

REX

S. 124

-V-

25/90

5 yrs.

SENTENCE

MALIEPO TOMA

→ Imprisonment?  
→ 3 months imprisonment.  
suspended for 1 year.  
\$ 750 - to the Court.

BEFORE THE HON. MR JUSTICE FORD

COUNSEL : Mr Bloomfield for Crown.  
Mr Tu'utafaiva for Accused.

Date of Hearing : 29 September, 27 October, 2000  
Date of Judgment: 9 November, 2000

J U D G M E N T

On 15 July 1999 the complainant, Kololiana Naufahu, went with two of her overseas business partners and her trusted friend and driver, Olivia Fifita, to the Waterfront Bar/Café in Ma'ufanga (the "Waterfront"). The Crown case is that within a very short time of her arrival at the bar, the complainant was indecently assaulted by the accused. The accused denied the charge and the case proceeded to trial.

The elements which the Crown must prove beyond reasonable doubt to establish a charge of indecent assault are well established. First, the Crown has to prove that there was an assault on the complainant. An assault is any intentional application of force. Any degree of force is sufficient. Secondly, the Crown must prove that the assault was indecent. There is no fixed legal definition of indecency and so the test applied by the Courts is whether what was done would be considered indecent according to commonly accepted community standards. Finally, the Crown has to establish that the complainant did not consent to what occurred and that the accused did not honestly believe that the complainant consented.

Prior to going to the Waterfront, the complainant and her group had attended an invitation only function to mark the opening of a refurbished hairdressing salon. The complainant was cross-examined at considerable

length as to how much alcohol she had consumed at that function but she was adamant that, although she had been present for some 3 ½ hours, she had consumed only a very small quantity of wine and this was confirmed by the other Crown witness.

The complainant's version of what happened at the Waterfront was that when her group arrived, one of the Italian partners she was with went to the bathroom and the other partner went to order drinks. The complainant sat on a low stool at the bar, facing the bar. Her friend Olivia stood at the bar with her back half turned towards her and they started talking. She says that next thing she felt a man standing close behind her back almost leaning against her back. She told him to move away but he proceeded to put his two hands on her head and ran them down the side of her face towards her breasts. At that point, she was angry and shocked and she said that the shock of someone doing that to her upset her greatly. She said that she pushed the accused away and told him to get lost and she yelled out, 'who is this man'? She told his friends to take him away. But he did not go away. He came up and started touching her friend Olivia.

The complainant said that the next thing she knew was that the accused was back at her again and this time he grabbed both her breasts and then ran his hands down to her buttocks and by then she was on her feet and she shoved him backwards - pushing him on the chest or shoulders. She then called the police.

That basically is the plaintiff's account of what happened. She said she had travelled the world extensively in the course of her business career but she had never felt so degraded and humiliated in her life. She said that nothing like that had ever happened to her before. She said that it was all the more embarrassing because the incident occurred when she was hosting her overseas business partners.

The complainant is a prominent businesswoman. She explained in her evidence the special significance of the conduct she had described in Tonga where traditionally women enjoy a higher status than men. She said that in Tonga no man ever touches a woman like that unless she is a whore or his own woman.

The other witness called by the Crown was Olivia Fifita. She is a married woman with children. She is a taxi driver by occupation and the complainant is one of her main customers. Because she was the driver, Mrs Fifita had not been drinking at all on the night in question. She gave her recollection of what had happened.

The accused gave evidence and called two witnesses. He did not have to of course because the onus lies with the Crown throughout to establish every element of the charge. The accused did not deny that he had come into physical contact with the complainant at the Waterfront on the night in question but he said that he had been drinking heavily and he had no recollection whatsoever of the evening. He called evidence from his drinking

friend, Maliu Takai, but he had no recollection of what had happened. The other witness called by the accused was Kisione Valu and the defence relies heavily on Mr Valu's account of what happened.

Mr Valu said that he was at the Waterfront at the bar and he saw the accused, who was a lifetime friend, enter the bar with Maliu. He said that the accused came and talked to him but he was very drunk and he was swaying back and forth. He gave evidence about how the accused had "swayed" backwards and come in contact with the complainant. He described the complainant's reaction and he said that after the complainant threatened to call the police, the accused apologised to her and he (Mr Valu) took hold of the accused and led him out of the restaurant.

Because none of Mr Valu's evidence had been put to the complainant in cross-examination, I allowed the Crown to recall the complainant to hear her reaction to two of the matters he had said which directly affected the complainant.

I say at once that I did not form a favourable impression of Mr Valu as a witness. I have serious doubts about his story and wherever there is a conflict between the evidence of the complainant and Mr Valu's evidence, I have no hesitation in rejecting Mr Valu's account of the facts.

That, however, is not the end of the matter. The question I have to ask myself is whether the Crown has proved that each of the elements of the charge made against the accused has been established beyond reasonable doubt. It is not up to the accused to prove his innocence.

The complainant and Mrs Fifta were cross-examined extensively by counsel for the accused on every detail of the incident and the cross-examination did reveal some inconsistencies in their account of exactly what happened but it is not often that witnesses give identical accounts of an incident - no matter how traumatic, and the concessions obtained in cross-examination in this case do not, in my judgment, cause me to have any doubts about the substance of the Crown case.

As an alternative to the accused's denial that he committed the offence in the manner alleged, he submits that he did not have the required intention (*mens rea*) because of his state of intoxication.

When considering the relevance of intoxication, it is necessary to distinguish offences of specific intent, in other words, offences where an intention to cause a specific result is an element and offences of basic intent where the only relevant intention is the intent to do the physical act which is required as part of an *actus reus* of a non-purposive kind. Indecent assault comes within this latter category of offence.

In DFP v Majewski [1977] AC 443, the House of Lords held in substance that on the trial of an accused for an offence of basic intent, evidence of self induced intoxication was irrelevant and therefore inadmissible if tendered

solely to raise a doubt as to the voluntariness of, or as presence of an intention to do, the physical act involved in the crime charged.

An identical question came before the High Court of Australia in **R v. O'Connor** [1980] 146 CLR 64. The majority of the High Court declined to follow **DPP v. Majewski**, holding that evidence of intoxication (either by alcohol or drugs, or both) was relevant and admissible to the issues of voluntaries and intent in offences of both specific intent and basic intent.

The common law principles relating to intoxication as laid down by the majority in **R v. O'Connor** have equal application in Tonga by virtue of section 21 of the Criminal Offences Act the relevant parts of which provide:

21.(1) *Save as provided in this section intoxication shall not constitute a defence to any criminal charge.*

(2) ...

(3) ...

(4) *Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the offence.*

(5) ..."

In other words, intoxication can never be a defence in criminal proceedings but is a factual matter which bears upon the existence or the non existence of an ingredient of the offence itself.

The evidence in the present case satisfies me that although the accused was very drunk, he was not so grossly intoxicated on the night in question that he could not form any conscious intent at all and that is the real test.

In my view, the Crown has succeeded in proving every element of the charge beyond reasonable doubt. Much was made of the delay on the complainant's part in lodging her formal complaint with the police but she explained that she was allowing the accused the opportunity of making an apology for his actions in the customary Tongan way but no apology was forthcoming. I found the complainant's explanation both plausible and convincing. In summary, I found both her and Mrs Fifita to be truthful and impressive witnesses and I have no doubt that the complainant found the incident deeply offensive in the manner that she described quite dramatically to the court.

The accused is convicted and I will now hear counsel on sentencing.

NUKU'ALOFA: 9 November, 2000



*[Handwritten signature]*  
JUDGE