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BETWEEN : R E X - Prosecution;

A N D : 'AHOIA POLUTELE - Accused.

Ward CJ

Miss. Weigall for the Prosecution

Mr. Kengike for the Accused

Date of Hearing. : 10, 11 & 12 October 1994

Date of Judgment : 12 October 1994

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J U D G M E N T

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The accused has pleaded not guilty to one count each of rape, indecent assault and assault. The victim is the same in each case and the three counts relate to the same series of incidents on the evening of 6 August 1994.

An order has been made under section 119 of the Criminal Offences Act prohibiting publication of the name or evidence of the complainant.

The complainant is a 21 years old school teacher and on the afternoon of the 6 August was waiting at a bus stop at about 5.00 pm when the accused stopped his van and gave her a lift. There is a dispute whether the accused was stopped by someone else or whether the complainant herself waved him down. The complainant is related to the accused and knows him.

The complainant's account of the events that followed is largely disputed by the accused.

The complainant told the Court the accused repeatedly referred to the fact that she was safe with him because he was a brother and, indeed, she trusted him because of their relationship.

The accused said he would buy some beer and did so. She was surprised when he turned off the road at Niutoua but he explained he would just have one drink and invited her to join him. She declined, saying she did not drink and, when he had finished, suggested they should go. He was intending to drive back to the road on which they had come but the complainant pointed out the road they were on joined the road to her home and they drove that way. Unfortunately, a tree had fallen across the road and could not be removed.

In the process of attempting to turn the van, it became bogged down and, although released once, was subsequently stuck immovably. In order to free it the first time, the complainant, who could not drive, had to take the wheel. During his explanation of what to do, the accused touched the complainant's legs in order to place them on the pedals.

During all this time the accused was drinking and continued after the van was finally stuck. The complainant was alarmed and asked to be taken back to the road so she could get a lift in another vehicle. Eventually he said he would take her back and they alighted from the van but the accused grabbed her hands and started pulling her.

She escaped and tried to run along the beach but stumbled in the sand and fell. The accused jumped on her and took her to the van. He threatened her with a pair of scissors or shears and said it was a dagger so the complainant told him not to use it.

Thereafter, he removed her clothing and repeatedly kissed her, sucked her breasts, licked her vagina and eventually had sexual intercourse. By then, both were naked.

They returned to the van and, as they did so, heard voices from the beach. The accused pushed the complainant into the van and put a coat over her. He asked the people on the beach if he could borrow their flashlight to look for the complainant's shoe. He referred to her as his wife.

Following another attempt to free the vehicle, he asked the man to go and tell a man, Misi, they had seen previously to come and assist. They waited a shortwhile during which he again sucked her breasts and kissed her and he then gave her clothes and said they would go to meet the man. He took her with him. The complainant knew Misi but it was dark. The accused again referred to her as his wife and, although Misi, could see she was a different build to the accused's wife, he was unable to identify her.

Back at the van, the accused pushed her into the van and put the coat over her head. The van was freed and the accused, having dropped off his helpers, drove the complainant back to Kolonga where she lives. On the way he stopped at a shop and bought some food and later stopped and again kissed her and sucked her breasts.

During the whole incident, the complainant never shouted for help or asked any of the people who came to the van to help her. She tried to run away once but, after that, made no further attempt. It is pointed out by the defence that there were houses a little more than 100 metres or so away and, on two occasions, other people were nearby including the man she knew, Misi. Similarly, when the accused stopped for food, she was left in the van and made no attempt to escape.

The complainant told the Court she was crying more than once but was too weak and exhausted to try to escape or even resist after the early attempt but her evidence is consistent that she never gave her consent to any of the things that occurred.

On her arrival home she was crying and saw her father first but only complained about the rape when she saw her mother a few minutes later. I accept that is a recent complaint and shows consistency in conduct by the

complainant. However, the defence case is that she consented and so the evidence is of limited value. If she had indeed behaved as the defence suggest and arrived back very late, tears and complaint may have been a way of covering her absence.

The accused was seen by the police and interviewed under caution. No trial within a trial was requested and it was put to the officer that a number of answers were wrongly recorded. In cross examination of the countersigning officer it was suggested the accused was told that he would not be able to leave unless he signed. When the accused gave evidence he went further. He said he wanted to give his account in court and was told he had to answer. He asked for a lawyer to be present and his request was ignored and when he was interviewed the countersigning officer frightened him so he felt he had to answer. At no stage was he told to change an answer but many that were written by the officer were different from the answer he gave. He signed thinking they were accurate and reflected his denials.

Some of those allegations should have been tested by a trial within a trial. I have considered the evidence from the officers and the accused in relation to admissibility before passing on to consider the evidence as a whole. In his final address Mr. Kengike for the accused also challenged the admissibility of the interviews and statements on the basis that they were in breach of the Judges' Rules from England. He was unable to supply me with any authority for the proposition that such administrative directions are part of the law of Tonga and I am not satisfied they are. However, I certainly accept them as guidelines and, if breached, may result in the exclusion of any evidence so obtained.

