IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

CR. NO. 940/95

BETWEEN : R E X - Prosecution;

A N D : FEHOKO KULA - Accused.

Hearing : 8, 9, 10 & 11 January 1996
Judgment & verdicts : 15 January 1996

Mrs. Taumoepeau for Crown
Mr. Niu for Accused

JUDGMENT OF HAMPTON CJ - VERDICTS AND REASONS FOR VERDICTS

1. The Accused was indicted on 4 counts, all of those counts relating to allegations arising out of, in effect, the same incident which occurred in the early hours of the morning of Saturday 10 June 1995 at Hufangalupe Beach, near Vaini, Tongatapu. That incident involved just 2 parties, the then 14 year old school girl complainant and the then 31 year old Accused I add here, because it is of some relevance, that the Accused is a man of some experience, education and intelligence who has held significant positions within the Civil Service of Tonga and who is married with a number of children.

Read 18/1/96.

2. The 4 counts are in this order in the indictment; rape (sec. 118(1) Criminal Offences Act Cap. 18) indecent assault, (sec. 124(1) & (2)), abduction (or rather a forcible detention), (sec. 128) and common assault (sec. 112(b)); although chronologically the allegations should run as follows: the assault, the abduction (or detention), the indecent assault and the rape.

3. During the course of final submissions I raised with counsel one aspect of the common assault count and, as a result, the Crown elected not to seek a verdict on that count taking the (sensible) view that the assault allegation was factually a part of, and effectively subsumed in, the abduction/detention charge. I did not then, but I do now, enter a formal verdict of not guilty on that count, if that is indeed necessary and appropriate in view of the reservation which I raised and which I set out below.

4. Sec. 112 creates an offence of common assault which is punishable "on summary conviction". How then can such a charge appear in an indictment, presented after a preliminary inquiry before a Magistrate? Historically, I am told, this has been done and often. That does not make it correct. The one possible way for this Court to have jurisdiction in such a summary matter, it was argued before me, was through the provisions of sec. 5 of the Supreme Court Act (Cap. 10) which provides that this Court "shall have power to ..... exercise all the powers of the Magistrate's Court .....". I have some doubt as to whether that provision could or should give this Court jurisdiction in summary criminal matters. However because of the stance taken by the Crown the matter was not fully argued before me and I do not purport to make any definitive ruling on it.

5. I can also say at this juncture that another of the counts, count 2 - the indecent assault - was effectively disposed of at the time of counsels' final submissions. That count was founded on subsects. 1 & 2 of sect. 124. Subsect. 1 creates an offence of indecent

assault on a female; and subsect. 2 provides that a girl under 16 years of age "cannot in law give any consent which would prevent an act being an indecent assault for the purposes of this section".

6. The complainant's age was proved as being 14, she being born on the 19 September 1980. Mr. Niu, in closing, conceded that there was, and could be, no defence to this charge in the circumstances here involving, factually, the Accused touching and licking the complainant's vaginal area. Both the complainant and the Accused agreed that this occurred. I propose entering a verdict of guilty on this count and then to say no more about it until I get to the narrative of the facts later in this judgment.

7. That leaves the detention and the rape counts for determination.

8. I say at the outset that I am well aware of both (i) the onus of proof being on the Crown throughout this trial (and unchanging despite the Accused giving evidence himself and calling other witnesses) and (ii) the standard of proof required of the Crown on each count, and on every constituent element, or essential ingredient of each count, being an unchanging beyond reasonable doubt. If that standard is not met by the Crown then the charge to which such failure relates must also fail. If I am left with a reasonable doubt in relation to a count or a constituent element of a count then the Accused must be given the benefit of such doubt, and an acquittal must result. Whenever in this judgment I refer to a matter having been found proved that has been done by me on the basis of both the onus and the standard as just discussed.

