IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

IN THE MATTER of Section 108 of the Criminal Procedure Act 1972

BETWEEN: **MATILA TAVITA** of Apolima-uta in Western Samoa, Teacher

Applicant

A N D: **COMMISSIONER OF POLICE AND PRISONS**

Respondent

Counsel: C J Nelson for applicant
G Latu for respondent

Hearing: 2 & 20 May 1997

Judgment: 26 May 1997

JUDGMENT OF SAPOLU, CJ

The accused, who is the applicant in the present proceedings, was charged with having raped the victim on 13 October 1995. He was tried before a panel of assessors with myself as presiding Judge on 13 and 14 March 1997. At the conclusion

of the trial, the assessors returned a unanimous verdict that the accused was guilty of the charge of rape. The case was then adjourned to 7 April 1997 for a probation report and sentencing, and the accused continued to be remanded on bail.

In preparing the probation report on the accused, the chief probation officer had with him both the accused and the victim. From the probation report, which was produced to the Court, it appears that when the victim was interviewed by the chief probation officer, she told the chief probation officer that the accused and herself had been living as man and wife for two weeks prior to the interview. Even though it is not clear from the probation report when the interview took place, the report is dated 3 April 1997. The accused and the victim must therefore have been living as husband and wife for two weeks at the time of the interview which was held on or prior to 3 April 1997. It is also mentioned in the probation report that the victim told the chief probation officer that she had an intimacy with the accused in 1994.

As a result of what is said by the victim in the probation report, counsel for the accused orally applied for a retrial. The proper application for a retrial was subsequently filed under section 108 of the Criminal Procedure Act 1972. The sole ground of the application was that since the conclusion of the trial, the victim had recanted crucial parts of the evidence she gave at the trial, including her evidence that sexual intercourse with the accused took place without her consent. It will therefore be necessary at this junction to refer to the evidence that was given at the trial and to consider that evidence together with the new evidence now given by the victim.

The victim, who was 17 years old at the time of this incident, testified at the trial that on 18 October 1995 she was with her father at a family funeral held at the village of Pata, Falelatai. In the evening, her father sent her to their home at Mataufu, Falelatai, to tell her brothers to bring things for the funeral. When she arrived at their home no one was there. She then went and stood in front of her family's house. It was getting dark at the time and she was taken by surprise when someone grabbed her hand from behind. She noticed that it was the accused who told her to go with him to the back of the house. When she asked him what for, the accused told her just walk. She said she refused and held on to the branch of a breadfruit tree. However the accused pulled her along. So she screamed that she wanted to live. No one came to her assistance. Meanwhile the accused was still dragging her towards the back of her family's house. When they came to a log she dug her feet against the log, but the accused still managed to drag her along as he was strong. When they came to the kitchen behind her family's house, the accused tied her mouth to a post of the kitchen and then undressed her. He then dragged her again to the beach behind the kitchen and tried to push her down onto a mat. When he did not succeed, he held her feet and tipped her over. The accused then had sexual intercourse with her and told her that he had been after her for a long time, but now that he had got her, she would see what he was going to do to her. The victim also testified that she did not consent to having sexual intercourse with the accused and that during the act of sexual intercourse she lost consciousness. When she regained consciousness there was no accused around. She was at that time bleeding from her private part and so she went and washed herself.

Later on that night the victim returned to the village of Pata, Falelatai, where a female cousin noticed her walking with discomfort. What the victim told her cousin was objected to by counsel for the accused because the questions put by the victim's cousin to the victim were in leading form. I upheld the objection and ruled that what the victim told her cousin was inadmissible in evidence. The victim spent the night with her cousin at her cousin's home. The next day, the victim met her older sister who lives at Tuanai, at Pata, Falelatai. She asked her sister to go with her to Tuanai as there was something she wanted to tell her. The victim's sister, who was called to give evidence, testified at the trial that when they arrived at Tuanai the victim told her that the accused had raped her. She also said that the victim told her that the accused dragged her to the kitchen, tied her mouth to a post of the kitchen, undressed her, and then raped her. She further said that the victim complained of pain to her side and when she massaged the victim with oil, she noticed lacerations on the victim's back.

To continue with the evidence given by the victim at the trial, she also denied having had any previous sexual intercourse with the accused. She said that she knew the accused because he was teaching and living up to the end of 1995 at the school which is next door to her family's home at Matautu, Falelatai. But she never had any previous sexual intercourse with the accused.

