

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

CRIM. NO. S.

BETWEEN : THE POLICE

Informant

A N D : ANTON AH BEN

Defendant

Counsel : K. Latu for Prosecution  
K.M. Sapolu for Defendant

Hearing : 24 June 1993

Decision : 25 June 1993

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DECISION OF SAPOLU, CJ.

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The accused is charged under section 53 of the Crimes Ordinance 1961 that at Letava in May 1992 he had sexual intercourse with the complainant who was between the age of 12 and 16 years and not being his wife.

In a case of this kind, the Court must bear in mind the warning that it can be dangerous and unsafe to convict the accused solely on the uncorroborated testimony of a complainant. The Court, however, may still convict the accused of the charge solely on the uncorroborated testimony of the accused, but if it does so, the Court must still bear in mind the warning I have mentioned.

The charge in this case consists of 2 essential ingredients which the prosecution must prove beyond reasonable doubt. The first of these 2 ingredients is that the accused must have had sexual intercourse with the complainant. Sexual intercourse, of course, is complete upon penetration of the complainant's private part by the accused's private part. The second ingredient is the age of the complainant which must be between 12 and 16 years.

I will refer in detail later on in this decision to the evidence, suffice at this stage to refer specifically to those parts of the evidence which are directly related to the ingredients of the charge. As to the first ingredient, namely, sexual intercourse, the complainant says that on a night in May 1992, she had sexual intercourse with the accused at Vailima on the back seat of the accused's car. The accused admitted to the Police that he had sexual intercourse with the complainant and that admission was tendered in evidence. In his own evidence before this Court, the accused again admits that on a night in May 1992, he had sexual intercourse at Vailima with the complainant on the back seat of his car. The admissions of sexual intercourse made by the accused to the Police and to this Court are evidence which corroborate the testimony of the complainant that sexual intercourse occurred between herself and the accused. From this evidence, the Court is satisfied that the prosecution has proved the first ingredient of the charge. As to the second ingredient, namely, that the complainant was between the age of 12 and 16 years at the time she had sexual intercourse with the accused, the complainant says she was 15 years of age at the time, and she gives her date of birth as the 22nd of March 1977. The complainant's natural mother was called to give evidence, and she testifies that the complainant was born at Motootua Hospital on the 22nd of March 1977. She also produced the complainant's birth certificate which shows the complainant's date of birth as the 22nd of March 1977. On this evidence, the Court is also satisfied that the complainant was between the age of 12 and 16 years at the material time and the prosecution has therefore also proved the second ingredient of the charge.

The real issue in dispute in this case as demonstrated by oral submissions from counsel at the conclusion of the evidence is that of consent. It appears to the Court the question of consent has arisen as an issue of this case because of the nature of the defence anticipated by the prosecution that the defence will raise and which the defence did raise. That defence is provided in section

53(4) of the Crimes Ordinance 1961 and it would be helpful to set out that provision:

"53(4) It is a defence to a charge under this section if the person charged proves that the girl consented, that he was under the age of 21 years at the time of the commission of the act, and that he had reasonable grounds to believe, and did believe, that the girl was of or over the age of 16 years:  
" Provided that proof of the said facts shall not be a defence if it is proved that the consent was obtained by a false and fraudulent representation as to the nature and quality of the act".

To clarify the issue of consent and how it is to be decided, the Court will now refer to the conflicting versions of the two key players, namely the complainant and the accused. According to the complainant's version of what happened, she knew of the accused before this incident because he used to drop off before work and picked up after work from her sister, Tamali'i Marfleet's ice cream shop in Apia one Judy Kopa, a girl who used to work at her sister's ice cream shop. On the night before this incident, she was with Judy at the Tijuana Nightclub when she met with the accused. The complainant then wanted to go to the Mount Vaea Nightclub and she left the Tijuana Nightclub with the accused in the accused's car. She went with the accused that night to Mulinuu and later on that night she was dropped off at home by the accused together with Judy and another person.

