Police v Apelu [2004] **WSSC 7 and** *Police v Apelu* [2004] **WSSC 8**

By Arthur V. Faerua[*]

Coram: Sapolu CJ

Counsel: R Schuster and L Petaia for prosecution

M Leung Wai for accused

INTRODUCTION

Often a case note would be written on a court case because the case may have created a significant legal development, created a binding legal precedent or opened up a new area of the law that no other case in the past has done so. I have been drawn to review this particular case for the compelling reasons mentioned above. First, all legal counsel who participated in the case are known to me personally. Counsel for the accused was my colleague at Law School and a close friend. Counsel for the prosecution are colleagues, and both of them are members of the Law Alumni of Emalus Campus. It may be appropriate to write about cases which feature legal counsel who are either past students of our school or are professional colleagues. Secondly, *Police v Apelu*, deals with a sensitive sexual health issue in the context of a traditional society, that being "pregnancies and abortion in Samoa". It is the first ever case in that jurisdiction to prosecute a person for procuring abortions. Finally, a compelling factor that arises out of *Police v Apelu* is that there is no precedent on the issue and the provision of the criminal statute which has been used to charge the accused has never been used before by the prosecution. Instead, the court in this case has in its decision utilised common law principles. This once again shows that the criminal law in the Pacific is still being shaped by the common law and foreign precedents. These reasons have made *Police v Apelu* a suitable subject for a case note.

THE FACTS & PROCEEDINGS

Akalita Apelu, 33 years old, a registered nurse practitioner was charged with sixteen counts of procuring abortions under the Samoan *Crimes Ordinance 1961*, section 73A(1) and (2). Between March 1999 and January 2003, she performed abortions on 16 (sixteen) different women who had approached her, indicating the fact that the accused had been carrying on this activity without being detected for over 3 years.

The evidence that was collected and admitted in court was from the accused's own statements. They comprise of a letter that she wrote to the nursing division of the Tupua Tamasese Meaole Hospital apologising for her actions, the statement of a specialist obstetrician and gynaecologist who was the expert witness in the case, statements from 11 (eleven) witnesses and the statements from the 16 women. It is interesting to note that the court granted the motion to suppress the names of the sixteen women but not

the accused. In addition, the accused was never put on the stand and the court only received her statement which assumedly was obtained by the Police.

Procedurally, the criminal trial was carried out on 8 and 9 June 2003 and prosecution laid 16 counts of procuring abortions pursuant to section 73A (1) (b) of the *Crimes Ordinance 1961* against the accused, although the case report recorded seventeen counts of offences. At the close of the evidence for the prosecution, counsel for the accused made a submission of no case to answer. This explains why there are two written judgments being produced in this matter. The judgment delivered by Chief Justice Sapolu on 18th June 2004 was in determination of the "No Case to Answer" proceedings. The second judgment which actually determined the charges against the accused was delivered on 10 August 2004. In short, the court did not approve the submission for "No Case to Answer" by Mr. Leung Wai on behalf of the accused. The reasons offered by the court for its decision in this regard are identical to those delivered in the second and main judgment. The writer will focus on those issues later in the subsequent paragraphs.

It is worthy to note that the case consisted of large amounts of testimonial evidence and yet the trial lasted only for 2 days. This may indicate that prosecution and defence have cooperated in the pre-trial stages of the case to manage the evidence and agree on technicalities, which is often a rarity in criminal cases in the Pacific of this nature. The other notable factor in the case is that the judgment by the court was delivered 12 months after the hearing.

THE LEGAL ISSUES

The charges against the accused in this case were made under section 73A of the *Crimes Ordinance 1961* which reads as follows:

> (1) Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to procure the miscarriage of any woman or girl, whether she is with child or not:
>
> (a) Unlawfully administers to or causes to be taken by her any poison or any drug or any noxious thing; or
> (b) Unlawfully uses on her any instrument; or
> (c) Unlawfully uses on her any other means whatsoever.
>
> (2) The woman or girl shall not be charged as a party to an offence against this section.

