

REGINA -v- FRANK POLAU

High Court of Solomon Islands

(Muria ACJ)

Criminal Case No. 4 of 1992

Hearing: 22 April 1992

Judgment: 8 May 1992

J. Faga for Prosecution

J. Wasiraro for the Defendant

MURIA ACJ: The accused has been charged with the offence of rape contrary to section 129 of the Penal Code. It was alleged that the accused Frank Polau, on 20 February 1992 at Honiara had sexual intercourse with the victim Susie Tangoia without her consent. The accused pleaded Not Guilty and it is for the prosecution to prove the accused's guilt beyond reasonable doubt.

The evidence for the prosecution is that after a dance that night at Hibiscus Hotel, the victim went with some of her friends to the Guadalcanal Province area. There the victim, because she was drunk, lied down on a concrete patchment and went to sleep. She was still lying down on her stomach when the accused came and laid on her back and pushed his penis into her anus. A friend of the victim saw what happened, came to the victim and the accused and scorned the victim for allowing the accused to push his penis into her anus. The victim did not realise what the accused did to her because she was drunk and fast asleep. The victim pushed the accused away and she went back to sleep again on the concrete slab. Her friend went away. The accused then saw the victim went back to sleep again, came back to her and rolled her down to the side of the concrete slab and laid on her. The accused pulled down the victim's long trousers and underpants, pulled his own long pants down and had sex with the victim. They were still having sex when a security man named Sam Taro came and stopped them from having sex in public. Sam Taro came because he said he heard screams from the victims.

The accused gave evidence and his version is that on the night in question, he was also at the dance at Hibiscus Hotel and after the dance, also left for the Guadalcanal Province area. When he arrived at the Guadalcanal Province area, he saw the victim and a boy from the Philippines having sex on the concrete slab. The victim

was full drunk and after she and the boy had sex, she went to sleep straight away on the concrete slab. The Filipino boy left her there sleeping and he went to his ship which was by the Guadalcanal Province wharf. The accused, having seen the victim sleeping on the slab with her clothes already below her knees, went and laid on the victim's back. The victim was lying on her belly. After being disturbed by the victim's friend, the victim woke up.

Later after her friend left, the victim went back to sleep again on the concrete slab. It was then the accused came back again and moved the victim down to the ground beside the slab and laid on her. She did not struggle but instead asked the accused to stand up so that they could move to a dark place for the place where they were lying down was lit with an electric street light on a pole. The accused did not want to move anywhere. The accused pulled his own pants down and tried to have sex with her. The victim's clothes were still at her knees. He did not manage to have sex with the victim although he tried to do so.

On the evidence, it is not in dispute that the victim was lying down by herself on that night in question on the concrete slab beside the Guadalcanal Province area. She was very drunk and that upon arrival at that place, she laid down on her belly and went to sleep. It is not disputed that the accused came and laid on her backside while she was lying sleeping. It is further not disputed that the accused was also very drunk at the time. There is no dispute that the accused rolled the victim over from where she was sleeping onto the ground and that the victim was lying, face up while the accused laid on her face down. There was no dispute that the victim suggested that they move to a dark place although she said that it was an attempt to tell a lie to the accused. There is also no dispute that one Sam Taro found them with the accused on top of the victim.

What is in dispute is the question of who removed the victim's clothes and whether there was penetration or not.

As to the removal of the victim's clothes, the victim was adamant that it was the accused who moved her long trousers and underpants down to below her knees while she was lying down. She described how the accused came on her, put his right hand over her mouth and used his left hand to move her clothes down to below her knees. The accused on the other hand insisted that the victim had been lying down throughout that time with her clothes already below her knees. On this issue, I prefer the account given by the victim. The accused's version contains the suggestion that the victim had been sleeping on that concrete slab already half naked and that the accused need not pulled her clothes down and that all he has to do was to pull his own clothes down and lay on her. I cannot accept the accused's version with the suggestion he sought the court to

infer. There was no evidence to show that the victim is a person of loose character, but even if there was any evidence to that effect, the accused's version of the victim's clothing must be a near absurdity.

On the question of penetration, the only evidence of that comes from the victim herself. She said that the accused moved her long trousers and underpants down to below her knees and laid on her. She then felt the accused's erected penis pushed into her vagina and moved his buttocks up and down. The accused however stated that having moved his pants down, he laid on the victim. The victim's legs were not that wide apart because her clothes were still on at her knees. He was only laying on her. His attempts to push his penis into the victim's vagina did not succeed, firstly because her clothes being still on at her knees prevented her legs from opening wide and secondly, he was so drunk that he could not achieve full erection to enable him to penetrate her. The victim's evidence would seem to suggest also that her long trousers and underpants were moved down together to her knees and were kept there throughout. On this issue, I cannot say that the victim is not telling the truth. But equally, I cannot say that the accused's version cannot be believed. The only way the Court can say for sure as to who was telling the truth in such a case was to have some other evidence to corroborate the victim's evidence. The question of penetration is a material particular in rape cases which if supported by other evidence will confirm the commission of the offence with the identification of the accused as the person committing it.

In the present case, the evidence to support the issue of penetration leaves the Court with some doubt and however slight that doubt, the accused must have the benefit of it.

The offence of rape on the evidence, is therefore not made out to the required standard.

There is evidence in this case which the Court can still consider if some other offences have been committed. The power of the Court to do that is provided under section 166 of the Penal Code which states:-

"166. Where a person is charged with rape and the Court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 133(1), 134, 135, 137 and 156 of the Penal Code, he may be convicted of that offence although he was not charged with it."

The evidence in this case clearly admitted by the accused is that he saw the victim lying down on the concrete slab went to her and without asking her pulled down his pants and laid on the victim's back. Later the accused rolled the victim down to the side of the concrete slab and pulling down his long trousers laid on top of the victim

who was lying on her back facing up. The victim was naked with her clothes pulled down to her knees. The accused with his clothes also pulled down to below his knees, laid on top of the victim and clearly placing his penis against the body of the victim. There was no evidence to suggest that the victim allowed the accused to do so.

The evidence clearly shows that an indecent assault had been committed upon the victim.

The accused is therefore convicted of the offence of indecent assault contrary to section 133(1) of the Penal Code.

(G.J.B. Muria)
ACTING CHIEF JUSTICE

SENTENCE

The accused has been acquitted of rape but on the evidence he is found guilty of indecent assault upon the victim.

The facts of this case although do not entitled the accused to take advantage of the conduct of the victim, clearly must be looked at in order to assess what sentence is to be passed on this accused.

The victim must bear some blame in this and cannot be solely be said to be the accused is to be entirely responsible.

I took into account the fact that the accused is married with a child and that he has a good job. This is his first of this sort of offence. He co-operated with the police. I attach no adverse view on the fact that he pleaded Not Guilty as that is his constitutional right.

In all the circumstances I feel the appropriate sentence is one of 4 months imprisonment. The circumstances of the case clearly justify that sentence to be suspended in its entirety.

SENTENCE: 4 MONTHS IMPRISONMENT SUSPENDED IN FULL FOR
1 YEAR

(G.J.B. Muria)
ACTING CHIEF JUSTICE