

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT A'IA

CRIM. NO. S.306/95

BETWEEN:     THE POLICE

Informant

A N D:     FORATI AIGA of Saleimoa

Defendant

Counsel:     F Tufuga for prosecution  
              Accused in person

Judgment:   4 March 1996

---

JUDGMENT OF SAI'OLU, CJ

---

The accused is appearing for sentence on the charge of having sexual intercourse with a girl over the age of 12 years and under the age of 16 years not being his wife which carries the maximum penalty of seven years imprisonment. He is a 23 year old single male from the village of Levi, Saleimoa, and has pleaded guilty to the charge against him.

The victim was 14 years of age at the time the offence was committed on her. In August 1995 when this offence was committed the accused and the victim met at a village not far from the village of the victim. They strolled together along the road and when they came to a bush area they left the road for a private talk in the bushes. It was getting dark at the time. They heard the victim's

mother calling for her but the victim did not respond. The accused and the victim then went to the copra shed of another family and had sexual intercourse and slept the night there. Those are the essential facts of this matter as set out in the prosecution's summary of facts which was confirmed by the accused. The accused also told the Court that he first became friends with the victim in August 1995 which was when this incident took place.

In *Attorney General v Paopaoalii Sagato Ioane*, C.A. 7/93, judgment delivered on 31 March 1994 which was also concerned with the charge against an accused of having sexual intercourse with a girl over the age of 12 years and under the age of 16 years not being his wife, the Court of Appeal in a judgment delivered by Bisson J said :

"Lord Justice Lawton in *R v Taylor and Others* [1977] 3 All ER 527 instanced at p.529, three categories of case. The least serious case of unlawful sexual intercourse is where there is a virtuous friendship which leads to sexual intercourse. Then there is the case where a young man picks up a girl of loose morals at a dance, takes her out in the local park and, behind the bushes has sexual intercourse with her. But, then, when he comes to deal with the most serious situation, he refers to a man in a supervisory capacity who abuses his position of trust for his sexual gratification".

Further on in the judgment Bisson J said :

"Consent is not a relevant issue in proving the offence but it is relevant on sentencing as it would reduce the seriousness of the offence if the girl were a willing partner".

The Court of Appeal also took into consideration in mitigation the penalty that

was paid on behalf of the accused to the council of his village as well as his plea of guilty to the charge.

In that case, the victim was a 13 year old step-daughter of the accused who was 38 years old. The accused went to the victim while she was sleeping and forcibly removed her clothes and had sexual intercourse with her. Even though the victim was crying, the accused continued to have sexual intercourse with her until he was satisfied. In all the circumstances of that case, the Court of Appeal imposed a sentence of 2 years imprisonment. Obviously, the circumstances of that case puts it in the category of cases described by Lord Justice Lawton in *R v Taylor and Others [1977] 3 All ER 527* as the most serious situation where a man in a supervisory capacity abuses his position of trust for his sexual gratification.

In *Attorney General v Tamalemai Tuanuu Tamalemai Fereti*, C.A. 5/93, judgment delivered on 31 March 1994, the Court of Appeal in another judgment delivered by Bisson J also applied the sentencing principles as stated by the Court in its judgment in *Attorney General v Paopaoalii Sagato Ioane*. The facts of this case were that the accused, Tamalemai, was 42 years of age and was living in a defacto relationship with the mother of the victim. The victim was 13 years of age and she treated the accused as a brother. She went to see the accused on an errand. The accused pulled the victim into a room in his house removed her panties and had sexual intercourse with her. He was charged with having sexual intercourse with a girl over the age of 12 years and under the age of 16 years not being his wife. After taking into account the mitigating factors which included the accused being a first offender, the formal apology (ifoga) made by

his family to the victim's family, the fine of one cattle beast paid by the accused to the village council, as well as the accused's plea of guilty to the charge against him, the Court of Appeal imposed a sentence of 2 years imprisonment.

Here again it is obvious that the circumstances of that case fall within the category of cases described by Lord Justice Lawton in *R v Taylor and Others* [1977] 3 ALL ER 527 as the most serious situation where a man in a supervisory capacity abuses his position of trust for his sexual gratification.

In the case of *Aki Tauiliili v Police*, Misc 15041, judgment delivered on 13 November, which was another case concerned with an accused charged with having sexual intercourse with a girl over the age of 12 years and under the age of 16 years, an appeal against a sentence of 2 years imprisonment was abandoned before the Court of Appeal. In that case the Court of Appeal said that counsel for the accused very properly abandoned the appeal against sentence.

The facts of that case were that the accused who was 51 years crawled into the room of the house where the 13 year old victim was sleeping, forced himself on her and had sexual intercourse with her. The victim screamed. She eventually became pregnant from that sexual intercourse.

The facts of the present case for which this Court is called upon to pass sentence do not in my view come within the category of cases described in *R v Taylor and Others* where a man in a supervisory capacity abuses his position of trust for his sexual gratification. It also appears from the facts of the

present case that the girl was a willing partner to the act of sexual intercourse with the accused. This Court also takes into account in mitigation of penalty the fact that the accused is a first offender and has entered a plea of guilty to the charge. On the other hand is the gravity of the offence and the current prevalence of this kind of offending within the community.

I must also point out that the factual situation in this case, although serious, is not in the same category as the factual situations in the cases of *Attorney General v Paopaoalii Sagato Ioane* and *Attorney General v Tamalemai Tuanuu Tamalemai* where the accused appeared to have been in a supervisory capacity in relation to the victim and the victim appeared not to have consented to sexual intercourse with the accused. Likewise the factual situation of this case is not in the same category as the facts of *Aki Tauiliili v Police* where the victim was 38 years younger than the accused and did not consent to sexual intercourse with the accused who forced himself on her. In all these other cases as I have already pointed out, a sentence of 2 years imprisonment was imposed as appropriate.

In the circumstances of the present case and having regard to all matters I have referred to, a sentence of 16 months imprisonment will be appropriate. Accordingly the accused is convicted and sentenced to 16 months imprisonment.

*TFM Sapolu*  
.....  
CHIEF JUSTICE