CRC 38-A92

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

CRIMINAL CASE N°38 OF 1992

PUBLIC PROSECUTOR -v- FABIANO BULEURU

Coram : Beaumont A.J.
Mr John Baxter-Wright, Prosecutor
Mr Michael Purcell, Public Solicitor for the accused

JUDGEMENT

Fabiano Buleuru is charged with rape (two counts under S.91 of the Penal Code) and with an attempt to procure the miscarriage of a woman under s.117 (2) and s.28 of the Penal Code. He has pleaded not guilty to each count, but on the counts of rape, the accused admits that he had sexual intercourse with the complainant on many occasions, yet says that this was always done with her consent.

Particulars of the Counts in the Information are as follows :

" COUNT 1 Particulars....
....., in 1988 you forced Salome Matan to have sex with you against her will while her husband, Grasiano Tabi, who was your own son, was in Santo.

COUNT 2 Particulars....
..... in 1989, in your house, you forced Salome Matan who was your own son's wife, to have sex with you against her will while her husband Grasiano Tabi was in Santo.

COUNT 3 Particulars...
..... in 1989 at Melsisi Pentecost, in your house, you meant to kill an unborn child carried by Salome Matan Wai, by giving her some customary medicine and rubbing her belly with some hot leaves and putting a bottle of hot water on her belly attempting to kill the child by causing a miscarriage."

I will deal with each Count separately.

THE FIRST COUNT

There is no real dispute about the background facts.

(There is a dispute about the date when the complainant was married and a related dispute as to the year in which intercourse took place between the accused and the complainant. According to the complainant, both events took place in 1988; however, the accused's version suggested 1987 as the date. In the event that I were to be satisfied, on the criminal onus, that the charge was made out in respect of the year 1987, the provisions of s.139 (3) of the Penal Code, as amended, would apply, unless the accused could show prejudice as there provided. No such prejudice is suggested.)

The complainant is about 23 years of age. She was born, and has always lived, in Central Pentecost. In 1988, she married Grasiano Tabi. They have one child, who is a year old. Grasiano Tabi is the son of the accused.

The accused, now 50, is married with 5 other, younger, children. The accused and his wife have known the complainant and her family for many years.

At the time now in question, the complainant's husband worked in Santo and did not spent much time in Pentecost. The complainant lived with the accused, his wife and their family in a village.

The complainant appeared to be quite unsophisticated and was not comfortable when in court. The accused, on the other hand, did appear comfortable during the proceedings. He has, from time to time worked at places away from Pentecost. For instance, he drove a truck in New Caledonia for 5 years. When giving his evidence, he was very articulate. He was able, without prompting, to give an elaborate and lengthy description of his relationship with the complainant over a considerable period.

In 1988, the accused took his wife to see a doctor at another place. The accused returned home but his wife remained away overnight. The incident relied on by the Prosecution is said to have occurred on this night. According to the complainant's evidence, the accused raped her on this occasion. The accused admits having intercourse with the complainant on an occasion in 1987 (not 1988) but his evidence was that this occurred at the invitation of the complainant.

I will summarise each version in term.

The complainant's version of the incident

The complainant gave a detailed description of the incident which may be summarised as follows :

That night the complainant slept with the children of the accused. Whilst she was asleep, the accused came into the area where she and the children were asleep, She was surprised. She shouted out her husband's name ("Grasiano"). She screamed. The accused said : "Don't say anything". The accused then grabbed her hand and pulled her out of bed. He was then wearing only under pants. He pulled her over to the kitchen house which was nearby. He pushed her onto a bed in that room, pulled off her clothes, forced her legs open and forcibly penetrated her. He warned her not to shout, otherwise, he said, he would strangle her.

She said that she was too ashamed to tell anybody about what happened.

(The matter was reported by the police by the complainant's mother in March 1989.)

[The complainant also gave evidence about other occasions in which she complained that the accused had intercourse with her against her will. I will deal with these when considering the second Count.)

The accused's version of the incident

As has been noted, the accused gave evidence. His version, also given in detail, was at odds with the complainant's account in fundamental respects.

According to the accused's evidence, the complainant and his son were married in 1987. When his son went to Santo to work, the complainant "used to play with me". On one occasion, she offered him a drink out of a coconut, a gesture which, the accused said, was "a signal that she wanted me to go (i.e. have sex) with her". In November 1987, he asked the complainant about this and she said : "It was the sign of that thing." The accused then asked whether she wanted to have sex with him. She said : "Yes, but where ?". It was arranged that later that night, they would meet in the kitchen house. The meeting took place as arranged and sexual intercourse took place with the complainant's consent.

[The accused also gave evidence of subsequent occasions in which intercourse took place with the agreement of the complainant in accordance with a pre-arranged plan. This evidence is the subject of Count 2 and will be dealt with later].

