

REGINA -v- TIBON OGE**HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.)****Criminal Case No. 396 of 1999****Date of Hearing: 13th, 14th, 15th and 16th September 2004****Date of Judgment: 20th September 2004****R. Barry for the Crown****M. Samuel (Mrs.) for the Accused****JUDGMENT**

Kabui, J: Tibon Oge is the accused in this case. The accused has been charged with the rape of Wendy Komou, contrary to section 137 of the Penal Code Act, (Cap. 26) "the Code". The offence took place on 21st August, 1999 at New China Town in Honiara. The accused pleaded not guilty to the charge against him on arraignment. The accused admitted having sexual intercourse with Wendy Komou on the date cited in the information but said he did it with her consent. Wendy Komou said she did not consent to sexual intercourse between herself and the accused. Lack of consent is therefore the issue in this case.

The burden of proof in criminal cases

The burden of proof beyond reasonable doubt that the accused is guilty of rape is upon the Prosecution, the Crown. That is, proving beyond reasonable doubt that Wendy Komou did not consent to having sexual intercourse with the accused is the responsibility of the Prosecution throughout the trial. The accused does not need to do or say anything if he does not wish to do so, for he is presumed innocent until proven guilty by a court of law. I bear in mind this burden of proof on the Prosecution when deciding the fate of the accused in this case.

The facts not in dispute

In the afternoon on 21st September 1999 Wendy Komou and her sister, Janet went to Lawson Tama playing field to watch a soccer match. The soccer match ended at about 6:00pm whereupon Wendy and her sister returned home. They called at the canteen owned and operated by Mr. and Mrs. Gereia near the Matanikau Clinic in New China Town. Wendy Komou and Janet lived with Mr. and Mrs. Gereia in a house situated behind the Honiara High School of which Mr. Gereia was the Deputy Principal. Mr. Gereia is their brother-in-law who is married to their sister, Phyllis Gereia. Wendy stopped at the canteen and served

customers and then left and walked to their house intending to have a shower. She left the canteen at about 7:30pm. On her way to her house, she saw a man sitting in front of Sweetie's house which she had to pass by before she could reach her house. The man greeted her saying "evening" and asked what she was chewing. She said she was chewing betel-nut. She thought the man was Billy with whom she was familiar. She approached the man and gave him some betel-nut. They later had sexual intercourse and then she went home.

The case for the Prosecution

The Prosecution called seven Crown witnesses for its case. The main witness was Wendy Komou, the complainant. The fact that complainant reported the accused to the Police as having raped her that night made all the difference in this case. The following is her evidence given on oath. She said that when she gave some betel-nut to the accused, the accused grabbed her hand and instantly she realized that the man she had thought was Billy was not Billy after all. The accused pulled her towards him and said in Pidgin English, "you no doim anyting, you followem me" which in English means, "you do not do anything, you follow me". Wendy then said in Pidgin English, "what now you try for doim long me" which in English, means, "what is it that you try to do to me". She said the accused still did not let go of her. She said the accused was holding two bottles, one was a coke bottle which was empty and the other was hot stuff with some content inside. The accused gave the two bottles to Wendy which she dropped on the ground during the struggle with the accused. The accused then said in Pidgin English, "you must followem me". **Me murderer before, me killem people before** which in English, means, "I am a former murderer, I killed people before". She said those remarks made her afraid. Just then, Sweetie's mother opened her door and said in Pidgin English, "what now happen long there" which in English means, "what is happening there". The accused still grabbing her then moved to where there was light and told Sweetie's mother in Pidgin English "you go back, you no talk big" which in English, means, "go back and do not speak loudly". The complainant called out in Pidgin English, "please mummy help, please mummy help" or something to that effect but Sweetie's mother closed her door and disappeared. The accused then still grabbing her moved them back into the dark and shut her mouth with his hand to stop her making noise. Then a truck arrived and parked on the road. The driver came out and said in Pidgin English, "what now you try for doim long girl ia" which in English, means, "what are you trying to do to the girl". The accused's reply in Pidgin English was, "you say anything no good, me killem you" which in English, means "you say anything bad, I will kill you". The driver then said in Pidgin English, "me come for takem you" which in English, means "I have come to pick you up". The accused then said in Pidgin English, "no, you go back". She pleaded to the driver in English, "please help me" but the driver went to his truck and left. His wife had called him back to the truck. The accused then still grabbing her moved them both behind the butchery building and to the back of Sweetie's building. The accused then removed her top and bra and then

pulled her trousers down below her knees together with her under-pant. The accused kissed her face and her breasts and then forced her to the ground and had sexual intercourse with her. After that, the accused in Pidgin English said, "sorry now, thank you" which in English, means, "sorry and thank you". She had not consented to it. After that she stood up and cried all the way to her house where she reported the matter to her relatives and then to the Police that same night.

