IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

S.6/93

BETWEEN: THE POLICE

Informant

A N D: POUVASA VAI FANUELI of Moamoa Faleasiu

Defendant

Counsel: Mr M. Edwards for Prosecution
Mr R.S. Toailoa for Defendant

Date of Hearing: 19 November 1993

Date of Decision: 23 November 1993

DECISION OF SAPOLU, CJ

The accused is charged with the crime of manslaughter. When this case was called for the accused to enter a plea to the charge, his counsel raised the issue that the accused is unfit to stand trial. The case was then adjourned for evidence to be called on that issue.

There is no provision in the Crimes Ordinance 1961 or the Criminal Procedure Act 1972 on the question of an accused's fitness or unfitness to stand trial. The relevant provision is section 11 of the Mental Health Ordinance 1961. That provision says :

"If any person on being charged with an offence is found to be "of unsound mind so that he cannot understand the nature of the "proceedings, he shall not be tried, but on the order of a "Judge or Magistrate he shall be detained in prison or in some "other place of security until the pleasure of the Minister of "Justice, or in the case of murder or manslaughter the pleasure "of the Head of State is known".

So it appears from section 11 of the Mental Health Ordinance 1961 that the real

issue is whether the accused is of unsound mind that he cannot understand the nature of the proceedings. If the accused is found to be in such a condition then he cannot be tried of the charge against him.

I will now refer to the evidence. In support of his application that the accused is unfit to stand trial, the accused called Dr Tafunai, a medical practitioner and a psychiatrist and Dr Forsythe who is not a medical practitioner but a psychologist with a doctorate in psychology.

Dr Tafunai in his evidence produced a copy of a report he prepared on the accused. In that report he refers to the personal history of the accused from his childhood up to now. The information about the history of the accused was provided to Dr Tafunai by the mother of the accused and his aunt. According to that information when the accused was a child he did not play freely with other children of his age group but was rough and made other children cry. At the age of 12 he refused to go to school and he became irritable and destructive. At the age of 14 he cut down with a knife some cocoa trees which were useful to his family. Later on in his life he punched his father until the old man was unconscious. His actions were also described as inappropriate as he often talked and laughted to himself. At the age of 25 he became suspicious of people. During the interview by Dr Tafunai, the accused was able to relate to Dr Tafunai how the incident with which he is now being charged took place. He said that he was involved in a fight. He used a piece of broken bottle indiscriminately during the fight and that led to the death of the deceased. Dr Tafunai also says that during the interview, the accused displayed abnormal mannerisms. He rolled his tongue in and out of his mouth while speaking, laughed and smiled inappropriately, and gave irrelevant answers to questions. Dr Tafunai also says that during the interview, the accused's sensorism, i.e.. memory was clear and that there was no expression of delusions or hallucination. Dr Tafunai then gives as his opinion that the accused suffers from

a psychotic illness most likely that of schizophrenia characterised by a disorder of speech and behaviour, and a marked disturbance of emotions. He also says that the accused was not fully responsible for his actions due to an ongoing disease of the minds.

If Dr Tafunai's oral evidence, he says that the accused's sensorium, i.e., memory, is clear because he was able to recollect the incident that happened and which led to the death of the deceased. He also says that there are several kinds of schizophrenia and that the kind of schizophrenia with which the accused may be affected is 'simple schizophrenia'. This kind of schizophrenia can sometimes affect the intellectual capabilities of a person and it is a possibility that simple schizophrenia might have affected the intellectual capabilities of the accused. Dr Tafunai also says that the accused was conscious at the time of the interview and he was clear and he knew what happened and there was no evidence of delusions. He is pretty sure that the accused will understand some of the things relating to the present proceedings but would not understand some of the other things.

Dr Tafunai also says that with simple schizophrenia it is difficult to see signs of delusions and hallucinations. Symptoms of simple schizophrenia are exhibited on and off although the diseas is continuous. That is different from paranoid schizophrenia which is more serious. Symptoms of simple schizophrenia become manifest when a person is under pressure. Dr Tafunai also says that the relatives of the accused told him that the accused had not been given treatment before.