In all of the 16 counts of alleged offences of procuring abortion, the prosecution have used section 73A (1) (b) specifically, which requires the prosecution to prove beyond a reasonable doubt, in order to secure a conviction, (a) that the accused intended to procure the miscarriage of a woman, and (b) that the accused unlawfully used on her an instrument. Therefore, the legal questions that were being considered in this matter by the court were:

> (a) Whether on each count, the accused had the "intention" to procure the miscarriage of a woman;
> (b) Whether on each count, the accused "unlawfully" used on that woman an instrument;
> (c) Whether there was a bona fide intention by the accused to preserve the life or health of the woman; and
> (d) Whether on each particular count, the accused had any justifications for doing what she did.

For the accused to be convicted of any of the charges, it had to be proven that she had an intention, had carried out that intention in an unlawful manner and carried no defence to justify her actions. The trial judge adopted this logical analysis systematically throughout the case which made it straightforward for

anyone reading the case.

THE CASE AUTHORITIES

Having no local authority to be relied upon in this matter, counsel from both sides in the case submitted persuasive authorities from other jurisdictions in support of their various arguments. Sapolu CJ has adopted those case authorities and relied entirely on them for his ruling.

The English case of *R v Bourne* [1939] 1 KB 687 was labeled as being the "leading English authority" in regards to the offence of procuring abortion and was considered by the court in this instance as being highly perusasive. Secondly, a New Zealand Court of Appeal case, *R v Woolnough* [1977] 2 NZLR 508, was relied upon heavily by the court in defining the term "unlawfully". Even though the New Zealand Court of Appeal had made no benchmark statements as to the meaning of the word "unlawfully", Sapolu CJ favoured the approach that was taken by them and that influenced the slant that he then took in deciding the question in this case. *Woolnough* also considered *Bourne* which signposted some sound judicial analysis as far as the trial judge was concerned. Finally, the Samoan court was able to depend on a regional case, by considering *State v Sefanaia Bilovucu Tambua* (1992) (Criminal Appeal No. 6 of 1991), where the accused medical practitioner was acquitted of similar charges on the basis that he had carried out the abortion to safeguard the physical and mental health of the woman concerned. The Fijian case had also relied on *Bourne* and on its appeal, this reliance was further upheld. All these case authorities have shaped the outcome of the decision in *Police v. Apelu* and this will be illustrated in the preceding paragraphs.

From England, to New Zealand and then to Samoa, it may come as a surprise to readers and observers that the words of the statute used in those respective cases relating to the crime of procuring abortion are entirely identical with slight alterations. Section 58 of the *Offences Against the Person Act 1861* (UK) in *Bourne* is identical to section 73A (1) (b) of the Samoan *Crimes Ordinance 1961*. For those familiar with the history of the *Stephen Code*, this may be less of a surprise.

THE DECISION

The court in this matter delivered its decision just over 12 months after the conclusion of the actual trial. There were 16 counts of charges laid against the accused by the police and the trial judge systematically dealt with each charge in assessing whether there was sufficient prosecution evidence to have proved it beyond a reasonable doubt. Out of all the 16 counts of charges laid against the accused Akalita Apelu, she was found guilty by the court on only one of the charges, that being charge no. 1 in the series of charges. She was found not guilty on the rest of the charges for reasons of 'insufficient evidence' and failure to satisfy the elements of the offence to which she was being charged.

A separate judgment was given also by the same trial judge, Saplou CJ, regarding the No Case To Answer application, in which the judge refused the accused's application on the basis that the elements of the charges laid against the accused were not capable of being proven and even though there was no definition of the word "unlawfully" in s. 73A (1) (b), the Court had a constitutional function to give meaning to a term that the legislature had not provided a meaning for.

The case reports which I have consulted make no mention of the sentencing proceedings, leaving us to make no comment on that part of the criminal process.