9. In some instances I have been asked by the Crown, and indeed on behalf of the Accused, to draw inferences. If in this judgment I do draw an inference it is done on the basis of it being a reasonable and fair deduction which I am satisfied follows logically from other facts

which I have found satisfactorily established before me. If I do draw an inference I am not indulging in guess-work or speculation.

10. Amongst the evidence which I have heard from the Crown has been evidence which falls within the category of being evidence of recent complaint, by the complainant. I will refer to such evidence in the narrative of events and may make comment on it. But I will not be using that type of complaint evidence as being in any way corroborative of the alleged occurrence or as being evidence that the alleged occurrence happened, or as to how it happened. The only relevance of the complaint evidence, and this is how I will treat it, is that it may show that the complainant's conduct after the alleged events was consistent with her evidence about the events.

11. I have also had placed in front of me evidence as to oral and written statements by the Accused. Those are part of the materials for me to consider and I will comment on my view of the truthfulness, accuracy and weight of those statements in due course.

12. In particular I will do so in relation to the evidence which I heard from the Accused. As I have said, his giving evidence does not change the onus of proof, and by giving evidence he does not undertake anything. I will discuss his evidence, my view of it and the effects (if any) of it.when I come to the narrative.

13. Another general matter before I commence that narrative. Reference was made by Mr. Niu to intoxication - not as a defence (i.e. a complete absence of intent,) in itself, but as to the effect which intoxication may have on a persons state of mind, and in particular here, whether the Accused had the necessary guilty intent at the time of these 2 alleged offences. The onus of proof of intent lies on the Crown. When I come to states of mind

and intent I will take into account, as appropriate, the evidence which I have heard as to drinking and intoxication (on the part, I add, not only of the Accused but also the complainant and various other prosecution and defence witnesses).

14. I have given myself these general reminders before I go on to consider the facts, as I am sitting and deciding the facts in this case instead of a jury; and it is cautionary to remind myself of matters such as these, as a jury would be. I also will look to see, when consideration the facts, if there is any evidence, independent of the complainant, which might support her account of events. Although not necessary as a matter of law, I would be reluctant to act on the complainant's account if it were not supported in some independent way.

15. I turn to the first of the 2 counts i.e. the rape charge. In this case the essential elements for proof by the Crown in the way the evidence has been presented, are that -

(i) the Accused carnally knew the complainant (- complete on proof of penetration)

(ii) against her will

(iii) the Accused knowing at the time of the sexual intercourse that the complainant did not consent; or

(iv) the Accused being reckless at the time of the sexual intercourse as to whether the complainant consented to that intercourse or not.

As to that matter of consent or not, or recklessness as to consent or not, I am aware of the provisions of subsect 4 of sect. 118 which provides that on a rape trial if the jury (here, in fact myself, in lieu of the jury) has to consider whether an Accused believed the complainant was consenting to sexual intercourse, the presence or absence of reasonable grounds for such belief is a matter for which I am to have regard in conjunction with any other relevant matters

in considering whether the Accused so believed. I will bear that matter in mind, and apply it as necessary, when I come to that relevant part of this judgment. I add that the real issue on the rape charge is the matter of consent or otherwise and/or recklessness. The proof or lack of consent, (or recklessness) is with the Crown.

16. As to the second count for my consideration i.e. the detention charge, the essential elements for proof by the Crown are the following:-

(i) the Accused by force detaining a woman

(ii) with intent to carnally know her

The real issue on the detention charge is the question of intent. Again the proof lies on the Crown.

17. As to the facts. First a general remark or two. Undoubtedly both the complainant and the Accused acted foolishly on this night of 9 and 10 June 1995. Both, undoubtedly, were under the influence of liquor to some extent.

18. Between the accounts of the complainant and of the Accused as to the generality of events there is very little difference or conflict, except essentially as at the actual time of the acts of alleged detention, indecency and intercourse; and even as to the alleged detention there is very little difference in essence between the two accounts.

