

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN: THE POLICE

Informant

A N D: TUAOPEPE FELIX WENDT  
of Alafua, Vaitele and Apia

Defendant

Counsel: G Latu for prosecution  
G J Judd QC (of the New Zealand bar) and  
T K Enari for accused

Hearing: 9 December 1997

Judgment: 1 May 1998

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JUDGMENT OF SAPOLU, CJ

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The accused is faced with 28 different informations which charge him with theft as a servant of a Samoan passport, forgery of a Samoan passport, official corruption, and uttering a forged document. Of these informations, 16 of them complain of acts the accused is alleged to have committed at the Samoan embassy in Washington DC in September 1992. The accused was at the time the Samoan ambassador to the United States.

Senior counsel for the accused raised as a preliminary issue that in terms of the provisions of the Crimes Ordinance 1961 the acts complained of are not offences

because they are alleged to have been committed in Washington DC and not in Samoa. It follows that this Court has no jurisdiction in respect of the 16 informations which complain of those acts. Accordingly those informations must be quashed. Counsel for the prosecution on the other hand contended that in terms of the provisions of the Diplomatic Privileges and Immunities Act 1978 and the Vienna Convention on Diplomatic Relations 1961 this Court has jurisdiction.

I turn now to consider these opposing contentions. Section 2 of the Crimes Ordinance 1961 defines the term "offence" as follows :

"'Offence' means any act or omission for which any one can be punished  
"under this Ordinance or under any other enactment."

Section 3 of the Ordinance then provides :

"(1) This Ordinance applies to all offences for which the offender may be  
"proceeded against and tried in Samoa.

"(2) This Ordinance applies to all acts done or committed in Samoa."

The expression "Samoa" is defined in Article 1 of the Constitution and it does not include a Samoan embassy in a foreign country.

Then in section 4 of the Ordinance it says:

"Subject to the provisions of section 5 of this Ordinance, no act done or  
"omitted outside Samoa is an offence, unless it is an offence by virtue of any  
"provision of this Ordinance or of any other enactment."

For completeness section 5 of the Ordinance provides :

“For the purpose of jurisdiction, where any act or omission forming part of any offence, or any event necessary to the completion of any offence, occurs in Samoa, the offence shall be deemed to be committed in Samoa whether the person charged with the offence was in Samoa or not at the time of the act, omission, or event.”

None of the acts forming part of the alleged offences is alleged to have occurred in Samoa. It seems, therefore, that section 5 of the Ordinance does not apply.

Given that section 5 does not apply here, the material part of section 4 for present purposes is the statement:

“no act done or omitted outside Samoa is an offence, unless it is an offence by virtue of any provision of this Ordinance or of any other enactment.”

This section reflects the common law position expressed by Devlin J in *R v Martin and Others* [1956] 2 All ER 86 where he said at p.89:

“I have had a number of statutes and cases cited to me which show what the position is in relation to offences that are committed abroad on foreign land. I think that the position is conveniently summarised in *Archbold's Criminal Pleading Evidence and Practice* (33<sup>rd</sup> Edn), at p.28 where it says this:

‘No British subject can be tried under English law for an offence committed on land abroad, unless there is a statutory provision to the contrary..... A foreigner is not liable under English law for an offence committed on land abroad....’

“That is the position under common law, Various statutes have modified the general principle so that English criminal law may apply to acts done abroad in specific cases.”

Now section 6 of the Crimes Ordinance 1961 is an example of a provision of the Ordinance which may make an act done or omitted on board a ship or aircraft outside of Samoa an offence in respect of which the Samoan Courts would have jurisdiction. There is no provision in the Ordinance which makes an act done or omitted in a Samoan embassy outside of Samoa an offence. Nor is there any provision in any other enactment to that effect. So the general principle stated in section 4 that no act done or omitted outside Samoa is an offence applies to an act done or omitted in a Samoan embassy in a foreign country. This must be the position until our law is amended.

