

## POLICE v TAPĀ (KAISALA)

Supreme Court Apia  
21 August; 13 September 1974  
Donne CJ

CRIMINAL LAW - Sexual intercourse with girl under 21 alleged to be ward of accused and living with him as member of his family: s 50(1) Crimes Ordinance 1961 - Evidence proving girl's parents living and father had placed her in care and custody of accused for purposes of her attendance at school - Held, that since her father remained the girl's legal guardian at all times and there was no question of his being deprived of custody, she was not a ward of accused - Information dismissed.

PROSECUTION of charge under s 50(1) of the Crimes Ordinance 1961.

Epati for Police.  
Clarke for accused.

Cur adv vult

DONNE CJ (orally). The accused is charged that at Leulumoega-fou on an unknown date between the 1st and 28th days of February, 1973 he had sexual intercourse with a girl then under the age of 21 years, not being his wife, and who, being his ward, was at the time of the intercourse living with him as a member of his family. This is an offence created by section 50(1) of the Crimes Ordinance 1961 as amended by the Crimes Amendment Act 1969.

At the hearing it was admitted that sexual intercourse occurred, that the girl was under the age of 21 years at the time, was not the accused's wife, and she was living with the accused as a member of his family.

The following facts were found by me.

1. The girl was placed by her father in the care of the accused for the purposes of attending school.
2. The accused was to have the care and custody of the girl to the exclusion of all others except for her parents.
3. The parents from time to time provided maintenance for her by way of food, but did not fully maintain her while she was with the accused.
4. The parents paid the expenses involved in the education of the girl who during school holidays stayed with them at Savai'i.

On these facts the prosecution contends the girl was a "ward" of the accused. Counsel for the accused contends that the term must be construed in a strict legal sense, and that in order to be a ward a child must have a guardian, who is appointed according to law.

The term "ward" is not defined in the Act. I think the correct approach to ascertain its meaning is to analyse the wording of the section under which the charge is laid. Section 50(1) reads as follows:-

Every one is liable to imprisonment for a term not exceeding 7 years who has or attempts to have sexual intercourse with any girl, not being his wife, who is under the age of 21 years and who, being his step-daughter, foster daughter, or ward, is at the time of the intercourse or attempted intercourse living with him as a member of his family.

[The underlining is mine].

This section clearly creates an offence, which could be considered as one intra familiar, and in considering the scope of it and defining the terms therein regard should be had to family law.

The term "ward" in its ordinary and legal sense means an infant who is in the care of a guardian: Osbon's Concise Law Dictionary, 5th Ed., p. 332. The crux of the matter is the meaning of the term "guardian". In its natural and ordinary meaning the term means, "one who guards, protects or preserves: one to whom the care or preservation of any thing is committed": Shorter Oxford Dictionary, 3rd Ed., Vol. II. But in relation to a child the term in family law has a more limited meaning. Inglis on Family Law at page 466 says:-

A guardian is a person appointed by the court or by the parents of a child to safeguard the child's interests and bring it up in a suitable manner.

At common law the natural guardian of a child is the father and this is the position in Western Samoa. One of the rights in law of a guardian is the right to custody of the child. As Halsbury's Laws of England, 3rd Ed., Vol. 21, p. 211, para. 465 states:-

A guardian of the person is entitled to the custody and control of his infant ward, and he can obtain by legal proceedings the restoration to his custody of a ward who has been removed or is being kept therefrom. But the Court has jurisdiction to interfere with his right of custody and to commit the custody of the infant to another person.

Now in law where a parent is alive, a child's guardian and custodian is the father, or if he is dead, the mother, and only the Court either by adoption, custody or guardianship orders can divest a parent of the status. A parent may appoint a guardian of his child to succeed him on his death. In this case there is no question of the girl's father being deprived of custody of the girl, who was at Leulumoega-fou in the accused's family for the purpose of attending school only. At all times her father was her legal guardian. Consequently it would seem she cannot in law be regarded as a "ward" of the accused, and I so hold.

It is noted that the comparative citation following section 50 refers to section 131 of the Crimes Act 1961 of New Zealand. However, our section does not extend the offence to a girl "under the care or protection" of a person as does the New Zealand enactment. I do not propose to speculate on the reason for that omission, but clearly if the New Zealand enactment were to apply here, an offence would have been committed.

For the reasons stated and the girl not being a ward of the accused, the information is dismissed.

Solicitors for prosecution: Office of the Attorney-General.

Solicitor for accused: Messrs Jackson & Clarke.