

POLICE v ALAIVA'A (PA'I)

Supreme Court Apia
Callander CJ
22 March 1983

CRIMINAL LAW - statutory defence to charge of sexual intercourse with a woman, other than the Defendant's wife over the age of 12 but under the age of 16 - elements of such defence.

LEGISLATION:

- The Crimes Ordinance; section 53(4)

C J Nelson for Prosecution
R T Faaiuso for Defence

The Defendant is charged that on the 20th January of last year, he had sexual intercourse with Ioka Pasia also known as Letaulau Pasia a girl over the age of 12 but under the age of 16 years, not being his wife. There is no doubt that sexual intercourse occurred between these two young people on the day in question. The accused does not deny that fact. He relies upon a statutory defence provided by section 53(4) of the Crimes Ordinance, and for that defence to be successful, there are really four elements that he must establish upon the balance of probabilities.

It is clear from my comments that I accept the prosecution has achieved its onus of proving beyond reasonable doubt that sexual intercourse took place with a girl over the age of 12 years and under the age of 16 not being the accused's wife.

Each of the 4 ingredients of the statutory defence must be established by the accused: Firstly the court must be satisfied that Iokapata consented to the sexual intercourse. Secondly that the accused is under the age of 21 years at the time of the intercourse. Thirdly that he had reasonable cause to believe Ioka was over 16 years old and fourthly and finally that he in fact believed that she was over the age of 16 years. A preliminary issue arose upon which I reserved my decision. It is not necessary now to be determined because I find other corroboration of the actual sexual act.

The first question is whether the girl consented to the sex. There was certainly no physical force used sufficient to cause injury to the girl. The girl says she did not consent and that she tried physically to resist the accused. The accused says, to

the contrary, that she agreed to have sex with him. I have considered carefully the manner in which both these young people have given their evidence to the court and I am not satisfied that the girl consented to sexual intercourse. Even 14 months after this episode I find her to be a naive and immature young person. Furthermore, although this is not now strictly necessary, I am not satisfied that the accused had reasonable cause to believe she was over the age of 16. He is a 19 year old youth of normal intelligence. He has lived in the same village as Ioka for most of their joint lives. He must therefore have had a very sound idea as to the true age of Ioka and then again, 14 months after the incident her physical immaturity is obvious when looked at by any person of reasonable wit. She does not now and certainly would not then have physical characteristics consistent with the average young woman of 16 years. Infact I find that the accused did not apply his mind to the question of age because he was determined to obtain sexual relief whatever the circumstance. The statutory defence having failed, the Defendant must accordingly be convicted of this charge. He will be remanded to the 11th April for probation report and sentence. His bail will continue. It is important that he sees the probation officer as soon as possible because he must be sentenced before I leave for New Zealand.