IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR: 255/13 (Aitutaki CR 19/13)

BETWEEN	**POLICE**
AND	**POARU TATIRA**

Hearing Date:	9 March 2015
Court:	Hugh Williams J
Appearances:	Mesdames Martha Henry and Cheryl King for Crown Mr Norman George for Defendant

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ORAL JUDGMENT OF HUGH WILLIAMS J

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[1] The accused Poaru Tatira is charged with one count of rape on a named complainant, Ms Vaevae, at Amuri on Aitutaki on 1 June 2013. The sole defence apparently to be advanced at his trial is that the complainant consented to intercourse on that date with the accused or that he had an honest belief that she was consenting.

[2] During a conference call convened in relation to this trial on 13 February 2015 (NZ DST) Mr George, for the accused, raised the possibility that the accused may wish to adduce evidence relating to the complainants claimed sexual activities both with himself other than on 1 June 2013 and with other men. He was directed to file some submissions on the topic.

[3] In fact on 27 February 2015, he filed an application under the Evidence Act 1968 s.20A together with two statements from proposed witnesses, a Mr Toko (also known as "Froggy") and Mr Turu (also known as "Captain").

[4] The matter was argued prior to the trial commencing on the morning of 9 March 2015. The complainant was present during the hearing though she took no part, Mr George making no request for her to be absent pursuant to s.20A (6)(c).

[5] As mentioned, the application is brought under s.20A which reads:

> "20A. Evidence of complainant in rape cases – (1) In this section –
> "Complainant" means a woman or girl upon or in respect of whom it is alleged that a rape offence was committed;
> "Rape" has the same meaning as in section 141 of the Crimes act 1969;

"Rape offence" means any of the following offences:
(a) Rape;
(b) Attempted rape;
(c) Assault with intent to commit rape;
(d) Aiding, abetting, inciting, counselling, or procuring the commission of any offence referred to in paragraphs (a) to (c) of this definition;
(e) Conspiring with any person to commit any such offence.

(2) In any criminal proceeding in which a person is charged with a rape offence or is to be sentenced for a rape offence, no evidence shall be given, and no question shall be put to a witness, relating to-

(a) The sexual experience of the complainant with any person other than the accused; or
(b) The reputation of the complainant in sexual matters, except by leave of the Judge.

(3) The Judge shall not grant leave under subsection (2) of this section, unless he is satisfied that the evidence to be given or the question to be put is of such direct relevance to -

(a) Facts in issue in the proceeding; or
(b) The issue of the appropriate sentence, as the case may require[1], that to exclude it would be contrary to the interests of justice.

Provided that any such evidence or question shall not be regarded as being of such direct relevance by reason only of any inference it may raise as to the general disposition or propensity of the complainant in sexual matters.

(4) Notwithstanding subsection (2) of this section, leave shall not be required:-

(a) To the giving of evidence or the putting of a question for the purpose of contradicting or rebutting evidence given by any witness, or given by any witness in answer to a question, relating, in either case, to -
(i) The sexual experience of the complainant with any person other than the accused; or
(ii) The reputation of the complainant in sexual matters; or
(b) Where the accused is charged as a party, and cannot be convicted unless it is shown that a person other than the accused committed a rape offence against the complainant, to the giving of evidence or the putting of a

[1] The section is reproduced as in the Statue Book, but s.20A(3) should be reformatted as the 'contrary to the interests of justice' test clearly applies to both s.20A(3)(a) and s.20A(3)(b) that was thought to tilt the balance too much against the interests of complainants – already beleaguered in what they must endure to maintain their complaint – and too much in favour of defendants who only needed to assent a belief in consent – no matter how threadbare the reasons – and not have the honesty of that belief tested against the criteria of reasonableness.

> question relating to the sexual experience of the complainant with that other person.
>
> (5) Nothing in this section shall authorise evidence to be given or questions to be put that could not be given or put apart from this section.
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> (6) An application for leave under subsection (2) of this section-
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> (a) May be made from time to time, whether before or after the commencement of the proceeding;
> (b) If made in the course of a proceeding before a jury, shall be made and dealt with in the absence of the jury;
> (c) If the accused or his counsel so requests, shall be made and dealt with in the absence of the complainant.

[6] The position concerning consent in the Cook Islands is that the standard of consent is honest belief. That standard was enunciated by the House of Lords in director of *Public Prosecutions v. Morgan [1976] 182.* There, their Lordships held that an accused only needs to honestly believe in the fact that – even though it may be mistaken – that a complainant consented to the sexual activity comprised in the charge.

[7] The decision was a controversial one at the time and, to the extent that it remains relevant, it remains controversial. The reason of course, is that *Morgan* substituted the subjective test of an accused's belief and honest belief in consent, for the objective test of an accused's belief in the consent being given by the complainant tested against the reasonableness of that belief being held.

[8] *Morgan* was so controversial that a number of jurisdictions promptly legislated it out of existence. A number of the Pacific countries have done that, as has New Zealand.

[9] The position concerning the status of *Morgan* is usefully summarised in the Criminal Laws of the South Pacific, 2nd ed Findlay 2000, pp138 ff.