On the following night, which was a Friday night, the complainant attended the St Mary's College Concert called the "Wizard of Oz" which was held at the Feiloa'imauso Hall in Apia and she acted a role in that Concert. After the Concert the complainant met the accused whom she says was standing outside the Feiloa'imauso Hall with another boy. The accused asked the complainant to take her home but she said someone else was picking her up. When she could not find that person she returned to the accused and agreed for him to take her home. They walked to Cam's video shop where the accused's car was parked and she got into the back seat and the accused hopped into the driver's seat. When they came a short distance from the complainant's home, where it was

dark the complainant says, the accused stopped the car. There was a neighbour's house close by but it was deserted. He locked the doors of the car from the front, got into the back seat and talked with the complainant and the accused told her that he loved her. At that time the complainant's back was towards the door on her side. The accused then kissed the complainant but she turned her head away. Later he pulled her down, parted her legs and pulled down her shorts and panties. He then had sexual intercourse with the complainant. She says she did not consent to such sexual intercourse. She struggled and tried to push him away. She also tried to scream but his mouth was on hers. The doors and windows of the car were locked and so she could not scream. In cross-examination she says that the distance from where sexual intercourse occurred was about the distance from one corner of the courtroom to the door at the back going towards courtroom number 2. She also says in cross-examination that this incident between herself and the accused at the back seat of the car lasted for about 2 hours from 11.30pm to 1.30am and the accused's mouth was not on hers during all that time. After sexual intercourse, she came out of the car and went home. She found her brother-in-law, a niece and her nephews at home and she then went and had a shower. The complainant also says that she did not tell anyone about this incident as she was scared that her father might know about it and kill her or the accused. She was also ashamed of what had happened. However, 2 months later, her sister Ivapene learnt about this incident from Judy as the accused had told Judy that he had had sex with the complainant. So she told her sister Ivapene what had happened as she trusted her sister. In September, the complainant's mother says that she asked the complainant if she was sick as the complainant appeared to be growing fat but the complainant replied she was not sick. So the mother took the complainant to a doctor who confirmed that the complainant was pregnant. From that time the complainant ceased attending school at St Mary's College. In October, when the complainant's sister Tamali'i learnt that the complainant was pregnant she asked the accused

to pay the airfares of the complainant to go and give birth to her child in Australia. When the accused made no payment within a week, Tamali'i then lodged a complaint with the Police. Tamali'i also says she would not have lodged the complaint with the Police if the accused had paid. The shorts and top that the complainant was wearing at the time of this incident were also produced in evidence as exhibits.

The accused on the other hand says he left school at St Joseph's College at the end of 1991 and he was 18 years of age at the time of this incident. He gave as his date of birth the 21st of November 1973. His natural mother was called by the defence to give evidence and she confirms the accused's date of birth as the 21st of November. She also produced the accused's birth certificate to confirm his date of birth.

Now the accused says that on Thursday night, when he met with the complainant at the Tijuana Nightclub she was wearing a mini-skirt and top. He later that night went with the complainant to Mulinu'u after driving around town and had a talk inside his car near the memorial stone opposite the headquarters of the HRPP. He asked the complainant to be his girlfriend and she replied it was alright. They also kissed. They then made a plan to meet at the Feiloa'imauso Hall the following night. They did after the Concert which was held there. They then drove to Mulinu'u where the coral fill operation is. They parked the car there, had a kiss on the back seat and then sexual intercourse followed. He then drove the complainant to Vailima and dropped her off at her home.

About a week later, he went in his car to the complainant's home at midnight according to a plan he had made with the complainant for him to come that night at 12 o'clock to meet with the complainant. He parked his car before the entrance of the driveway to the complainant's <sup>home.</sup> A short time afterwards, the complainant came out from what she later told him to be a guest room which was next to the complainant's family home. The complainant was wearing shorts

and a top and she hopped in the front and they had a talk. After what appeared a short while, they went to the back seat. They kissed and later he removed her shorts and panties while she removed her bra. They then had sexual intercourse. At that time, the accused says the complainant was just lying on her back and embraced him. He also says that the complainant never struggled or tried to scream at any stage. After sexual intercourse which did not last for more than 5 minutes, the complainant put on her clothes, then they kissed again and she went home. The accused also says that the doors and windows of his car are not power-operated but manually operated. The window on his side was also down at the time he had sexual intercourse with the complainant and the doors were not locked.