Counsel for the prosecution argued that this Court has jurisdiction in respect of the acts alleged to have been committed by the accused at the Samoan embassy in Wellington DC and with which he has been charged. He relied on section 5 of the Diplomatic Privileges and Immunities Act 1978 which apply certain provisions of the Vienna Convention on Diplomatic Relations 1961 to Samoa. Section 5 of the Act is quite a lengthy provision and deals generally with diplomatic privileges and immunities. Subsection (1) thereof which is the relevant provision states:

“Subject to subsection (6) of this section, the provisions of Articles 1, 22 to 24  
“and 27 to 40 of the convention shall have the force of law in Samoa.”

Article 31 (4) of the Vienna Convention on Diplomatic Relations 1961 provides:

“The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.”

There was no dispute that for the purpose of article 31 (4) of the Convention the accused was a diplomatic agent, the receiving State was the United States and the sending State was Samoa.

There are two ways of considering whether section 5(1) of the Diplomatic Privileges and Immunities Act 1978 and article 31 (4) of the Convention apply here. The first is whether they create an offence. As already pointed out section 4 of the Crimes Ordinance 1961 provides that no act done or omitted outside Samoa is an offence, unless it is an offence by virtue of any provision of that Ordinance or any other enactment. In terms of the definition of "enactment" in section 2 of the Ordinance, the Diplomatic Privileges and Immunities Act 1978 is an "enactment". The question which then arises for the purpose of section 4 of the Ordinance is whether any of the acts with which the accused is charged is an offence by virtue of the provisions of section 5(1) of the 1978 Act and article 31(4) of the Convention. The answer must be no.

Section 5(1) of the 1978 Act is not an offence-creating provision. It does not speak of an offence or make any of the acts with which the accused has been charged an offence. It deals only with diplomatic privileges and immunities generally. If section 5(1) is an offence-creating provision as contended for the prosecution, then a strict construction is called for. On that basis I do not see how the argument for the prosecution would be in any stronger position.

Likewise, article 31(4) of the Convention does not create any offence. It is not an offence-creating provision. It does not speak of an offence. It speaks only of jurisdiction. Certainly nothing in article 31(4) expressly makes any of the acts with which the accused has been charged an offence. And the informations with which the accused has been charged are not laid under article 31(4) or any other provision of the Convention. Therefore section 5(1) of the 1978 Act which applies article 31(4) of the Convention to Samoa is not an enactment which makes an act done outside of Samoa an offence in terms of section 4 of the Crimes Ordinance 1961.

Perhaps the other way of looking at this issue is to start from article 31(4). Here the focus is on the question of jurisdiction because of the wording of article 31(4) which provides that the immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State. The sending State in this case being Samoa, the question then is what jurisdiction does the Samoan Courts have in respect of the acts with which the accused has been charged. To answer this question one would have to turn again to the relevant provisions of the Crimes Ordinance 1961. Section 3 of the Ordinance provides that the Ordinance applies to all "offences" for which the offender may be proceeded against and tried in Samoa. The crucial word here is the word "offences." And the Samoan Courts would only have jurisdiction in respect of offences to which the Ordinance applies and for which the offender may be proceeded against and tried in Samoa. But the general principle at common law which is also expressed in section 4 of the Ordinance is that no act done outside of Samoa is an offence. So prima facie the Ordinance does not apply to an act done outside of Samoa because it is not an offence. And it follows that the Samoan Courts do not have extra-territorial criminal

jurisdiction in respect of such an act unless one of the exceptions provided in section 4 applies. As already pointed out, none of those exceptions apply in this case. So the general principle remains.

I am therefore of the view that the 16 informations which charge the accused with acts alleged to have been committed by him at the Samoan embassy in Washington DC do not disclose any offences. Accordingly, they are quashed.

*TEM Sapulu*  
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CHIEF JUSTICE

Solicitors:  
The Attorney-Generals Office, Apia for prosecution  
Kruse, Enari & Barlow Law Firm of Apia for accused