[10] The current law concerning consent in the Cook Islands is of course relevant to an application under s.20(A) because what the Crown needs to

disprove is that, on the evidence, the accused did not subjectively genuinely hold an honest belief in the complainants consent. It does not have to focus the evidence on whether a belief in consent held by the accused was objectively reasonable in all the circumstances of the matter. Therefore in jurisdictions that retain the honest belief in consent defence, the focus is narrowly focused on the subjective belief of the accused rather than more broadly focused on the reasonableness of the belief the accused claims to have held.

[11] Turning to the specific application, in terms of s.20(A)(2)(a) a complainant can without leave be asked questions relating to her sexual experience with the accused both on the date charged and on claimed other dates. That is relevant because it can affect credibility the honesty with which the belief of consent is claimed to be held. It is part of the overall duty of the defence in any criminal trial to put the defence to the prosecution witnesses.

[12] Broadly the events alleged by the Crown in this case are that the complainant was at home asleep on the night in question, Mr Tatira entered her dwelling and had sexual intercourse with her despite her protestations and the fact that she did not consent.

[13] As the Court understands it, part of the complainant's evidence will be that the accused had propositioned her for sex on earlier occasions but on all occasions had been rebuffed and that she had not had sexual intercourse with Mr Tatira on any occasion prior to 1 June 2013.

[14] If there is direct evidence that the accused and the complainant had consensual sexual intercourse on occasions prior to 1 June 2013, that evidence would be relevant to her actions in relation to Mr Tatira on the date charged and that would apply whether the evidence comes from Mr Tatira or from other persons who claim to have personally witnessed the intercourse between Mr Tatira and the complainant on earlier occasions.

[15] Here, Mr Toko, “Froggy” and Mr Tumu a “Captain” have both given witness statements claiming that the complainant was known by vulgar or obscene or soubriquets. That evidence of course is completely irrelevant and cannot be put.

[16] Mr Toko also claims that he had sex with the complainant in about 2012 and regularly thereafter to the point where he understood she conceived but lost a child in 2012. Applications for leave to cross-examine complainants about matters such as that are quite outside s.20(A). There is ample precedent for the fact that because a complainant is prepared to have a sexual relationship with a man at a time other than that charged of rape with another man, has no logical connection whatever to whether there was an honest belief in consent on the date charged. That is so, especially since there is no suggestion that Mr Tatira was aware of the detail of Mr Toko’s claimed relationship with the complainant. He cannot have had an honest belief in her consent to sexual intercourse on 1 June 2013 simply from the fact that he may or may not have known that she had a consensual sexual relationship on one or more occasions a year or more earlier with another man. A woman is entitled to give or withhold consent to sexual intercourse on every occasion when it is imminent, whether with the same man or with more than one.

[17] So that evidence from Mr Toko amounts to no more than evidence of the complainants reputation in sexual matters. It is not in the interest of justice to allow it and the application to put to the complainant evidence relating to that relationship with Mr Toko is dismissed.

[18] His statement also speaks of other forms of sexual intercourse. That is not alleged to the charge against Mr Tatira and is again no more than claimed evidence of the complainant’s reputation in sexual matters. That cannot be put either.

[19] Mr Toko gives evidence of an occasion in 2012 where he claims to have had sexual intercourse with the complainant and to be replaced by Mr

Tumu. That is not logical, that is not relevant. It bears only on the complainants reputation in sexual matters and accordingly the application is dismissed in relation to that matter.

[20] Effectively, that means that Mr Toko cannot give evidence on any of the matters set out in his witness statement.

[21] As far as Mr Tumu is concerned, he claims to have had sexual intercourse with the complainant on a number of occasions in 2011, 2012 and through to 2013. That too has no logical relevance or connection to the occasion charged. As mentioned, the fact that a complainant is prepared to have consensual sex with one man at a different time is not relevant or logically connected to whether or not the accused had a honest belief in consent to sexual intercourse on another occasion. That effectively means that the whole of Mr Tumu's witness statement cannot be put.

[22] Reverting then to the questions that Mr George set out in his 27 February memorandum, the answer is that of his questions in plan 8 relating to Mr Toko, none of those questions can be put and none of the questions in his plan 9 relating to Mr Tumu's proposed evidence can be put.

[23] Mr George's memorandum says he has two other witnesses who are neighbours of the accused who claim to have witnessed the complainant's regular visits to the accused's home at different times of the day and night from 2011 to 2013 but not witnessing any sexual acts. That evidence can be put in the sense that although the complainant apparently accepts that she knew the accused and had conversations with him on other occasions, the degree of her familiarity with the accused in the sense of social visits, can be part of the narrative and bear on her credibility in saying that she rejected any propositions made to her. Accordingly the witnesses mentioned in paragraph [10] of Mr George's memorandum, Nane Herman and Tereora Williams, can be called to give evidence to the extent set out in that paragraph.

[24] Apart from that, the application under s.20(A) is wholly dismissed because the questions and the evidence proposed to be given are on the reputation of the complainant in sexual matters and to exclude it would not be contrary to the interests of justice.

Hugh Williams, J