19. I find the following facts established. The then 14 year old complainant and her then 13 year old friend, Mele Tu'ivai (who gave evidence), went out on that Friday night, 9 June. They came into the centre of Nuku'alofa. They were in a van with young men they knew. They were drinking alcohol. They visited a night club. None of these things seem to have been unfamiliar to these 2 young girls.

20. The Accused, with others, was initially in Vaini, where he lives, at a Tongan kava gathering. Later alcohol was consumed and the Accused and four or five others, in two vans, came into Nuku'alofa.

21. In the early hours of Saturday morning, 10 June 1995, the 2 girls and the Accused met, somewhere near the bus stop parking area, opposite the Tonga Visitors Bureau. The 2 girls had had enough of their then male companions. After some to-ing and fro-ing they left those men and their van. It was starting to rain.

22. They ended up obtaining cover and a ride in another van, being that driven by the Accused. From 4 different people I have had 4 slightly different accounts as to how that entry into the Accused's van took place i.e. at whose initial request or invitation. I take the view that that matters not in the overall context of this case. Suffice to say that it was an extremely foolish thing from both points of view; from the complainant's and her friend's by getting into a van with a stranger who had been drinking; from the Accused's by inviting or allowing young girls to get into his van with him and then inviting, if not encouraging, them to drink with him and drive around with him, instead of taking them home which he, in evidence, accepted, was the request first made of him by them.

23. The 3 persons in the front seat of the Accused's van were later joined by a fourth, Fatui Taulanga, the male friend of the Accused and who gave evidence on behalf of the Accused. Incidentally he, Fatui, described his state as being drunk and he said the Accused was also.

24. It is indicative of the state of all four persons perhaps that there was further drinking of some beer in the van, the complainant's girl friend perforce of necessity sitting on the lap

of the Accused's friend. A small amount of marijuana was produced by the complainant but was not smoked, apparently, although the Accused did go and obtain tissue papers to enable the marijuana to be rolled into cigarette form.

25. At some stage in this driving around there was mention made of going to see Hufangalupe. It is clear that there was some misunderstanding between the complainant and the Accused as to that. The complainant thought that a night club was being referred to. The Accused meant the beach of the same name. The complainant says that she pointed out his mistake to the Accused when they drove past the night club. He says she did not tell him of his mistake until the van was at the beach, and it became stuck shortly thereafter. The evidence of the other 2 people in the van is silent on this issue. On this issue I prefer the evidence of the complainant. The Accused, once the 2 girls were in the van, seems to me to have set the agenda and had the control over where they went. The original request to be given a lift home seems to me to have been quickly diverted by him.

26. Whatever the position, it is when the van and the party of persons within it get to the beach that the difficulties start. First the van gets stuck in the mud. It had been raining, and quite hard, from time to time and I find, on all the evidence that I have heard, that it was still raining at the relevant times of the events I am going on to. I find it was also quite cold.

27. With the other 3 pushing the Accused tried to drive the van out of the mud, without success. He then got the complainant to swap places with him. Again without success. As with earlier, so now - he, the Accused seems to have put himself in charge of matters.

28. He directed his friend, Fatui, to go with Mele and see if they could find another vehicle to tow the van out. By then it was dawn - and on all accounts it was becoming daylight or was daylight.

29. I find that Mele did not want to go without the complainant. The complainant wanted to go with Mele. The Accused shouted at Mele to go, quite angrily so she was afeared and moved off following some little distance behind Fatui.

30. The complainant went to leave but the Accused reached out to her, took both her hands and held her back, at the same time shouting at the others to go. Unfortunately they left. Mele saw the Accused holding on to the complainant. The Accused in his evidence in chief said that the complainant told him she wanted to leave but that he told her no (explaining to the Court that it would have been foolish to let her go alone along a dark road at this time - an explanation which does not have any credibility given (a) the near proximity of her friend Mele and (b) the state of daylight which I have already commented on).