According to the accused's version of events, in essence, the complainant had sex with him because she wanted to be his "friend" (lover).

Conclusion on Count 1

The complainant was cross-examined about the coconut incident. She remembers the occasion. She said that she tried to give the coconut to the accused but he pushed it back into her hand. In their submissions, counsel referred to the symbolism that might or might not, be perceived to exist in this incident. In the absence of any satisfactory evidence of custom in this regard, it would not be appropriate to attach any real significance to this matter.

It was put to the complainant in cross-examination that she had consented to having intercourse on the occasion in question. She firmly rejected the suggestion. She gave her evidence in a convincing and cogent fashion. On the only issue remaining for determination on this Count, that is, the issue of consent, I would find, if her evidence alone were taken into account, that the Prosecution had established a prima facie case.

However, the Prosecution must prove, beyond a reasonable doubt that the complainant did not consent, if the accused is to be convicted on this Count. The accused has given evidence to the effect that the complainant did consent. Moreover, there was no evidence by the way of corroboration of the complaint. As the Chief Justice has recently pointed out (Public Prosecutor -v- Mereka, 30 December 1992), although the absence of corroboration is not fatal to a Prosecution for rape, its absence must be taken into account by the Court.

Has the Prosecution proved the offence charged beyond any reasonable doubt? In my opinion, it has.

It is true that the accused maintained his version of events under cross-examination. But in two significant respects, it has been demonstrated to my satisfaction beyond a reasonable doubt that the defendant's evidence is not reliable.

In the first place, the accused sought to create the impression in his evidence that he discharged his responsibility to "look after" the complainant as a member of his family, and that their family relationship was a happy one. Yet his conduct, even on his own evidence of it, that is, even if her consent be assumed for the moment, is quite inconsistent with the proper discharge of that responsibility.

Another aspect of this matter is that it is common ground that, at a period after the incident in question, the complainant moved to another village and only returned to the accused's village when the accused and his wife went and brought her back. Again this conduct is not consistent with the general picture which the accused's evidence sought to convey.

Secondly, the accused claimed, in his evidence, that he did not know that the complainant was pregnant until he was charged by the police. However, a prosecution witness, Raymond Tabisalsal a local councillor, contradicted this. He said that at a meeting of local chiefs, at which he was present, the accused admitted that he got the complainant pregnant. He was an independent witness and I accept his evidence. It contradicts the evidence of the accused on the point since it is common ground that the chief's meeting calling the accused to account took place before he was charged.

Both this considerations are, I think, significant. In my opinion, they seriously undermine the foundation upon which the credibility of the accused's version of the incident depends.

I take into account the absence of corroboration, although I note that the complainant did not suggest that the accused bruised her or otherwise made any visible marks on her. On the other hand, as has been said, I found the complainant's description of the event in question convincing and compelling.

At the same time, for the reasons already given, I am unable to give credit to the accused's explanation of what happened.

I follows in my opinion, that the prosecution has proved its case on this Count beyond reasonable doubt. I propose to convict the accused of this offence.

THE SECOND COUNT

Here also, the accused admits having intercourse but says this was done with the agreement of the complainant.

The Complainant's Evidence

After explaining in detail, as has been noted, what had occurred in the first incident, the complainant went on in her evidence to say :

"he did it to me many times. I cannot remember the detail of every occasion."

She proceeded to say that this happened "seven days of the week". She then added that - "in some weeks it would be only once or twice a week."

No further particulars of the specimen charge of rape alleged in this count were given in her evidence in chief.

Conclusion on Count 2

In my opinion, it would be unsafe and unfair to the accused to convict on such generalised material, lacking as it does, any degree of particularity. I propose to dismiss this charge.

THE THIRD COUNT

The accused disputes entirely any involvement in this alleged event.

The Complainant's evidence

In her evidence, the complainant said that, after sleeping with the accused, she noticed that she missed her period. She talked to the accused about this. Later, he prepared a mixture of leaves and water and forced her to drink it. Subsequently, she said, "he burnt my belly. I felt a pain in my stomach .... A week after I bled."

Conclusion on Count 3

Here also, I take into account the absence of corroboration. But, in constrast with the position with respect to the first charge, there is one thing, that is, the alleged "burning of the complainant's belly - that could reasonably be expected to have been seen by another person at that time. Evidence of such a visible injury could have been given by way of corroboration. In the absence of any corroboration, it would, I think, be dangerous to convict on this count. I propose to dismiss this charge.

VERDICTS

My verdicts are as follows :

1. The accused is convicted of the offence charged in Count 1.

1. The accused is acquitted on the charges in Counts 2 and 3. Those charges are dismissed.

DATED at Port Vila this 31st day of May 1993.

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B.A. BEAUMONT A.J.

REPUBLIC OF VANUATU
COUR SUPREME
LEX
REPUBLIQUE DE VANUATU