CASE COMMENTARY

The meaning of "unlawfully"

The word "unlawfully" exists in section 73A, section 1, sub-section (b) which is the charging section

which defines the offence., It reads *'Unlawfully uses on her any instrument...'*, and that single word has created a "technicality" which has become the focus of attention in *Police v. Apelu.*

Counsel for the accused, Mr. Leung Wai, made strong submissions to the court, initially in the No Case To Answer application and throughout the actual trial that the 'second element' of the offence of procuring abortion was for the prosecution to prove 'that the accused had **unlawfully** used an instrument on the female victim concerned'. He further submitted that the word "unlawfully" or "unlawful" used in s73A(1)(b) was not expressly defined in the statute and that being the case, it should be interpreted to mean, prohibited by or contrary to a statutory provision. This was a move to persuade the Court to give the word its ordinary meaning and to adopt one of the rules of statutory interpretation. A technical argument to say that the allegations against the accused were without statutory basis, in other words, the law did not make the use of the instrument unlawful and further the prosecution had not supplied any evidence or legal argument to that effect. Notably, no other case in Samoa had tested the meaning of that term prior to this case.

This argument and the related issue caused the trial judge to resort to foreign judicial precedents in order to determine the question facing the court. There were two things that he did and I wish to highlight each of them briefly. First, the judge "put his foot down" by saying that the Court had a judicial function of statutory interpretation to ascertain what the legislature meant or intended by the word "unlawfully" and to pronounce that meaning, not otherwise being judicial legislation. In my view, this would be a normal reaction by the judiciary when alerted to possible loopholes in the law to re-state the law and avoid opening floodgates especially in the criminal arena. Secondly, the judge moves to rely heavily on two cases; *R v. Woolnough*, a New Zealand Court of Appeal case and the UK case of R *v. Bourne*. Both cases had facts similar to those in the current case and both cases had dealt with the issue of defining "unlawfully". Coupled with that, the statute at that time in NZ and the UK had identical provisions to those in the Samoa *Crimes Ordinance 1961* relating to procuring of abortion. The position in those cases were that the term "unlawful" was to be read with common sense as there were situations where an abortion is not unlawful, in cases where the abortion is performed in order to preserve the life, physical health and mental health of the mother - a "bona fide" situation where the abortion is performed in good faith. Saplou CJ, in the main judgment, then restated the test for unlawfulness by saying:

> ... for the prosecution to secure a conviction under s73A(1)(b) of the Crimes Ordinance 1961, it must prove beyond reasonable doubt that the use of an instrument was unlawful in the sense that it was not necessary to preserve the woman from serious danger to her life or to her health ...
> In the circumstances, I conclude that the two elements for the crime of procuring an abortion in the present case which the prosecution has to prove, beyond reasonable doubt are: (a) that the accused intended to procure the miscarriage of the victim, and (b) that the accused did not procure the miscarriage of the victim in good faith for the purpose of preserving her life or health

These words are very crucial, as they reveal the *ratio decidendi* of the case and also they become the turning point as to the outcome of the case regarding the question of guilt. Given the re-stated rule and the formula by the trial judge, it becomes clear as why only 1 out of 16 of the charges was found to be proven beyond a reasonable doubt. In charge No. 1, the uncontested evidence showed the accused had not acted in good faith in performing the abortion because she had charged the woman $300 and inferred by the Court as a monetary reward for the accused. Also, the woman in question was found to have sought an abortion because she had limited resources for raising another child and not for the preservation of her life or health. These facts failed under that test and therefore, the accused was found guilty on that charge.

Common law fills the gap

The judgment in *Police v. Apelu* identified gaps in the criminal legislative framework of Samoa as well as lack of local precedent in certain areas of the criminal law. This is not a surprising factor and equally, the situation also exists in other countries in the Pacific. The judiciary in many pacific jurisdictions have had to improvise and become creative in their outlook towards interpreting and enforcing the law. Chief Justice Sapolu has illustrated in his various rulings both in the civil and criminal jurisdiction that the common law can be accommodated in the current legal framework and has appropriately exercised this constitutional function in many of his judgments. While his preference for New Zealand cases may be criticized, the finger should point more to the authors of the Samoa *Crimes Ordinance 1961*. The history of the development of criminal statute in Samoa and elsewhere in the Pacific is keeping the door open for the common law to enter and fill any gaps that may be identified. However, what should be more appropriate is legislative reform from within.