The case for the accused

The accused had chosen to remain silent and called no evidence. The accused is entitled to sit back and let the Prosecution to prove its case against him beyond reasonable doubt. The fact that the accused pleaded not guilty on arraignment is a denial of the charge against him in this case. However, the accused's version of events that night is contained in the caution statement (Exhibits B, C and D) he gave to the Police on 24th September 1999 in which he stated that he had had sexual intercourse with the complainant with her consent. That is his case. In her closing speech, counsel for the accused attacked the evidence of the complainant and exploited the inconsistencies in the rest of the evidence for the Prosecution. The first argument by defence counsel tried to show that the complainant and the accused had been together for at least twenty-five minutes, a long time, before Betty Maelia, (PW7) appeared on the scene in front of her house. I do not understand that argument. Point A of Exhibit A was where the accused grabbed the complainant's hand. The accused and the complainant were there until (PW7) came out of her house. They would not have been there for twenty-five minutes. The time spent there would have been much less because the accused and the complainant had moved on to points B, C and D. The times mentioned in the evidence were rough estimates. They are not exact and so can be misleading and unreliable. I suppose the thrust of that argument is that there had been opportunities for the complainant to escape from the accused but she chose not to escape from the accused. I reject that argument. My observation was that (PW7's) evidence was accurate to the extent that the accused was outside the house talking to PW7. I would not say that (PW7) was deliberately lying when she denied hearing any crying or call for help at point A. It depended on the loudness of the sound that was emanating from the mouth of the complainant and the distance from the source of the sound. In the accused's caution statement, he said that he was outside Sweetie's house. Then the complainant passed by and he called her up to him. I believe the complainant when she said after she dropped the bottles to the ground, Sweetie's mother opened her door. She must have heard noise coming from outside her house. When she spoke, the accused still grabbing the complainant moved closer and told her to go back and be quiet whereupon she disappeared into the house. The accused had also spoken loudly that the complainant was his girl friend. The accused also spoke Kwara'ae language to Sweetie's mother. She might not have heard the complainant's plea for help. The complainant, on being cross-examined, said that although point D on Exhibit A was stony, the exact spot at D where the accused raped her was of ground material. PW2

confirmed that the complainant was dirty when she arrived at their house that night. PW2 did not say anything about grass being on the body of the complainant. There is not point of substance here. The evidence of PW5 was that the complainant was sobbing and was a metre apart from the accused. The fact that PW5 did not hear any call for help nor saw any struggle between the complainant and the accused proves nothing because the rape was not committed where PW5 saw them. I believe that the complainant did call for help to PW5 but was not heard or simply ignored. Also, it must not be forgotten that the accused had earlier threatened the complainant not to go away but to follow him and that he was capable of killing as he had done it before. Whether the accused was bluffing his way is not the point. Fear gripped the complainant and her state of mind was under the threat coming from the accused. I must take the complainant where I find her. Not all women are robust in character. Not all of them can fight like a lion. Some are timid and frail in character. Some are terrified and freeze when confronted with threat of violence by drunken men who are violent and aggressive towards them, especially if they are alone with the aggressor. The complainant is a small person in stature. It was night and she was alone. She said repeatedly in evidence that she was afraid of the accused. The accused was capable of chasing her if she had ran away. She could have done it but at a certain risk to her which she was not able to measure at that time. The fact that she did not run away did not mean that she wanted sexual intercourse with the accused. In fact, the accused's description in his caution statement of her willingness to have sex with the accused is unrealistic and a lie. No sane woman would agree to have free sex with a drunken man whom she meets for the first time on the road and whom she does not really know just for the fun of it. That is not human nature. The point about the exchange of the finger ring and the wrist watch is of no significance. The accused removed her ring and put his wrist watch into her pocket after he had completed sexual intercourse with the complainant. The accused was creating the impression that sexual intercourse was performed and done between them as lovers. The complainant denied such a relationship. I do not believe what the accused said in his caution statement about the exchange of the ring and the wrist watch.