I do not deal with the matter in detail. I am sorry to say counsel's understanding of the Rules is incorrect. He suggests that, once the caution is administered the police are prohibited from questioning the accused further. That is incorrect. He suggests that all interviews and statements under caution must be recorded in full in the officers' notebooks and not elsewhere. That is incorrect.

I have considered already, the manner in which the interviews were conducted and the statements were taken and do not repeat them. I am satisfied

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beyond any doubt whatsoever that the interview with, and statements by, the accused were voluntary and not obtained by any improper influence and are admissible.

The accused, as has been said, gave evidence on oath. He told how he picked up the complainant and how the conversation traversed the question of their relationship but, he said, it was the complainant who referred to it and the accused denied it on the basis of an improper marriage in Tongan custom between the families.

He explained that they agreed to turn off the road and drink the eight bottles of beer he had bought. When they turned off, they both drank beer. He describes the van becoming bogged down and said they both continued to drink. He eventually asked to kiss her and, after some slight prevarication, she agreed.

The accused described in very great detail all that happened thereafter. The sequence of events matches generally that of the complainant but he describes how, far from the complainant being unwilling, she was the initiator of almost every new step. He denies she tried to run away along the beach, he denies she cried and he saw absolutely nothing to suggest she was unwilling. Indeed, she was sexually aroused and asking him to have sexual intercourse.

He spoke about requesting the flashlight but denies referring to the complainant as his wife. When they went to meet Misi, he again denies referring to her as his wife or pushing her into the van.

He also explained how, when he was interviewed by the police officers, the recording officer, Ma'afu, behaved properly throughout but the countersigning officer, 'Isoa, threatened him. However, despite his suggestion Ma'afu was acting properly, he recorded twelve questions inaccurately. In general terms, where he denied the offence or referred to the complainant having consented, the officer quite blatantly turned the answer around so it read as admission of the offence or an acknowledgment of her lack of consent. Despite that, he signed the notes and statements because he did not realise and did not read them.

In relation to the evidence of the officers, I have absolutely no doubt the accused is not speaking the truth. I am satisfied beyond any doubt that the answers given by the accused were voluntarily given and accurately recorded. I do not believe the accused's account of the incidents at the police station.

The case, apart from that, turns on the credibility of the complainant and the accused. Before I can convict, I must be satisfied beyond reasonable doubt, that the complainant's account is true and the accused's, therefore, in relation to consent, is untrue. If I feel the accused may be speaking the truth about the consent of the complainant, I must acquit him.

Other witnesses were called by the prosecution and the defence.

The couple who lent the flashlight were called by the prosecution. There is little in their evidence except that the man called described how the accused referred to the woman as his wife and so confirms the complainant's account of that.

Similarly Misi and another of the men who eventually freed the van also told the Court that the accused referred to the woman as his wife. They spoke of how he made aggressive remarks about her which the accused also denies. Misi himself also supports the complainant's account of being pushed into the van; he describes how the accused grabbed her by the collar and pushed her inside.

One of the witnesses called by the defence confirmed that than the accused bought food. The van was out of sight when he did so and so, presumably, the complainant could have fled. Another witness saw the complainant shortly after she was dropped off in Kolonga and did not notice anything unusual. Certainly he did not see she was distressed or crying.

One other aspect of the evidence should be referred to. The accused felt that the whole response of the complainant to his sexual advances suggested that she was sexually aroused and her movements gave him the impression she was experienced sexually. The medical evidence shows she was undoubtedly a virgin prior to the sexual intercourse that night.

There were a number of minor injuries to the complainant besides the ruptured hymen and some blood had been passed. Whilst I considered the doctor's opinion of the cause of the injuries was far too subjective, I accept her opinion they were not consistent with consensual sexual intercourse.

All these matters together with the police evidence and the answers I accept were given in the interview satisfy me beyond any doubt that the accused has not told the truth. My opinion is reinforced by his demeanour and attitude in the witness box.

The complainant on the other hand, struck me as a truthful and careful witness. I accept her evidence in its entirety as truthful and accurate. I am satisfied beyond any doubt at all that the accused had sexual intercourse with the complainant well knowing she did not want it and that it was against her will. That is rape and he is convicted on count one.

Mr. Kengike has drawn my attention to some authorities relating to the accused state of mind. I have considered them and I do not feel they bear on this case.

I must be satisfied before I convict that the complainant did not consent and that the accused knew she did not. The prosecution have proved so I have no doubt whatsoever the accused knew he was having sexual intercourse and committing all the other indecencies without her consent. Similarly the suggestion is made than the things he did, even if not welcomed at first, were such that the complainant became aroused and was thereafter a willing and eager participant. On the evidence I am satisfied no such thing occurred and the complainant at no time consented to these acts or any of them.

The prosecution say the counts are not alternatives and the indecent assault represents the further sexual advances made after the rape was complete. I am satisfied beyond any doubt they also were not consented to. They were an assault and indecent and he is convicted on count 2.

I do not accept there is any need for a separate verdict on count 3 and I do not give one.



*Condon Was*

NUKU'ALOFA, 12 October 1994.

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