Reviving the defence of necessity

One definite delight found in this case is the reappearance of that old defence of necessity. The defence was pleaded on behalf of the accused and was noted as being the second Samoan case to have featured such a defence. Necessity has not featured much in the last 10 or so years within the Pacific jurisdiction and this case justifies the chance to raise it again in criminal law classes, and not to label it as archaic.

The case of *Perka v. R* [1984] 2 S.C.R. 232 was considered as the leading authority in this area as it outlined the three elements of the defence of necessity and also, *R v. Latimer* [2001] 1 SCR 3 was being submitted to further support the case for the accused. After a comprehensive discussion and analysis of the law relating to necessity and the factual background of the case, the judge remarked that necessity had no application in the case. The judge again followed the same approach as in *R v. Woolnough*, where the court in that case refrained from engaging in any discussion as to the applicability of necessity as a defence in a case of therapeutic abortion, 'because of the extreme vagueness of necessity as a general defence in English criminal law'. Sapolu CJ identified a clash between the situation where an abortion is not unlawful because it is necessary to preserve the life of a woman and the situation where one claims necessity for performing an abortion. He resolved the confusion by stating as follows:

> It will, therefore, not be necessary to call in aid the common law defence of necessity to make lawful what is already made lawful by the statute itself. Necessity only applies to excuse an act that is unlawful, not an act that is lawful by statute.

In my view, this statement has the possible effect of qualifying the defence of necessity and to set a precedent for future criminal cases which may choose to endorse this slightly fading common law defence.

Underlying social issue of abortion

It is natural when reviewing cases to "read between the lines" and make some assumptions and analysis as to which the way the court has swayed or the implications of court decisions and its effects on society. In this matter, I see the need to identify some very important social and cultural factors to which their surfaces have been scratched. I am not Samoan and I am wary of this while making these comments.

Unplanned pregnancies and pregnancies outside of wedlock are a most highly sensitive cultural issue in Samoan society and the fear of shame, ridicule and abandonment that the victims have disclosed in this case is evidence of that. While all the victims were not teenagers and over the age of 21, their freedom to be pregnant and bear a child of their own is determined by the wishes and expectations of their families, especially parents. It is clear from the case that two-thirds of the victims actually sought after the accused and requested her to abort their pregnancies. The accused was not a "back-street abortionist" as such and on several occasions she was invited to the place where she was to perform the abortion.

The law states what is an unlawful abortion and only makes a general, broad statement as to what is a lawful abortion. What constitutes just grounds for performing an abortion is entirely a medical ethics question and surely there are standard medical procedures in place to deal with that question. The law may set standards, but the discretion lies with the medical practitioner or specialist. In this case, 15 out of 16 abortions performed by Akalita Apelu were found by the court to be not in breach of the law. In simple language, she was not breaking the law when she carried out those 15 abortions. If anything, the court has not sanctioned this unsafe practice, nor has it deterred any future practitioners, because it is implying that if a woman or girl approaches a nurse or doctor and says that she wants an abortion because she is scared of her parents finding out that she is pregnant, the nurse or doctor will be justified in performing an abortion on her. One could ask whether that presents a *bona fide* circumstance to preserve her physical and mental health?

In conclusion, it is fair to mention that this was a complex case both legally as well as socially. The name suppression granted to the victims indicates the deep social implications that the case has for that community and the underlying cultural and moral issues that exist in such matters. The case does expose deeper social problems of reproductive health, social awareness and clash of moral views regarding unwanted pregnancies. However, for our purposes, the case illustrates judicial activism in restating the law in areas that are ambiguous and the gradual development of criminal jurisprudence within the Pacific legal systems.

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