It appears to me that the essence of Dr Tafunai's evidence is that the accused showed abnormal mannerisms during the interview but his memory was clear and there was no sign of delusions or hallucinations. In his opinion the accused suffers from a psychotic illness, most likely that of simple schizophrenia which might have affected the accused's intellectual capabilities. However, Dr Tafunai was also pretty sure that the accused would understand some of the things relating to these proceedings but would not understand some of the other

things. Whatever are those things he would understand or would not understand is not clear.

Dr Forsythe, the psychologist, in her evidence says that she gave the accused some tests. These appear to be learning abilities tests but not an IQ test. Whilst the accused was co-operative with the simple tests he lost his concentration, started to mumble and move his body and was unable to cope with the tests as they became difficult. Dr Forsythe also says that the tests the accused could not cope with would have been easy with a 6 or 7 year old. In her opinion the accused suffers from a chronic fictitious disorder with underlying psychological problems and a severe personality disorder. She also thinks that the accused would not be able to stand trial. She says he is fragile and is holding on to reality with a thread and if he is subjected to pressure he would not be able to hold on to that thread.

However, Dr Forsythe also says that the accused has sufficient intellect to instruct a lawyer but he is delusional. The accused may also understand witnesses called against him but he is delusional. Dr Forsythe also says that the accused cannot communicate sensibly with anybody.

In cross-examination, Dr Forsythe says that the accused does not have a clear cut understanding. He also has a severe personality disorder but was not schizophrenic right now, i.e., while Dr Forsythe was giving evidence. She also says in cross-examination that the accused has sufficient intellectual to instruct counsel as long as he is not delusional and subject to pressure.

I find Dr Forsythe's evidence rather unsatisfactory in certain respects. She says that she does not think that the accused would be able to stand trial and that he cannot communicate sensibly with anybody. But she also says that the accused has sufficient intellect to instruct a lawyer and he may also understand witnesses called against him but he is delusional. Then in cross-examination she says that the accused has sufficient intellect to instruct counsel as long as he is not delusional or subject to pressure. It will also be recalled that Dr Tafunai in his evidence says that the accused showed no

signs of delusions and hallucinations at the time he interviewed the accused. The psychotic illness from which the accused was suffering was most likely to be simple schizophrenia which is not as serious as paranoid schizophrenia. And that the symptoms of delusions and hallucinations in the case of simple schizophrenia come on and off. Those symptoms tend to come on when a person with simple schizophrenia is under pressure. So delusions and hallucinations are not continuous symptoms for simple schizophrenia as it appears from Dr Tafunai's evidence.

The prosecution called Dr Thieme who is the head of the psychiatric unit at the Apia National Hospital. Dr Thieme had examined the accused twice and has prepared two reports for both examinations. The personal history of the accused provided in Dr Thieme's reports is very much the same as the personal history of the accused mentioned in Dr Tafunai's report and is also based on information supplied by the accused's mother. It is also clear from Dr Thieme's report that the accused related to him the incident with which he has been charged and what the accused told Dr Tafunai about the incident is really the same. Dr Thieme then says in his report of 9 March 1993 that during his physical examination the accused did not show any abnormalities but hnis mental condition was problematic in that he found the accused to be clinically a good example of post epileptic automatism. Dr Thieme seems to have come to that view because of the continuous movements of the accused's arms and legs and because he was restless when he explained the incident with which he is now being charged. Dr Thieme also says that when the accused is not subject to frequent fits he would lead a fairly 'normal' life in the same way of anybody else. He nevertheless accepted the possibility that the accused was labouring under a defect of reason from a disease of the mind at the time the alleged offence was committed although that was relatively difficult to establish. Dr Thieme then comes to the view that the accused when he is not suffering from epilepsy does appear to understand the nature of the charge against him and the concept of

guilty and not guilty in a Court situation and would be quite capable of conducting his defence intelligently.

In his report of 12 October 1993 which is the report prepared on his second examination of the accused, Dr Thieme says that the accused showed no gross disturbance in his emotions, thinking or perception. The accused also showed no illusion or hallucination and denied having any epileptic attacks or mental disease. The accused also knew simple mathematics and the place where he was but his answers appeared confused.

In his oral evidence Dr Thieme also says that the accused displayed signs of post epileptic automatism and that the movements of his body as well as the movements of his tongue were consistent with epileptic automatism and is not a sign of schizophrenia. Dr Thieme also disagrees with Dr Tafunai's view that the accused is most likely to be suffering from schizophrenia. In Dr Thieme's opinion, the accused does not suffer from schizophrenia and had shown no illusions, delusions or hallucinations.