31. The Accused went on in evidence to say that the complainant kept on telling him to let her go, but he still held her hands. In cross examination he agreed that that meant she was not able to go.

32. Jumping ahead in the chronological narrative it is appropriate to deal with some of the answers given by the Accused during the course of a police interview conducted at the Vaini Police Station later on the evening of Saturday 10 June (starting at about 11 minutes to 10 pm and going on for some 1 1/2 hours or so). The Police Corporal Latu, who conducted this interview, was not challenged as to that interview, his manner of conduct of it, his record of it, or any claimed divergence between the Accused's actual answers and the answers recorded in writing in the Record of Interview (7 pages and some 39 questions and answers) - Exhibit C1 - when he was cross examined.

33. Then in the Accused's evidence in chief he complained of a lack of sufficient food and sleep before the interview saying he felt that he was not thinking right at the time of interview. As well there were some matters which he mentioned as to events at the Police Station at Vaini, before the interview, which were not put in cross examination to either the complainant or to Corporal Latu (as to the Accused's claim that he asked the complainant why she was like that; and that he did not ask the complainant, as Corporal Latu had testified, to forgive him and not to be angry with him for a long time). Those matters significantly and adversely affect my view of the credibility of the Accused. The remark Corporal Latu reported was, in my view, a very significant one, and I will come to it later in the sequence of events.

34. Under cross examination the Accused had put to him various questions and answers from the Record of Interview. He then proceeded to resile from many of those answers claiming that he had replied differently and that the Corporal in effect had written it down quite differently and incorrectly, making it say something quite different. He claimed he did not read the questions and answers through himself, as the Corporal had said he had done (and the Police Officer was not challenged on that either - significantly adversely affecting the Accused's credibility again); but that the Corporal read them back to him either incorrectly or he, the Accused, failed to pick up the errors because of his state. Yet his, the Accused's, signature appears at the end of every answer - a very cautious approach indeed by the Corporal - and the Accused did change, materially one answer i.e. no. 34. He must have had the document in front of him a significant time to sign after each answer. He is not illiterate. He is experienced and educated. None of these claims of distortion by the Corporal were put to the Corporal in cross examination. No oppressive conduct of any sort, physical or mental, is alleged against the Corporal. I find that I cannot believe the Accused on this issue. What he said to the Corporal in the Record of Interview has real significance in this case as the Accused well knows. I find that I can rely far more on that Record of Interview (and what followed after it, as I will come to in due course) than on the account of

the events at the beach as given me in evidence by the Accused. The Record of Interview, on scrutiny, is an account given by the Accused almost in a narrative form with only quite innocuous questions being asked by the Corporal. It smacks not at all of a cross examination. By the time of interview the Accused was sober.

35. So after such a long digression I come back to what the Accused said in the Record of Interview -

"Q.22. What did you do to 'Ana when she insisted on going with Fatui and the other girl?

A. Because that was my agreement with Fatui, that he go with the other girl while I stay with 'Ana" (I interpolate - a significant comment in my view - an agreement with Fatui; not on agreement or arrangement with 'Ana).

Q.24. What did you think of doing that you held 'Ana back to stay with you?

A. Just to stay with me."

Q.25. How long did you and 'Ana pull each other for?

A. It wasn't long."

36. There are significant sign posts to truth to be found in this passage of the Record of Interview and in the other passages to which I will refer later. They confirm in very large measure what the complainant says and I find them, significantly, independently supportive of her account of what occurred.

37. The complainant went on to describe how the Accused asked her twice to get in the var and she refused; and how she claimed the Accused said he would force her. She described trying to break clear, of a struggle between the 2 of them, of her screaming, of him threatening her with violence, of her breaking away and slipping and falling, of him

pulling her up and along and then pushing her down in some weed and of his falling on top of her.

38. When measured alongside what the Accused told the Corporal I find that I can, and do, rely on that account of hers. This is what he said to the Police:-

"Q.27. After she told you that she will leave what did you do?