The law on rape

The law on rape is well established in this jurisdiction. I need not cite all the rape cases decided in this jurisdiction to prove this point. Each case would depend largely on the facts before the Court. In this case, penetration of the vagina of the complainant is not denied by the accused. The issue is one of lack of consent by the complainant. In this regard, I would revisit the recent judgment I delivered on 6th April 2004 in **Regina v. John Iroi, Criminal Case No. 250 of 2003**, being a rape case. In my judgment in that case, I cited at pages 7 and 8 the remarks made by Dunn, L.J. in **R. v. Olugboja** [1981] 3 All E.R. 443 at 448 to 449. Dunn, L.J. warns that in rape cases, any submission by the complainant is not necessarily consent though consent involves submission. His Lordship then cites two types of rape cases. The first being in the majority

are those where the absence of real consent is borne out by the evidence. The second being less common are those where sexual intercourse took place following no threats of violence or fear of violence. These are two broad categories of rape cases.

Assessment of the complainant's evidence

She was cross-examined by defence counsel thoroughly. In cross-examination, she denied being friendly with the accused that night she was raped or before that or talking about any friendship proposals at all. She was on her way to her house from the canteen to have her shower when the accused spoke to her. Her journey was a legitimate one with no plan to detour for any reason. In fact, her sister Janet, (PW3) confirmed in cross-examination that the complainant was supposed to go to St. Nicholas as well with her but did not do so. The explanation for that of course was that the complainant had been detained by the accused and was not able to join her sister to go to St. Nicholas. There is nothing to suggest that the accused or the complainant had planned to meet the other that evening. They had not been familiar with each other before that night although they might have attended the Honiara High School and seen each other before as students. The accused had come separately to New China Town from Lungga Bridge where he and others had been drinking alcohol and likewise the complainant had come back home to New China Town from a soccer match but first calling at the canteen where she did some work before walking back to her house. The accused in his caution statement confirmed that he saw the complainant passing along the road for the first time that day. That suggests that she was not going to meet him by any pre-arrangement. The fact that the accused also admitted that the complainant was frightened in the first place and took him sometime to cool down her fear before negotiation commenced about friendship suggests that they had not been boy and girl friends before. The complainant's denial on cross-examination of being a girl friend of the accused that night does have a ring of truth. The fact that the accused was holding two bottles, one of which was a hot staff bottle, when the complainant approached him to give him some of her betel-nut confirms the fact that the accused had been drinking. This fact was confirmed by the accused in his caution statement. It was only natural that the accused had to put the bottles away in order to grab the hand of the complainant. The complainant said that the accused put the bottles down on the ground to free his hands. The accused then told her to pick up the bottles but she dropped them again during her struggle with the accused. The complainant demonstrated in court how the accused held her. She said that the accused held her by locking her both hands with his left hand behind her back and shutting her mouth from time to time with his right hand so that the accused was effectively behind her back, pushing her forward and sideways as they moved along to where the accused raped her. Whilst there might have been momentary breaks in the accused's hold on the complainant, the accused was in control, having uttered threatening words to the complainant to frighten her so that she would not leave him. The fact that she was sobbing when Martin Oru, PW5, arrived does suggest in the least that

