as it was, cannot be dismissed as irrelevant.

Furthermore with that attitude it is perhaps not surprising that the various matters set out above relating to the 1st Complainant did not strike the learned magistrate as significant.

That is not to say that consent is a defence to a charge of incest which it clearly is not but should it then be completely ignored when considering sentence where the victim is 18 years of age? I would venture to think not.

The English Court of Criminal Appeal in a Reference by the Attorney General reported in (1990) 90 Cr. App R. 141 laid down the following sentencing guidelines in relation to offences of incest where there had been no plea of guilty :

" 1. <u>Girls over 16</u>

> Three years imprisonment down to a nominal penalty would be appropriate depending on the one hand whether force was used and the degree of harm, if any, to the girl and on the other hand, the desirability, where it existed, of keeping family disruption to a minimum. The lower the degree of corruption, the lower the penalty."

The Court also recognised the following aggravating and mitigating features of the offence :

" 4. Aggravating features

(i) Evidence that the girl suffered physically or psychologically from the incest.

(ii) If the incest continued at frequent intervals over a long period of time.

(iii) If the girl had been threatened or treated violently by or was terrified by the father.

(iv) If the incest had been accompanied by perversions abhorrent to the girl, i.e. buggery or fellatio.

(v) If the girl had become pregnant by reason of the father failing to take contraceptive measures.

(vi) If the defendant had committed similar offences against more than one girl.

5. Mitigating features

Possible mitigating features were, inter alia,

(a) a plea of guilty;

(b) where there has been a genuine affection on the defendant's part rather than an intention to use the girl as an outlet for his sexual inclinations;

(c) where the girl had previous sexual experience;

(d) where the girl had made deliberate attempts at seduction; and

(e) where a shorter term of imprisonment for the father might be of benefit to the victim or the family."

In the light of the above features it is clear that the learned magistrate did not receive very much assistance or information to assist him in assessing the appropriate sentence and indeed on the basis of the guidelines enumerated the sentence passed in this case was certainly at the upper limit being in excess of 3 years.

At the hearing of the appeal the appellant provided the Court with some additional information. He was 49 years of age, a first offender and has already served almost a year in prison. He realises the wrong he has done and is remorseful.

He said that he had parted from his daughters when they were just 11 months old and he saw them next when the offences were committed. He had not known them and had little parental feelings towards them. He had two other children

from a legal marriage whom he was supporting with his mother. At the time these offences were committed he was separated from his wife. His daughters no longer live with him and there is no likelihood of repetition.

Viewing this case unclouded by the natural abhorrence that one tends to hold against such offenders, this Court is in no doubt that the sentences imposed by the magistrate are harsh and excessive in all the circumstances of the case.

Accordingly the sentences are quashed and in substitution therefor I impose sentences of 21 months imprisonment on each count to be served concurrently with effect from the 14th of December 1989.

(Appeal allowed; sentence varied.)