Now the complainant says in her evidence that she did not have any pre-arranged plans to meet with the accused at any time. It should also be mentioned at this stage that the witness Judy Kopa, called by the defence, says that on the night she was with the accused and the complainant at the Tijuana Nightclub, the complainant asked her for the accused to take her (the complainant) to the Mount Vaea Nightclub. She told the complainant not to go but eventually the complainant left the Tijuana Nightclub with the accused and they were absent for about 2 hours.

The accused goes on to say in his evidence that he thought the complainant was about his age because of her clothing, her personality, the way she talked and the way she kissed him when they had a kiss. He also thought that way because she met the complainant in a Nightclub. However, he did mention that they never discussed the question of the complainant's age. In my view this part of the accused's evidence must be considered in view of the circumstances of the accused, whether he had reasonable grounds to believe that the complainant was about his age and whether he actually believed that the complainant was about her age.

Now after the sexual intercourse at Vailima, the accused did not meet the complainant again. It was not until October that he was confronted by Tamali'i

who told him the complainant was pregnant and for him to pay the complainant's airfares to go to Australia to give birth to her child.

Now in assessing the credibility of the complainant, the Court must bear in mind the warning that it can be dangerous and unsafe to convict solely on the uncorroborated testimony of the complainant. The Court may still convict provided that in so doing it bears in mind the warning I have mentioned.

On the disputed issue of consent, the Court would inevitably rule out the defence raised under section 53(4) of the Crimes Ordinance 1961 if it accepts the evidence of the complainant that she did not consent to having sexual intercourse with the accused. That means the accused in this case would therefore have to be convicted as no other defence has been raised on his behalf.

Now the evidence by the complainant on lack of consent is uncorroborated. I find it difficult to accept the evidence of the complainant that she did not consent to sexual intercourse for several reasons. If the alleged incident occurred so close to her own home, it would require a male of very great courage to force a girl to have sexual intercourse with him against her will so close to the girl's home when there is the possibility that a member of the girl's family might be around, even late at night, and raise the hue and cry. The clothes of the complainant which were produced in evidence also show no signs that a struggle ensued between the accused and the complainant. She also did not immediately complain to the members of her family who were at home when she got home and found her brother-in-law, a niece and her nephews. The accused was also prepared to make his car parked in the vicinity of the Court for inspection to confirm that it was manual and not power operated and therefore the back doors and windows could not have been locked from the front at the time of this incident. This incident also lasted for about 2 hours and the accused's mouth was not on the complainant's mouth during all that time so that she could have screamed for help from her nearby family if she had wanted to. However, she did not scream.

For all those reasons and bearing in mind the warning that it can be dangerous to convict solely on the uncorroborated testimony of the complainant, I have decided not to accept the evidence of the complainant that she did not consent. As to the question of the complaint made to the Police, I rule that on the evidence that complaint is not admissible to show consistency between her conduct at the time of the complaint and the testimony she gave to the Court. It is clear that the complaint was not made at the first reasonable opportunity that was available to the complainant. The complaint to the Police was made about 5 months after the event and the evidence does not persuade this Court that that was the first reasonable opportunity available to the complainant. It also appears that it was Tamali'i and not the complainant who was instrumental in lodging the complaint with the Police.

As for the remaining matters in relation to the defence raised, I am satisfied on the evidence that the accused believed and had reasonable grounds for believing that the complainant was about his age, I am reinforced in this conclusion by my own observations of the demeanour of the complainant in the witness stand and the intelligent, fluent, articulate and mature manner in which she gave her evidence.

Accordingly, I find that the defence raised has been proved. The charge is therefore dismissed.

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CHIEF JUSTICE