something was wrong with her in the presence of the accused. As soon as Martin Oru left, the accused continued his assault on the complainant. On being cross-examined, the complainant said her sister Janet had passed by on her way to St. Nicholas but the accused shut the complainant's mouth to prevent her shouting by pushing her towards the wall. This must have been at point C, the butchery building, in the sketch plan being Exhibit A. The complainant said she spat on the accused's face. When asked by defence counsel in cross-examination why she did not state that fact in her Police statements, she explained that she was stressed and frightened in the Police Station. Also, Police Officers were coming in and going out during her interview whilst her statement was being recorded. Her explanation is believable because the Police had gone back and recorded two additional statements from her later. Her first Police statement was obviously inadequate. In any case, the Police statements are not evidence on oath by the complainant. The removal of her top, bra, trousers and pants was the work of the accused. She said the accused locked her legs with this leg when he did that. She demonstrated that in court. She said the accused pulled down her trousers and pants to below her knees and then forced her to the ground and had sexual intercourse with her. She said she tried to resist but to no avail as the accused was strong than herself. She denied that she gave her finger ring to the accused nor did she accept the accused's wrist watch nor did she agree to meet the accused later on a certain date for a further meeting. The fact that she cried all the way to her house and told her relatives and her brother-in-law about what the accused did to her and then reported it to the Police is significant. There was nothing said in evidence to explain why the complainant would want to accuse the accused of raping her that night. Why did she want to accuse the accused? There is no evidence to explain this big question. Mr. Gereá (PW2) who is related to the accused somewhat did admit that the complainant was crying when she got to the house. In fact, he arranged for the complainant to go by taxi to the Police to make a report of her rape by the accused. When Janet, (PW3), returned to the house, the complainant was still afraid and crying, suggesting that she was not a party to any agreement for friendship as stated by the accused in his caution statement. And still why after a lapse of over five years, the story of her rape was still fresh in her mind when she gave evidence on oath in the trial of the accused? She gave her evidence in a straight forward and consistent manner as she had told the Police over five years ago but for a few inconsistencies of no consequence. She stood her ground under thorough cross-examination by defence counsel. She was cool and emphatic in the witness-box when answering questions. She was obviously telling the truth. She was a credible witness. I believe her and accept her evidence as being the truth of what happened to her that in August 1999.

Corroboration of the complainant's evidence

A sexual offence case such as this case requires corroboration of the complainant's evidence. The nearest corroborative evidence is the fact that PW5 saw the complainant sobbing in the presence of the accused when PW5

arrived to collect his tape. But no rape was being committed at that point in time. The evidence is therefore of no value as being corroborative. I do warn myself that it is not safe to convict the accused on the uncorroborative evidence of the complainant. However, I can still convict the accused upon the uncorroborative evidence of the complainant if I believe her evidence as being the truth of what the accused did to her on 21st August 1999.

Conclusion

The medical report, Exhibit E, confirms that the complainant was not a virgin. So she was familiar with having sexual intercourse. She said she had a boy friend. She did not know the accused well. If she had a boy friend, why did she have to flirt with the accused that night resulting in sexual intercourse taking place between them? She was a normal girl returning home to have a shower intending to join her sister Janet, PW3, to go to St. Nicholas that same evening. Janet, PW3, had to leave without the complainant for that destination. If the complainant had agreed to have sexual intercourse with the accused, why did she report the matter to those in her house and her brother-in-law? She was not a virgin. Why did she have to put on a show to defend her virginity and reputation when no one saw them having sexual intercourse? It was her crying that attracted attention of those in the house and then noticing that she was dirty. If she had gone into the house quietly and into the bathroom, probably no one would notice her being dirty. She might have done exactly that on previous occasions after meeting her boy friend and no one in the house would have known. Deceitful persons are very clear in making up excuses to cover up their tracks. The accused saying sorry to the complainant after the completion of the act of sexual intercourse was simply to appease the complainant for forcing her to have sex with him. Thanking her was simply his own selfish appreciation for his own satisfaction. Arriving late in the house was not a concern because the canteen was open twenty-four hours. Arriving back at her house at 9:00pm or even 9:30pm would not have been too late for that reason. The complainant could have said that she was at the canteen as the reason for being late if she wanted to tell a lie to those in her house that night to cover up her clandestine stay with the accused. But she did not do this. Why should she make up the story against the accused? Although the complainant is from Ysabel Province and the accused is from Malaita Province, there cannot be any room for being biased because the complainant's brother-in-law, PW2, is from Malaita and is in fact distantly related to the accused. I am therefore at a loss to work out any legitimate reason for the complainant to blame the accused for what he did not do. That leaves me to conclude that the only reason for the complainant to report to the Police was that the accused had raped her on the night of 21st August 1999. The events taking place at points A, B, C and D as described by the complainant in her evidence were sufficient to negative consent on her part. I have no doubt in my mind beyond reasonable doubt that the accused raped the complainant on the night of 21st August 1999 at New China Town as alleged in the information. I therefore find that the accused did have sexual intercourse with the complainant without her consent on the night of 21st

August 1999 and accordingly and I convict the accused of the offence of rape committed against the complainant.

F.O. Kabui
Puisne Judge