

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

CRIM. NOS: S.238/98 & S.239/98

BETWEEN: POLICE

Informant

A N D: POE LAFOGA of Vaipuna/
Vailima

Defendant

Counsel: G Latu and A Volentras for police
R T Faaiuso for defendant

Hearing: 17 September 1998

Decision: 17 September 1998

DECISION OF SAPOLU, CJ

The accused Poe Lafoga of Vaipuna and Vailima is 46 years of age. He is charged that on 3 June 1998, he did have sexual intercourse with the victim, a girl under 21 years of age, who being his ward, was at the time of sexual intercourse living with him as a member of his family.

This charge has been brought by the prosecution under section 50(1) of the Crimes Ordinance 1961. At the conclusion of the evidence for the prosecution, counsel for the accused submitted that there is no case to answer. The short ground of

this submission is that there is no evidence that the victim at the time of the alleged sexual intercourse was a ward of the accused. Counsel for the accused therefore further submitted that the charge against the accused must be dismissed.

In bringing this submission, counsel for the accused referred to the relevant part of the definition of the expression "ward" at p.327 of the second New Zealand edition of Mosley and Whiteley's Law Dictionary by G W Hinde. The relevant part of the definition of the expression "ward" that counsel for the accused referred to is where it says that "ward" generally means a minor under the protection or tutelage of a guardian. It is clear that the crucial part of that definition for the purpose of this case is the meaning of the word "guardian". The real question therefore is whether the victim who was a minor at the time of the alleged offence was under the protection of the accused as a guardian. In the same Law Dictionary I have just referred to, the word "guardians" is defined in some detail at pp 140-141. It says guardians may be natural, testamentary, or Court-appointed. Natural guardians are defined to mean the father and the mother of a child and reference is also made to circumstances where a father or mother may be a sole guardian. A testamentary guardian is defined to mean a guardian who is appointed by the father or the mother of a child by deed or will for the purpose of taking care of the child after his or her death. Court-appointed guardians are guardians appointed by the Court usually by means of guardianship orders.

The question then is whether the accused is one of those guardians recognised in law. The answer is no. The accused is neither a natural guardian, or a testamentary guardian, or a Court-appointed guardian of the victim in this case. There is no

evidence before the Court to suggest that the accused was a natural, testamentary or Court-appointed guardian of the victim at any time. I have also looked at the 11th English edition of Mozley and Whiteley's Law Dictionary by E R Hardy Ivamy where the expression "ward" is defined at p.289 to mean, generally, as a minor under the protection or tutelage of a guardian. Again, the question is what is the meaning of the word "guardian". The same dictionary defines "guardian" in the following way. A person may be a guardian of a minor :

1. by parental right, that is, the right of a father or mother as natural guardian of a minor child;
2. by parental appointment whether the father and the mother appointed any person to act as a guardian of their child after their respective deaths;
3. guardians appointed by the Court.

Here again I am of the view that the accused is not a guardian under any of those defined categories. The evidence, as it would be recalled, was that at the beginning of 1998 the victim was released by her aunt with whom she was staying at Malaela, Aleipata, to live with the accused, his wife and their children for the purpose of employment. That employment arrangement was made by the victim's aunt with the accused's wife and the accused without the victim's knowledge. The victim's weekly remuneration was paid by the accused and his wife to the victim's aunt. There has been some suggestion from the evidence that during the time the victim was working for the accused and his wife, she was also under the care and protection of the accused and his wife, so that the victim was in effect under the guardianship of the accused and his wife. That may be so in a popular sense, but I am of the clear

view that the word "guardian" in this context must be given its legal sense rather than its popular sense.

In support of the view that I have taken in this case, I refer to the decision of this Court in *Police v Kaisala Tapa [1970-1979] WSLR 103*. The facts of that case as found by the Court were as follows. The girl or the victim was placed by her father in the care of the accused for the purpose of attending school at Leulumoega-fou. The accused was to have the care and custody of the victim to the exclusion of all others except for her parents. The parents from time to time provided maintenance for the victim by way of food but did not fully maintain her while with the accused. The parents also paid the expenses involved in the education of the victim. But during school holidays the victim stayed with her parents at Savaii. The charge in that case was brought under section 50(1) of the Crimes Ordinance 1961 which is the same provision under which the present charge has been brought. On the facts outlined the prosecution contended that the girl was a "ward" of the accused. Counsel for the accused on the other hand contended that the term "ward" must be construed in a strict legal sense and that in order to be a "ward", the child must have a guardian who is appointed according to law. Donne CJ who heard that case upheld the argument for the accused and decided that on the facts, the victim was not a "ward" at law.

It is clear from p.104 of His Honour's judgment that he gave the word "ward" a legal meaning. He said :

"The term 'ward' in its ordinary and legal sense means an infant who is in the 'care of a guardian.... The crux of the matter is the meaning of the term 'guardian'".

It is also clear from his judgment that Donne CJ recognised three categories of legal guardians. These are the natural, testamentary, and Court-appointed guardians. The accused in that case did not fall within any one of those three categories. So the contention for the accused of no case to answer was upheld and the information dismissed.

There is one other matter I wish to refer to. Section 50 of our Crimes Ordinance 1961 is based in part on section 131 of the New Zealand Crimes Act 1961. The New Zealand provision makes it an offence for a person to have sexual intercourse with an under aged girl who :

- (a) being his step daughter, foster daughter or ward at the time of the alleged sexual intercourse, was living with him as a member of his family;
- (b) not being his step daughter, foster daughter or ward at the time of the alleged sexual intercourse, was living with him as a member of his family.

The New Zealand statutory provision, if it was applicable in Samoa, would clearly have made the facts of this case an offence because the New Zealand statutory provision makes it an offence for a person to have sexual intercourse with an under aged girl who is not his step daughter, foster daughter or ward at the time of sexual intercourse and was living with him as a member of his family.

I do not know why our legislature has adopted only part of the New Zealand statutory provision in section 50(1) of our Crimes Ordinance 1961. Perhaps the prosecution may wish to consider an amendment to section 50 of the Crimes Ordinance 1961 to cover the kind of situation which had arisen before in *Police v Kaisala Tapa [1970-1979] WSLR 103* and has now arisen again in this case.

From all that I have said, it should be clear that the submission of no case to answer must succeed on the ground that there is no evidence to show that the accused was a guardian of the victim in the legal sense at the time of the alleged offence. So the accused not being a guardian of the victim, it follows that the victim was not a ward of the accused at the time of the alleged offence.

The charge is therefore dismissed.

Tom Sapolu
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CHIEF JUSTICE