The victim's father also gave evidence at the trial. He said that on Monday, 23 October 1995, the accused came to his house and apologised to him about what had happened. The accused at the time was crying. He told the accused that he would not accept his apology for what he (the accused) had done to his daughter. However, the accused apologised again. He then told the accused that it was better for him to

leave the house as he (the victim's father) was still hurt from what the accused had done to his daughter. The accused then left the house.

Now about a month after the alleged rape took place, the victim and her father lodged a complaint with the police at Faleolo. I need not go into the reasons for the delay in lodging the complaint, but they would be found in the evidence of the victim, her sister and her father. Sometime after the complaint was lodged, the victim's father requested the police officer who was in charge of the investigation of this case for the victim to live with him and his wife as the house of the victim's family was next door to the school where the accused was teaching and living at that time. That arrangement was carried out, but it is not clear how long the victim lived with the police investigating officer and his wife.

In the course of the investigation, the police investigating officer interviewed the accused who was 25 years old at the time, and obtained a caution statement in writing from him. In that statement the accused admitted that he was under the influence of alcohol and when he saw the victim standing in front of her family's house, he was tempted to have sexual intercourse with her. He said when he held the victim's hand and told her to go with him to the back she refused. He also said he then forcefully pulled her. Later at the beach, he said he laid the victim down and inserted his private part into her private part and had sexual intercourse with her. The accused also said in his caution statement that he was under the influence of alcohol and that was the reason why he raped the victim. He further stated that he knew well that the victim did not consent. At the end of the caution statement, the accused wrote

the words that he had read the statement and agreed with it. He then signed his name. That statement was produced in evidence at the trial by the prosecution.

At the trial, the accused did not give evidence. One witness was called for the defence. He was a male school teacher who was teaching with the accused at the Matautu, Falelatai school in 1994. His evidence was that in 1994 he observed the accused and the victim on one occasion going into a room in the school building for about an hour and on another occasion he observed the accused and the victim talking by themselves inside the school building at about 10.00pm at night. That evidence was put to the victim during her cross-examination by defence counsel at the trial and she denied it all.

At the hearing of the application for a retrial the victim, when asked by the Court, said that on the day after the assessors had delivered their verdict, the accused and his parents came to her family's house and had a discussion with her parents. She was not able to testify to all the details of what was said at that discussion, but she said that the accused and his parents approached her parents for her to come and live with the accused. At the conclusion of the discussion the victim's parents told her to go and live with the accused. That obviously explains why both the accused and the victim went to see the probation service together. Up to the time of the hearing of the application for a retrial, the accused and the victim were still living together as man and wife. And she wants to continue living with the accused as man and wife.

The victim's evidence in chief which was given at the hearing of the application for a retrial was presented in the form of a sworn affidavit. It is essentially

the same as the evidence she gave at the trial, except as to what happened on the beach where the accused had sexual intercourse with her. She has now said that when the accused pulled her to the beach and then pushed her down, he asked her why she was resisting him now when they had had sex before. She told him it was because she was then aware that he was having a relationship with another girl. The accused's reply was that he was no longer involved with that other girl and that he loves her (the victim). The victim said she then told the accused that she agreed to do what he wanted. Sexual intercourse then took place. She also said that she did not lose consciousness during the act of sexual intercourse as she had testified at the trial.

She then went on to say that she related all those matters to the police investigating officer, but the police investigating officer replied that if she did not consent initially, then she did not consent to the sexual intercourse at all. She further stated that after this incident was reported to the police, her family decided to withdraw the complaint and she agreed to it. She did not, however, say why her family did not go on to approach the police to withdraw the complaint. She further said that after the trial the accused's family and her family agreed that she lives with the accused as man and wife and she agreed with that decision and went to live with the accused as man and wife at the accused's family. She now wants to continue living with the accused as man and wife.

During cross-examination, the victim said that what she had told her sister about being raped by the accused was not true, and the reason she did it was because she was angry with the accused. She did not elaborate on why she was angry with the accused.

The police investigating officer, corporal Aneteru Tago, was called to give rebuttal evidence. His evidence in chief was presented in the form of a sworn affidavit. He denied that the victim related to him that she had any previous sexual relationship with the accused in 1994, or that the reason she refused to have sexual intercourse with the accused was because she knew that the accused was having a relationship with another girl. He also denied that the victim related to him that the accused had asked her as to why she was resisting now when they had had sex before, or that the accused said to her he was no longer involved with the other girl and that he loves the victim. He also denied that the victim told him that she agreed to do what the accused wanted, or that he said to her that if she did not consent initially then she did not consent to the sexual intercourse. The police investigating officer also said that during his interview of the victim, she told him that she lost consciousness shortly after sexual intercourse had began. The police investigating officer was therefore denying what the victim has now said that she told the police investigating officer about the matters she was telling the Court in her evidence in chief.

