

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAS. 884/93BETWEEN: THE POLICEInformantA N D: GESE KUKI of MalieDefendant

Counsel: K. Latu for Prosecution  
P.A. Fepuleai for Accused

Hearing: 20th June 1994

Judgment: 21st June 1994

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JUDGMENT OF SAPOLU, CJ

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The accused is charged that at Malie on the 5th day of December 1993 he did have sexual intercourse with the complainant a girl over the age of 12 years and under the age of 16 years not being his wife. It is clear from the evidence that the complainant is not the wife of the accused and therefore the two elements of the charge that the prosecution must prove beyond reasonable are these :

- (a) firstly, that the accused had sexual intercourse with the complainant;
- (b) secondly, that the complainant was between the age of 12 years and 16 years at the material time.

In the case of a sexual offence, the Court must bear in mind the solemn warning that it is dangerous to convict the accused solely on the

uncorroborated testimony of a complainant. There is nothing really to prevent the Court from convicting the accused solely on the uncorroborated testimony of the complainant if it decides to accept that testimony. But if the Court does so, it must do it bearing in mind the solemn warning I have just referred to. I bear this warning in mind.

The complainant in this case says she is now 15 years of age. Her natural mother also testifies that the complainant is now 15 years of age having born on 7 June 1979. The complainant's mother has also produced the complainant's birth certificate which shows that the complainant was born on 7 June 1979. So at the time of the alleged offence, the complainant was about 14½ years of age.

According to the complainant, she went to sleep inside her family's open Samoan house at Malie at about 9.00pm on Sunday night, 5 December 1993. She was wearing only a singlet and a lavalava. Her parents and "brother" Paulo who is really her first cousin were also sleeping in the same house. Paulo was sleeping not far from the head of the complainant's bed. At midnight the complainant was awakened when a person lay on top of her. This person had no clothes on but he had a singlet headband from his forehead around his head so that the complainant could not recognise his face at that time. The complainant says this person then removed her bed sheet, she then struggled with him and he whispered to her that he is Mapusaga, the elder brother of the accused. However when the headband came off during the struggle, the complainant saw that it was the accused and not his brother Mapusaga. The complainant says she knows the accused because she is acquainted with him and he is also her relative. Both of them are from the same village and the house of the accused's family is on the opposite side of the road

at Malie from the house of the complainant's family.

When the complainant could offer no more resistance during the struggle with the accused, the accused then had sexual intercourse with the complainant. She says she had sexual intercourse with the accused for about half an hour and the accused ejaculated into her private part. When the accused was about to leave, her brother Paulo came around and gave chase to the accused. When Paulo returned to the house and questioned her as to who was in bed with her, the complainant says she lied to Paulo that there was no one. She did not even tell her parents what had happened. When it was daylight the same morning, the complainant had a bath and washed her private part. She then came with Paulo to the Apia Police Station and the complainant was referred by the Police the same morning to the National Hospital where she was medically examined by Dr Hanipale Mose. The complainant also says that this was not the first time she has had sexual intercourse.

Dr Hanipale Mose gave evidence and he testifies that when he examined the complainant he found the vulva normal in appearance; he also found two old tears to the hymen. A vaginal swab was also taken for testing but no spermatozoa were seen. The doctor says that no spermatozoa were seen because the complainant might have had a shower before she came to the hospital. He also says that spermatozoa would be liquified after 8 hours.

According to the witness Paulo who was also called by the prosecution to give evidence he was asleep inside his family's Samoan house on the night of this incident and in his estimation it was about 1.00am to 2.00am when he went out to urinate. When he returned to sleep, he heard a sound which

he described as a "paō" coming from the complainant's bed. So he listened to the sound and it continued for about  $\frac{1}{2}$  an hour. So he stood up and went to see where the sound was coming from. Then a naked person stood up from the complainant's bed and took off at extraordinary speed holding a pair of shorts. It appears that Paulo went after this person to the house of the accused and found the lights on at the small Samoan house ("faleoc") of the accused's family with the accused, his younger brother Faatea, and another boy Asofa present there. When Paulo returned to his family's house, he questioned the complainant as to who was in bed with her but she replied she did not know. So Paulo says he told the complainant that they will go to the Police as perhaps she will tell the truth to the Police. When it was daylight they came to the Apia Police Station.