In assessing the evidence given by these three witnesses, I have also given due consideration to their respective qualifications, experiences and the lengths of time they interviewed the accused. I have also considered what Dr Thieme says that in preparing his reports he had consulted with another qualified psychiatrist who works at the Apia National Hospital but the opinions expressed in his reports are his opinions.

Now it is clear that where the issue of whether an accused is unfit to stand trial is raised by the accused, the onus is on the accused to prove on the balance of probabilities that he is unfit to stand trial; and where the issue is raised by the prosecution, the onus is on the prosecution to prove beyond reasonable doubt that the accused is unfit to stand trial: R v Podola [1960] 1 Q.B 325; (1959) 43 Cr. App. R. 220 and R v Correl [1992] 1 NZLR 760. But where the issue of whether an accused is unfit to stand trial is raised by the Court, it is my view that the onus should also lie on the prosecution to prove the issue beyond reasonable doubt. In this case the

issue thatthe accused is unfit to stand trial has been raised by the accused so the onus lies on him to prove on the balance of probabilities that he is unfit to stand trial.

As already pointed out the issue under section 11 of the Mental Health Ordinance 1961 is whether the accused is of unsound mind that he cannot understand the nature of the proceedings. If the Court is therefore satisfied on the balance of probabilities that the accused is in such a condition, then he cannot be tried of the charge against him. But if the Court is not satisfied, then the accused's application cannot succeed and he must stand trial.

The test which the Court seems to have applied in determining whether an accused is fit or unfit to stand trial is that provided in R v Pritchard (1836) 7 C & P 303. The report of Pritchard's case is not available in this country but the relevant passage is quoted in Podola's case, the report of which is available here. That passage reads :

> "There are three points to be inquired into: First, whether the "prisoner is mute of malice or not; secondly, whether he can plead "to the indictment or not; thirdly, whether he is of sufficient "intellect to comprehend the course of proceedings on the trial, "so as to make a proper defence - to know that he might challenge "any of you to whom he may object - and to comprehend the details "of the evidence which in a case of this nature must constitute a "minute investigation. Upon this issue, therefore, if you think, "that that there is no certain mode of communicating the details "of the trial to the prisoner, so that he can clearly understand "them, and be able properly to make his defence to the charge; "you ought to find that he is not of same mind. It is not enough, "that he may have a general capacity of communicating on ordinary "matters".

The above passage may also be found in R v Robertson (1968) 52 Cr. App. R. 690. In R v Berry (1977) 66 Cr. Aff. R. 157, CA, Geoffrey Lane L.J referred to the test in Pritchard's case as follows :

"It was then incumbent upon the learned judge to explain to the "jury the well known principles upon which they had to decide "the question, yea or nay, of fitness to plead. Those questions "and those bases are clearly set out in paragraph 394 A of "Archbold, (39th ed.) 1976. The last sentence of that paragraph "read as follows: 'The questions put to the witnesses called "'to give evidence upon the issue of the defendant's disability "'are based upon the test enunciated in Prictchard [(1836) "'7 C & P 303] and deal with whether the defendant has sufficient "'intellect to instruct his solicitor and counsel to plead to the "'indictment, to challenge jurors, to understand the evidence and "'to give evidence. The mere fact that the jury may think that "'the accused is not capable of acting in his own best interest is "'insufficient to entitle the jury to decide that he is unfit to "'stand his trial.....

"That passage is also based upon the decision of this Court in the "case of R v Robertson (1968) 52 Cr. App. R. 690 [1968] 1 WLR 1767".

Further on in his judgment Geoffrey Lane L.J says :

"That brings me to the direction which the learned judge gave to "the empanelled jury in this case. We have read through his "direction. It is a very short one and nowhere does the learned "judge deal with the matters upon which the jury have to base "their findings: the ability of the defendant to challenge jurors, "the ability of the defendant to instruct counsel, the ability of "the defendant to understand the evidence and the ability of the "defendant to give evidence himself".

Then in another later passage which is relevant for the purpose of this case Geoffrey Lane L.J goes on to say :

> "It may very well be that the jury may come to the conclusion
> "that a defendant is highly abnormal, but a high degree of
> "abnormality does not mean that the man is incapable of
> "following a trial or giving evidence or instructing counsel
> "and so on".