In the case of ***Lesa Farani Posala v Police*** (1995) (an unreported judgment of the Court of Appeal C.A. 10/94, delivered on 18 August 1995), Casey J in delivering the judgment of the Court of Appeal said at pp 7-8 :

> "[The] Chief Justice correctly directed himself on the well-known tests for "admissibility of fresh evidence, commencing with ***R v Mareo (No.2) (1946) "NZLR 297***. It must be new or fresh in the sense that it was not available to "be given at the trial; it must be relevantly credible, and be such that, if given "with the evidence adduced at the trial, it might reasonably have led the Court "to reach a different verdict. Mr Enari submitted that the Chief Justice had "gone too far in making the decision himself that the evidence was not

"credible, citing the comment by Lord Parker CJ in *R v Parks [1961] 3 All "E R 633, 634*, to the effect that to satisfy the test of credibility the new "evidence must be well capable of belief, and that it is not for the Court "hearing the application to decide whether it is to be believed or not. That is "for the Court which eventually retries the case if the evidence is admitted. "Again with respect, we think Mr Enari's submission on this point is over- "refined. It is clear from the passages we have cited and from the whole tenor "of his judgment that when he applied the word 'incredible' to the fresh "evidence, the Chief Justice meant that in his opinion nobody could believe it. "Once a Judge reaches that conclusion, it is his plain duty to reject the "evidence, because (to use Lord Parker's words) he has not found it capable of "belief".

That statement of principle was pronounced by the Court of Appeal in a case where the new evidence sought to be adduced was from a person who had been jointly charged with the appellant with having caused grievous bodily. Even though there is nothing in that statement of principle to show that its application is to be limited to that kind of case, it may be considered that in a rape case where a victim has recanted her evidence given at the trial, the first requirement that the new evidence was not available to the defence at the trial would be readily satisfied.

In *R v K (an accused) [1984] 1 NZLR 264* where the victim of an incest charge, after the trial was concluded, recanted the evidence she had given at the trial, Cooke J (as he then was), in delivering the judgment of the New Zealand Court of Appeal, said at p.270 :

"The case has some unusual features, but in principle there is guidance in the "authorities to the right course. *Re O'Connor and Aitken (No 2) [1953] "NZLR 776* was a case of a withdrawn recantation of evidence given at the "trial. That case arose out of a Governor-General's reference. This Court "ordered a new trial in the particular circumstances, but it was emphasised that "the power to do so should be exercised only with great caution. It was said "that there might, for instance, be cases in which the fresh evidence would "appear to the Court to be so suspicious and unreliable that it should be wholly

"rejected; and that in others the fresh evidence would often be such that it "would fall short of showing that the refusal of a new trial would cause a "miscarriage of justice. In *R v Flower (1965) 50 Cr App R 22*, after affidavits "had been filed, the Court of Criminal Appeal in England heard oral evidence, "including that of a witness who had given evidence at the trial having the "effect of incriminating an accused and who now retracted crucial parts of her "trial evidence. The Court felt compelled to reject her new evidence where it "differed from the evidence at the trial. They declined to regard the retraction "as warranting disturbance of the jury's verdict".

In ***R v Accused (CA 371/95) [1996] 14 CRNZ 499***, cited by counsel for the accused, and which involved the recantation by the victim of an indecent assault charge of crucial parts of the evidence he had given at the trial, a differently constituted Court of Appeal in New Zealand referred with approval to what was said by Cooke J in ***R v K (an accused) [1984] 1 NZLR 264, 270*** that if the new evidence sought to be adduced is so suspicious and unreliable, then it should be wholly rejected.

Turning back to the evidence, I would accept that the new or fresh evidence by the victim, which consists of recantation of crucial parts of the evidence she gave at the trial, was not available to the accused or the defence at the trial. It is therefore new evidence in that sense. I would also accept that it is relevant. The remaining question therefore is whether the new evidence is credible in the sense that it is capable of belief or whether it is so suspicious and unreliable that it should be wholly rejected.