Now Constable Tulaniu Tuiala, the police officer who investigated this case, was also called by the prosecution to give evidence. He says that he interviewed in relation to this matter three suspects, namely, Sialii, Mapusaga and the accused. The complainant confirmed to the Police that the person who came to her on Sunday night, 5 December 1993 was not Sialii. Mapusaga was questioned because of the complainant's statement that the person who came to her first mentioned his name as Mapusaga. However Mapusaga denied that he was at the scene of this incident on the night of 5 December 1993. The accused was also interviewed. According to Constable Tulaniu when he informed the accused of his right to counsel he replied that he did not want to have a lawyer. So he then cautioned the accused. That caution as it appears from the accused's statement is to the effect that the accused had been cautioned by the police officer that he was not obliged to say anything unless he wished to do so but whatever he says will be taken down in writing and may be given in evidence. Constable Tulaniu also says

that he knows the accused as he is acquainted with the accused's father and after he cautioned the accused the latter agreed to make a statement and the taking of the accused's statement took about half an hour. The accused then signed his statement. The constable also says he did not at any time threaten the accused with violence and the accused looked quite happy after his statement was taken. The accused's statement was not challenged on the voir dire as non-voluntary.

Now the accused's statement gives quite a detailed account. It says that on the night in question the accused went to the house of the complainant to find out where she was going to sleep. He found out that the complainant was sleeping on a bed in the front part of the house. So he returned to his own house with the intention of returning late at night to do something with the complainant. The accused then went with his brothers to see their plantation and upon their return from the plantation after 11.00pm the accused went to the complainant. He got into her bed and embraced her while she was sleep. He told the complainant his name when she asked who it was and then he removed the bedsheet the complainant's body was covered with and tried to insert his private part into her private part. The complainant, however, removed his hand and told him don't. The accused then got on top of the complainant and tried again to insert his private part into her private part. They then had sexual intercourse for quite a while until the accused went past the point of ejaculation. According to the accused's statement the complainant did not struggle and after sexual intercourse he told the complainant he was going home.

The accused gave evidence and he admits making his cautioned statement to Constable Tulaniu as produced by the police officer. However he now

says that what he told the police officer were all lies. He says that he admitted to the police officer because he was afraid as this is the first time he has been charged with anything. He also says that he initially objected to the accusation against him and when Constable Tulaniu told him "to go and sit over there in case something would happened to him", he took that to mean that he might be assaulted. So he cried and admitted this incident to the police officer.

Before this Court, the accused says that he never went to the house of the complainant on the night in question. He says that he went with his younger brother Faate'a and Asofa at about 9.00pm to see their plantation for pigs and thieves. They left their plantation at about 11.00pm to return home and when they arrived home he obtained his cassette player and played it at his family's "faleoo" with Faate'a and Asofa present. It was at midnight soon after their return home that Paulo came to their house and he asked Paulo as to where he was going to and Paulo replied he came for a "tafao". Paulo then just stood there and then left. The accused says that he did not leave his family's house again when they returned with Faate'a and Asofa from their plantation. He also says that his brother Mapusaga was not at their village of Malie but at the village of Tuanai on the night of this incident.

It is also stated on the accused's evidence that he is related to the complainant and that he is acquainted with the complainant and knows her quite well. His family also knows the complainant's family quite well and their respective houses are on opposite sides of the road at Malie

Asofa and Faate'a were also called by the defence to give evidence. According to Asofa's evidence, he went with the accused and Faatea on Sunday

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night, 5 December 1993, to see their plantation for any pigs or thieves. When they returned home, they listened to their cassette player at their family's faleoo and none of them left the faleoo again that night. Then Paulo came and they asked him where he was going to and he replied for a "tafao". Paulo then just stood there outside the faleoo for about half an hour and then left.

According to Faatea's evidence, he went with the accused and Asofa on Sunday night, 5 December 1993, to see their plantation and when they returned home, they listened to their cassette player at their family's faleoo. The accused never left their faleoo that night. Between 12 midnight and going on to 1.00am Paulo came and when they asked him where was he going to he replied for a tafao. Paulo then stood there for not very long and then left.