A. She insisted on leaving and at this time it was day break and I came and held her hand.

Q.28. And what?

A. And I told her not to leave for she will go alone but she insisted that I let her go so that she'll go but I did not let her go and that was when she started screaming.

Q.29. What did she say when she screamed?

A. Just "'oiaue". "

(I pause there-in cross examination it was put to the Accused, in relation to these questions and answers, that that indicated that the complainant was not agreeing to stay and wanted to go. The Accused accepted that she was asking him to let her go, but not screaming; but claimed that he knew she was pretending to him that she wanted to be let go - in effect that what she was saying and doing - and had been saying and doing for some time - were not real, and could be (and were)disbelieved by him. That attitude, revealed in cross examination, shows an arrogance and a recklessness which exemplifies the Accused's attitude throughout this whole transaction. A recklessness and a single mindedness which is of significance on both counts, but particularly on the rape charge).

I continue from the interview -

"Q.30. And what then?

A. I asked her to stop screaming" (- I add in his evidence he denied she was screaming - again destructive of his credibility for the reasons I have already expressed)" and I held her arm but she kept on screaming.

Q.31. And what did you do?

A. I kissed her and tried to get her to kiss with me and I reached out to try to take off her pants and she struggled.

Q.32. And what?

A. When she struggled I let her go but I kissed her again and I reached out to get her pants off and she struggled again and held the buttons of her pants.

Q.33. And what happened?

A. My hand reached down and caught the zipper of her pants and I pulled it down and she kept on struggling and I felt that her hands were softening their hold and I then reached out and undid the button of her pants.

Q.34. And what did you go on to do?

A. I pulled down her pants and I parted one of the legs of her pants and we lay down in the middle of the weeds.

I pause there - on reading back the Record of Interview the Accused added words to this answer, showing, in my view, that he was taking some care about the answers recorded by the Corporal. Those words were: "and she said to take off her shoes and pull down her pants".

39. The complainant described the pulling down of her trousers and the shorts underneath, and the putting to one side of her crutch the one piece body suit (which later was found to have some damage at the bottom left side seam); and of the Accused first licking her vagina and then putting his penis inside her vagina and having intercourse, she says against her will, without her consent.

40. It seems to me that she did demonstrate a degree of composure at the time which can be seen as to some extent an acceptance of what was occurring and would occur, in the face of threats and of superior strength. But composure and submission to the inevitable cannot here be seen as consent and I do not see it in that way. Submission to force and fear is not consent.

41. Again significant support for the complainant's account, and, independent of the complainant, is to be found in the answers of the Accused in the Record of Interview, which he purports now to reject.

Q.36. Why didn't you go and lie down in the van where its clean but you lay down in the saafa (weeds) which is dirty?

A. Because all this pushing and pulling and her screaming were all done outside."

I pause - significant matters in my view. It was cold, wet and muddy. If consensual intercourse why lie in the weeds and mud and rain? The Accused's answer just read is very revealing in my view. Outside the van was where he had overcome her resistance and that is when and where intercourse took place.

42. I go on with the interview:-

"Q.37. What did you do to 'Ana when you lay down?

A. We kissed and I told her that I wanted to lick her vagina and she did not speak to me and I went down and licked her vagina.

Q.38. And what?

A. While I was licking her vagina she struggled around and moaned.

Q.39. And what happened?

A. And I stopped licking and came up to kiss and she told me no that she won't kiss again for I have finished licking her vagina and when I was to have

intercourse my penis was not erect and I coped and tried to make it erect and I asked her if she can put my penis inside but no".

(I pause - significant in my view, and according with what the complainant said in cross examination, but the Accused tries to give a different account in evidence) "and I reached out and put my penis inside and we had intercourse and I ejaculated inside .....".