In R v Owen (No. 2) [1964] NZLR 828 Wilson J for the purpose of determining whether an accused is fit to stand trial under the relevant New Zealand legislation which at the time was the Mental Health Act 1911 refers to the matters that must be taken into consideration. These are, whether the accused is able to understand that he has been charged with the crime alleged against him and that he is entitled to defend himself on that charge; whether he is able to make a proper decision whether to plead guilty or not guilty; whether he appreciates his right of challenging jurors; whether he appreciates that he has the right to cross-examine prosecution witnesses, call witnesses in his defence and to give or abstain from giving evidence himself; and whether hs is able to have a rational recollection of the events and circumstances in which he was a participant at the time of the alleged offence.

In my view the authorities already cited are relevant and applicable in approaching the issue as provided in section 11 of the Mental Health Ordinance 1961. Applying those authorities to this case, it must be said at once that the mere fact that the accused may not be capable of acting in his own best interest or he is highly abnormal is not sufficient to warrant a finding that he is unfit to stand trial or to understand the nature of the proceedings against him. As to the other relevant matters, there is really no sufficient evidence to show that the accused does not have sufficient intellect to appreciate his right to challenge assessors or to exercise that right; or to show that he is

unable to make a proper decision whether to plead guilty or not guilty to the charge; or to show that he cannot appreciate his right to cross-examine witnesses, call witnesses in his defence and to give evidence or refrain from giving evidence or to follow the trial; or to show that he does not understand that he has been charged with the crime alleged against him and that he is entitled to defend himself. What the evidence shows and this is clear from all three witness called, is that the accused has a clear recollection of the incident which has led to the charge he is now faced with. It also appears from Dr Forsythe's evidence that the accused has sufficient intellect to instruct counsel and that he may also understand witnesses called against him provided he is not delusional due to pressure. Dr Tafunai's evidence is that he is pretty sure that the accused can understand some things in relation to these proceedings but cannot understand other things. But it is not clear what matters are those that the accused can understand and what matters are those he cannot understand. There is also the conflicting evidence of Dr Tafunai that the accused is most likely to be suffering from simple schizophrenia and the evidence of Dr Thieme that the accused has post epileptic automatism. On the evidence, I am inclined to accept Dr Thieme's evidence that the symptoms shown by the accused are more consistent with epileptic automatism than with schizophrenia. I base this view not only on the evidence by Dr Thieme but on the case law on the defence of automatism.

In all then, I am not satisfied on the balance of probabilities that the accused has discharged the onus on him. Accordingly I am not satisfied on the required standard of proof that the accused is of unsound mind that he cannot understand the nature of the proceedings against him. The application by the accused is accordingly dismissed.

One final matter is who should decide whether an accused is fit or unfit to stand trial. I refer to this matter because it was raised by counsel for the accused at some stage prior to the present proceedings. I am still of the view

that proceedings to determine whether an accused is fit or unfit to stand trial is not in itself a trial. They are proceedings to determine whether the accused is fit or unfit to stand trial. So these proceedings do not come within the meaning of section 87 of the Criminal Procedure Act 1972 which requires that this Court shall sit with assessors on the trial of any person charged with an offence punishable for more than five(5) years imprisonment. In Owen's case already cited, Wilson J says that proceedings of this kind is not a trial but an inquiry.

There is no express provision in our law which says who should decide whether an accused is fit or unfit to stand trial. But in my view, the clear implication of section 11 of the Mental Health Ordinance 1961 is that it is a Judge or a Magistrate in an appropriate case. If assessors were to decide the issue, then it will mean that where the accused or the prosecution raises the issue in relation to a criminal charge before the Magistrates Court, then assessors must be called in. That cannot be the case given the present state of our law. But if it is to be said that when the issue of fitness or unfitness to stand trial is raised in this Court it is to be decided by assessors but when it is raised in the Magistrates Court is to be decided by the Magistrate sitting alone, then an anomaly is created in our law without any sound justification. I also note that under section 111 of the New Zealand Criminal Justice Act 1985 it is for the Judge sitting alone to decide whether an accused is under disability that he is unable to plead or to understand the nature or purpose of proceedings against him, or to communicate adequately with counsel for the purpose of conducting a defence.

T.F.M. Sakora.....

CHIEF JUSTICE