

REGINA -v- CHARLES MAX NIULIFIA AND JOHN MARK IDU

HIGH COURT OF SOLOMON ISLANDS  
(KABUI, J.).

Criminal Case No. 318 of 2003

Date of Hearing: 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup>, October, 1<sup>st</sup> and 2<sup>nd</sup> November 2004.  
Date of Judgment: 10<sup>th</sup> October, 2004.

*R. Barry and H. Kausimae for the Crown.*  
*M. Ipo for the Charles Max Niulifia.*  
*R. Ziza for John Mark Idu.*

JUDGMENT

Kabui, J. The two accused, Charles Max Niulifia and John Mark Idu were charged jointly with the rape of Elsie Fane, (the complainant) on 4<sup>th</sup> April 2003 at the Town Ground field in Honiara, contrary to section 137 of the Penal Code Act (Cap. 26) "the Code". Both accused pleaded not guilty on arraignment and I entered a plea of not guilty in respect of each of the accused. I will refer to Charles Max Niulifia simply as "Niulifia" and John Mark Idu as "Idu" in this judgment. Niulifia and Idu called themselves brothers. I do not know whether they are blood brothers or cousins. I remind myself that the burden of proof beyond reasonable doubt of the guilt of Niulifia and Idu throughout their trial rested with the Crown, the Prosecution. I must be satisfied beyond reasonable doubt that Niulifia and Idu did rape the complainant on the night of 4<sup>th</sup> April 2003 as alleged in the information filed by the Director of Public Prosecutions.

The case for the Crown, the Prosecution.

The Prosecution called eleven witnesses. The first witness was the complainant, (PW1). Her evidence is this. Her group of friends were drinking initially on the grounds of the Art Gallery but were told by the Police to move elsewhere. They then moved to the Town Ground field. They continued drinking there. There were five of them, three boys and two girls, in their group. The other girl was Josephine. The boys were Bruce Rawson, (PW2), Chris Tevata, (PW3) and Walter Nadu (PW11). Chris Tevata was the boyfriend of the complainant. I will stop here and deal with the evidence of her friends first in order to place the sequence of events in a logical fashion as far as possible and then place the complainant's story in the appropriate place. This is Walter Nadu's evidence in chief. He said that when they were drinking, one boy came to them and asked for coca cola. That boy sat down with them. That boy was holding a bottle of hot stuff. That boy was big, had big hair with dreadlocks. After mixing his drink, the boy left. Their group then moved a little towards the main road. A group of about five boys came towards them and threw bottles at them. The boys in that group spoke roughly to them and kicked them. The complainant was drunk and was lying down on her boyfriend's legs and could not stand up. He ran away and did not see what happened to the two girls, namely, the complainant and Josephine. Bruce Rawson, too, confirmed that one matured man came to them and asked for coca cola. The man sat down with them and then left. After that, two men came and claimed the two girls as their sisters and were looking for them. One of them kicked Walter Nadu. They stood up and he tried to help the complainant but she was drunk so he left her and ran away. The matured man was not one of the two boys who claimed the girls as their sisters. The two boys came from the SMI direction. The evidence of Chris Tevata is similar in nature. He said two men came to them and asked for coca cola. He gave them some. One of them took their drink and never returned it. They left and later returned to them. The

men's group ran towards them shouting. One of them kicked Walter Nadu. They stood up and one in the other group threw bottles at them. They then grabbed the two girls, the complainant and Josephine. He was not able to identify which of the attacking men grabbed the complainant. There were two men dragging or pulling the complainant towards the road going up to Leggakiki. The complainant was shouting for his help. He was not able to say how far they had dragged the complainant but was sure that they were taking her towards the Leggakiki road. He had not seen Josephine and where she went. He then ran to the Rove Police Station and reported the matter to the Police. When he and the Police arrived in the Town Ground field, the complainant and Josephine were nowhere to be seen. They had disappeared from the field and so were the men who had dragged the complainant. According to the complainant, she had been raped by one of the two men who had dragged her. There were two men holding her by her hands. One held one hand and the other man held the other hand and they pulled her along. She described the two men as being big men compared to herself being of a small stature. She was struggling and calling for her friends. The two men pulled her towards the Christmas tree near the Leggakiki road. There was long grass there that time. It was quite dark that time. The two men were trying to lay her down but she was resisting them. One of them was about ten metres away watching and the other raped her. The man who raped her lay her on the ground. She then was wearing trousers, underpant, singlet and a bra. She also had a ribbon in her hair that time. The man who raped her took off her trousers and underpant by undoing the button and then unzipped her trousers. The man then pushed his penis into her vagina. The intercourse took about two minutes. The man's penis was initially strong and then it became weak during intercourse. She felt some pain in her vagina. She admitted that she was a bit drunk that time. She said the man who raped her was a bit fat, had bushy hair and had a beard. She said he was light-skinned. She identified the man in the dock, wearing a white singlet. The man in white singlet was Idu and the man in the black singlet was Niulifia. The man who had sex with her that night was the one in white singlet in the dock.

