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JUDGMENT NO. 60.

IN THE SUPREME COURT OF THE)
TERRITORY OF PAPUA AND NEW)
GUINEA.)

CRAM: MR. JUSTICE BIGNOLD

5th August, 1954

at 2.00 p.m.

B E T W E E N.

THE QUEEN

- v -

PAIOVI ARAVAPO

J U D G M E N T.

In this case the accused PAIOVI ARAVAPO appears before the Court charged that on the Thirtieth day of April, One thousand nine hundred and fifty-four (a Friday) in the Territory of Papua he committed rape upon one SUSUVI WAI-IVI.

Mr. O'Driscoll appeared to prosecute and Mr. Craig Kirke of Counsel for the defence.

The accused pleaded "Not Guilty", thus putting the Crown to strict proof of every element of the offence beyond a reasonable doubt.

The circumstances of the case are somewhat unusual. The complainant, a married woman living with her husband in native quarters at Badili, says that she lay asleep on the floor of their house with her young child beside her and otherwise alone. At about one o'clock in the afternoon of Friday the Thirtieth day of April whilst she was so lying, the accused entered her house without her permission, and, having removed her pants and pulled up her dress, had full intercourse with her against her will.

She says that she called out once "Labour, Labour", and that whilst attempting to call again, the accused stifled her cry by placing his hand over her mouth, and that she struggled as much as she could, but in spite of this, he had completed intercourse with her.

Strangely enough, it so happens that the event was witnessed by two natives attracted to the house, so they say, by the crying of her child. These two natives testify that they peered into the room through a long wide crack on the left side of the door, which was closed and fastened on the inside.

The accused, on the other hand, though each of the eye-witnesses and the complainant herself positively identified him as the intruder, denies ever having been at the house, and says, in

effect, that so far as the evidence connects him with the alleged offence, it is all a regrettable mistake. He made his denial at the earliest possible moment, and has at all times persisted in it.

He testified on oath, and he produced evidence to support it, that it was the veriest chance that he had the misfortune to be in the locality at the material time, having been over-carried on a truck past his place of business, Mogridge's Trade Store at Gavutu.

As pointed out by learned Counsel, it is for the Crown to prove beyond any reasonable doubt -

- (1) That the intruder was the accused.
- (2) That he did have carnal knowledge of the woman within the meaning of the Criminal Code,
and
- (3) That such carnal knowledge was without her consent, i.e. her free and conscious permission.

Dealing with the first question, namely was the accused the intruder, and this is plainly a question of the utmost importance to decide correctly, otherwise injustice may follow - the complainant SUSUVI identifies her assailant as the accused. She says she knew him through making purchases at the Trade Store, and that she recognized his face on the occasion in question.

Both the native onlookers, OWAMU and HORO identify the intruder as being the accused. Moreover, their description of his clothing, unhappily for the accused, tallies with the accused's clothing.

The accused denied to the Police that he was at the house, and says that the very first knowledge he had of the affair was when a Kikori native said "Pst, Pst", and said to him "You have got trouble", an assertion which he then and there denied.

In spite of his stout denial, the evidence convinces me that the intruder was undoubtedly the accused, and that his protestations in relation to his presence in the house are fabrications to attempt to deceive this Court.

This brings me to the next question - was there, in fact, carnal knowledge of the complainant within the meaning of the Criminal Code. The woman's evidence as to this is unequivocal, and the native witnesses OWAMU and HORO, described the accused as being on top of the woman for a considerable time in appropriate circumstances for intercourse, and one witness demonstrated motions

suitable to such an occasion.

I feel satisfied, from the direct evidence, that the accused, in fact, had carnal knowledge of the complainant. It only remains to consider the final question, namely, whether the evidence adduced satisfied me beyond a reasonable doubt that such carnal knowledge was without the consent of the complainant.

In determining this issue, the surrounding circumstances are pre-eminently important, as they are not subject to human fallibility.

After anxious consideration of the evidence, the following aspects suggest to me that a jury, considering the whole circumstances, would entertain a reasonable doubt on this issue:

- (1) The time and place do not seem propitious for such an offence.
- (2) The woman, in her evidence, was in a difficulty regarding the removal of her pants. At first she testified that she was awake at their removal. She then saw that there must be seen an unlikelihood of such a removal when she was awake, so she altered her testimony, placing her as asleep. Be this as it may, a jury may well consider the probability or otherwise of their removal without waking her.
- (3) No cry was heard from the woman by either HORO or OWAMU. The Court is entitled to consider whether a hand placed over her mouth would prevent her from crying out if she twisted her head violently.
- (4) A jury could, too, consider the unlikelihood of persons witnessing what appeared to them a shocking rape by a man known to them without calling to him to desist.
- (5) The curious circumstance of the removal of his boots by the accused. Even if this could be ascribed to a desire to reduce noise, and not to some rare delicacy in a person intent on rape, it seems fantastic that upon discovery, he should wait at the scene of his crime to put his boots on again, rather than either to abandon them or carry them in his hands in escaping.
- (6) There is evidence that the accused continued intercourse with the complainant after the

onlookers tapped upon the bedroom door. It would not seem probable, to a jury, I think, that this would be so, in the event of rape.

In all the circumstances, I do not feel that the Crown has discharged its burden of proof in respect of this issue, although the learned Crown Prosecutor argued the matter with diligence. The accused must therefore be acquitted, but he has no reason to feel that the case has placed him in any meritorious light.

Accused "Not Guilty" - discharged.

J.