43. From there there is a washing in the sea, a further waiting, another futile attempt to shift the van, a walking to where they found, eventually, Mele and Fatui, the obtaining of a lift into Vaini (by Fatui, Mele and the complainant - significantly the Accused tried to have the complainant stay with him and the others go in the car but she refused and quickly got in the car).

44. Once out of the presence of the Accused the complainant, quite consistently with what had happened to her, complained of rape to both Mele and the driver of the car, and then she and Mele went to the Vaini Police Station where she formally complained. I do not find any significance in the points Mr. Niu makes about time. No one was keeping track of times on a clock or watch. The evidence points to the visit to the Police Station being made as soon as possible. There was no delay, in my view, in raising the hue and cry.

45. The complainant was interviewed at the Vaini Station. Later Corporal Latu flagged down the Accused in his vehicle, as the Accused passed by. The exchanges which then took place between the 2 men and on which I place weight, and which again are independent evidence supportive of the complainant's account, are these. First the Corporal tells the Accused a complaint has been made against him. The Accused asks if it was 'Ana. Then in the Police Station the Accused sees the complainant, who was sitting in an office, and asks her to forgive him and not be angry with him for a long time.

46. The interview of the Accused follows later and I have already commented on that.

47. On completion of that interview the Accused was charged with 4 charges on 2 charge sheets, Exh. C2. This was at about 10 to midnight. On the first charge sheet were the rape charge and an indecent assault charge. The charges were read out; the Accused cautioned again and he said (as noted down and signed by him) "All those things are true things". The second charge sheet contained another indecent assault charge (on a girl under 16) and an assault charge (inter alia, by holding her hands). The reply noted and signed was "I did not know that she was under age and it's true I held her hands".

48. The reply on charge sheet 1 is important. It is indeed in my view an admission of rape. The Accused in evidence acknowledged that he did make those answers to the Police, on both the charge sheets. He does not claim, as he does with the interview, that his answers or replies were misinterpreted or distorted or rephrased in some way. (Indeed all he could say to the Court, as to his reply on the first charge sheet, was a rather lame "I do not really know why I said it"). Nor does he deny that after he was charged he signed an additional statement, under caution, which said "Firstly I did not know that the girl was under age when she drank and smoked and also smoked marijuana. As to her bringing these charges against me, my statement is there in my answers to your questions and there is nothing else that I want to add to those answers made and I do know about them". So no repudiation of interview there; and not was there the next day when, under caution and with a police photographer and others the Accused identified the scene of the events .

49. I conclude therefore, and find proved that the Accused knew full well that what he had done had been done without the consent of the complainant i.e. that he had not only held her back, struggled with her, touched, partially unclothed and licked her against her will, but

also that he had sexual intercourse (carnal knowledge) with her against her will. He was not only reckless at the time of sexual intercourse (as he had been at earlier times of holding her back and indecent assault, and as I have already commented on) as to whether she consented or not (and I find that recklessness proved beyond reasonable doubt) but he also knew that she was not consenting (and I find that proved beyond reasonable doubt). I therefore find the charge of rape, count 1, proved beyond reasonable doubt and enter a verdict of guilty to that count, accordingly.

50. Which then leaves the detention count, count 3. In view of the factual findings I have made along the way I find, beyond reasonable doubt, that the Accused did detain the complainant by using physical force. He admits as much. As to the question of intent I find, again relying on the factual findings I have already made, that such detention of her was for the purpose or with the intent of carnally knowing her. No other logical deduction can properly be drawn, in my view, from the facts which I have found proved. The Accused's explanation in evidence is neither credible nor consistent with all that had preceded the detention, the detention itself, or all that succeeded the detention. Beyond reasonable doubt, I find count 3 proved and enter a verdict of guilty accordingly.

Verdicts:	Count 1	-	guilty
	Count 2	-	guilty
	Count 3	-	guilty
	Count 4	-	not guilty.

NUKU'ALOFA, January 15th 1996.

(CHIEF JUSTICE)

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