Now that is the evidence in this case and the Court must make certain findings of fact. Notwithstanding what the complainant initially told Paulo that no one was in bed with her or that she did not know, I find as a fact that someone was in bed with the complainant on the night in question. The complainant now testifies that someone was in bed with her and who that person was. I accept the evidence by the witness Paulo as to the sound he heard for about half an hour from the complainant's bed and that when he stood up and went to see where the sound was coming from, a naked person stood up from the complainant's bed and took off at extraordinary speed holding a pair of shorts. Secondly, I also find as a fact that the cautioned statement given by the accused to Constable Tulaniu was voluntary and I accept the police officer's evidence in that regard. I reject the accused's evidence that he made his cautioned statement because he was afraid and was threatened by the police officer.

As to the question of reliability and credibility, I reject the evidence of the accused as unreliable and incredible. He voluntarily gave a detailed account including incriminatory admissions to the police officer after he was cautioned and informed of his right to counsel and he also signed his statement. Now he has backtracked from that detailed account and says that they are all lies. That is indeed quite a lot of lies, the accused now says, he had told the police officer. The accused also says that what he is now telling the Court that he never left his home on the night of this incident after he returned from his family's plantation and that he did not go to the complainant's house is the truth. But how can he expect the Court to believe him if he is already a self confessed liar because of what he says that all that he told the police officer in his cautioned statement were lies. I do not find the accused a believable witness. I was also not impressed with his demeanour in the witness stand. I reject his evidence. I also disbelieve the evidence of the witnesses Asofa and Faate'a when they say that the accused did not leave their faleoo at any time after they returned from their plantation. I was not impressed with these witnesses' demeanour in the witness stand especially given their close connection to the accused.

Turning now to the complainant's evidence, I have decided to accept her evidence that it was the accused who had sexual intercourse with her on the night in question. Even though on the question of sexual intercourse alone, the doctor says that he did not find any symptoms from his examination of the complainant to suggest recent sexual intercourse, the doctor also says that he found no spermatozoa because the complainant might have had a shower before she came to the hospital. And the evidence of the complainant was to the effect that she had a bath and washed her private part in the morning before she was examined by the doctor.



I have also stated that I accept the evidence by the witness Paulo that he heard a sound described as a "paō" from the complainant's bed for about half an hour and when he went to find out, a naked person stood up from the complainant's bed and took off at extraordinary speed. Paulo appears to have gone after this person and he went to the house of the accused and found the accused with Asofa and Faatea listening to a cassette player. This evidence at least tends to confirm the complainant's evidence that she had sexual intercourse with some one on her bed. Whether that person is the accused as the complainant says is now the question to be considered.

Now the accused is no stranger to the complainant. She knows the accused quite well, she is acquainted with the accused, and they are related to one another. They live in the same village and their respective houses are on the opposite sides of the road at Malie. When the accused's headband came off during the struggle with the complainant they then had sexual intercourse for about half an hour. In other words the complainant observed the accused's face at very close quarters and the clear inference from the evidence is that there was nothing which obstructed the complainant's view of the accused's face as he was lying on top of her. Then the complainant's observation of the accused's face was neither transitory nor fleeting. This incident continued on for about half an hour after the headband came off so the complainant had ample time to observe the accused's face at very close quarters. And given that the complainant knows the accused quite well, she is acquainted with him and related to him and they come from the same village, there is no doubt that the complainant correctly identified the accused. I am therefore satisfied beyond reasonable doubt that it was the accused who had sexual intercourse with the complainant.

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In saying that I do bear in mind the warning that special need for caution is required before convicting an accused in reliance on the correctness of identification evidence. I also bear in mind the reason for that warning, namely, that it is quite possible for an honest witness to make a mistaken identification and notorious miscarriages of justice have occurred as a result. However I am satisfied beyond reasonable doubt from the complainant's evidence that it was the accused who had sexual intercourse with her.

In all then, whilst there seems to be no corroboration of the complainant's evidence that it was the accused who had sexual intercourse with her, I am satisfied beyond reasonable doubt of her evidence on that point bearing in mind the corroboration warning and the identification warning already referred to in this decision. I also accept the complainant's evidence that she is now 15 years of age which is corroborated by the evidence of her natural mother as to her date of birth and by her birth certificate.

One final matter is the date of this incident which is specified in the information as 5 December 1993. The evidence suggests that this incident took place after midnight. That is clear from the evidence of the complainant and the witness Paulo. I will therefore amend the date in the information by omitting "5th" and substituting "6th". I see no prejudice to the defence by making this amendment and the defence also did not rely on the question of the date in the information as part of its defence.

In all I find the two elements of the charge against the accused proved beyond reasonable doubt

*TFM Saphir*  
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**CHIEF JUSTICE**