Now the evidence which the victim's sister, who lives at Tuanai, gave at the trial was that when she met the victim at Pata, Falelatai, the victim asked her to go with her to Tuanai as there was something the victim wanted to tell her. When they arrived at Tuanai, the victim told her sister she had been raped by the accused. Later her sister noticed lacerations on the victim's back when she massaged the victim who

complained of pain to her side. It is clear to me that the complaint of rape made by the victim to her sister was made voluntarily and spontaneously. The victim was under no pressure from anyone to make the complaint. She obviously wanted to unburden herself to her sister and she did so voluntarily and spontaneously. The victim has now said that she complained to her sister because she was angry with the accused, but she did not elaborate on why she was angry with the accused. I do not believe this new evidence. If, as the victim has now said, she agreed to having sexual intercourse with the accused, then I see no reason for her to be angry with the accused. She seems to be contradicting herself.

There is then the caution statement which the accused made to the police investigating officer, wherein he admitted that he raped the victim and knew well that the victim did not consent. On the face of that caution statement it is clear that the admissions by the accused were voluntary. He also wrote at the end of the caution statement that he had read the statement and agreed with it. He then signed his name on the statement. The accused did not challenge the admissibility of the caution statement on the ground of voluntariness or otherwise or give evidence at the trial. The caution statement therefore remained as it is now.

The victim's father also testified at the trial that on 23 October 1995, which was five days after the alleged rape, the accused came to his house. The accused was crying and apologised to the victim's father about what had happened. The victim's father refused to accept the apology. Defence counsel argued at the trial that the apology was ambiguous as the accused did not say that he was apologising for having raped the victim. That may arguably be so, if the apology is considered in isolation.

But when considered together with the accused's admissions in the caution statement, there is only one reasonable conclusion to be drawn and, that is, the apology related to the accused having raped the victim.

The victim's evidence in chief at the trial was also quite detailed and she was cross-examined in detail by defence counsel. However she maintained throughout that she did not consent to having sexual intercourse with the accused or had any previous sexual relationship with him in 1994. If her new evidence is now to be accepted as credible, that would be tantamount to accepting that not only was her evidence at the trial false, but her voluntary and spontaneous complaint of rape to her sister and the voluntary admissions by the accused in his caution statement must also be false. I simply cannot accept that situation in this case.

It is also clear that on the day after the assessors had unanimously found the accused guilty of rape, the accused and his parents went to the parents of the victim. From the discussion that followed between the victim's parents and those of the accused, the victim was told by her parents to go and live as man and wife with the accused, and the victim obeyed, and went and lived with the accused as man and wife at the accused's family. I must say that the real motive of the accused and his parents in approaching the parents of the victim the day after the verdict of the assessors was delivered and while sentencing was pending, is most suspicious. Since 23 October 1995 when the father of the victim refused to accept the accused's apology, the accused made no further approach to the father of the victim or to the victim's family. His parents obviously made no approach at all to the parents of the victim. Then on the day after the assessors found the accused guilty of rape, the accused and his

parents approached the parents of the victim for the victim to live as man and wife with the accused.

Even though the victim obeyed and went and lived with the accused as man and wife at the accused's family, it is clear that the decision was made for her by her parents upon being approached by the accused and his parents. It was two weeks after the accused and the victim had been living together as man and wife, that they approached the probation service for the preparation of the probation report on the accused which was ordered by the Court, and the victim told the chief probation officer that she had an intimacy with the accused in 1994. Up to the time of the hearing of the application for a retrial they were still living as husband and wife and the victim wants to continue living with the accused as man and wife. These circumstances caused counsel for the prosecution to submit that there was a huge opportunity for bias in the evidence given by the victim at the application for a retrial.

I must also say I was not at all impressed with the victim's new evidence or her demeanour. I reject what she said that all that she was now telling the Court had been related by her to the police investigating officer prior to the trial. I accept the rebuttal evidence which was given by the police investigating officer as true.

Counsel for the accused submitted on the basis of ***R v Flower (1965) 50 Cr App R 22*** that if the Court is not satisfied that the new evidence is conclusive, or is not satisfied that the new evidence is true but nevertheless thinks that it might be acceptable to a panel of assessors, then the proper course to take is to order a new trial. I am of the clear view that the retractions now made by the victim of crucial parts of her evidence given at the trial do not fall within any of those categories. My clear view is that the retractions by the victim are either not

credible in the sense that they are not capable of belief, or they are clearly so suspicious and unreliable that they should be wholly rejected.

The application for a retrial is dismissed. The accused must now commence serving his sentence.

TFM Sapolu

CHIEF JUSTICE