#### The case for the defence.

Proof from her → Niulifia gave evidence on oath. He admitted having sexual intercourse with the complainant with her full consent but at a different location than described by the complainant. He did not deny being with the complainant's group earlier on that evening. It was him who came up with the idea of mixing sugar and water and giving the mixture to the complainant and Josephine who were drunk and were lying down on the ground. He passed the mixture to Chris Tevata who gave it to the complainant and Josephine to drink which they did. After that, the girls stood up and vomited. After sometime, the girls sat up. After that he and Idu left the group and went across to the betelnut sellers on the other side of the Town Ground field in the easterly direction. There, they bought some smoke (cigarettes) and stood around for about thirty minutes or more, and then proceeded back to the Town Ground field near the goal posts intending to go up the Leggakiki road to the lodge. There, they met the complainant, running towards them calling Chris. The complainant asked for Chris Tevata and then came and hung on the body of Niulifia, who quickly told her that he was not Chris but Charles. The complainant then asked about Chris Tevata and her other friends. Niulifia then said that he did not know but she should know because she had been with her friends. The complainant told Niulifia and Idu that her group had been attacked. Niulifia then asked her where she had been. She told them that she was going away in any event or something to that effect. She said she was a Form 4 student at King George VI School. Niulifia then said the bus service had stopped working. She then asked where Niulifia and Idu were going to which Niulifia said that they were going to spend the night with John Kwanairara in the lodge. She then suggested that she accompany them to the lodge and asked them to find a taxi for her the next morning. After that conversation, the three of them then walked and sat down on the cement ladder at the east end of the Sol-Lanka store building, apparently waiting for the boyfriend of the complainant to show up but Chris Tevata did not. The three of them then walked up the footpath behind the eastern end of the Sol-Lanka store heading for the lodge. Idu was in the lead, followed by the complainant and

then Niulifia. They sat down on top of a hill for about ten to fifteen minutes. There, Niulifia, asked the complainant for sex and she agreed to it. She however told Niulifia to tell Idu to move away from them. Idu moved away about eight to ten metres and stood. Niulifia and the complainant then kissed. She removed her clothing and had sexual intercourse with the agreement of the complainant. They sat down and drank some more and then Idu joined them again. Then the complainant asked for another round of sex with Niulifia and they again had sex the second time. Suddenly, Idu alerted them that someone was coming so they got up in a hurry and Niulifia picked her underpant by mistake. They were on the move when PC Akao intercepted them and arrested Idu. Under cross-examination, Niulifia said he ran away because the Police had fired shots in the area and he was afraid so he ran down to the Town Ground area where he was arrested by the Police and taken to the Central Police Station. Niulifia was searched and an underpant was found in his pocket. The same was done to Idu and a ribbon was found on him also. Niulifia stuck to his story under cross-examination. However, when the version of facts stated by Niulifia was put to the complainant in cross-examination by defence counsels, she denied all the facts stated by Niulifia. Idu gave a similar story on oath. He also stuck to his story under cross-examination. His version of facts was also rejected by the complainant when put to her by defence counsel representing Idu at the trial. Niulifia and Idu called no witnesses to support their version of facts.

#### **Identity of Niulifia and Idu when arrested.**

The identity of Niulifia and Idu is not an issue in this case for he had had sexual intercourse with the complainant with her full consent at the top of the hill two times above the Sol-Lanka store. Idu was all the time with Niulifia except when Niulifia and the complainant were having sex he had to move away from them for obvious reason. So their case is that the person who raped the complainant near the Christmas tree in the Town Ground field was not Niulifia supported by Idu as alleged by the Crown, the Prosecution. The rape of the complainant at that location must have been done by someone else. Their case is that there were other potential rapists lurking in the Town Ground field that same night they were at Town Ground field.

#### **Identity of Niulifia and Idu in the Town Ground field before the alleged rape of the complainant.**

According to Walter Nadu, only one unknown person came to them and asked for coca cola. That person was big, had a big hair with dreadlocks. He was holding a bottle of hot stuff. He sat down for about fifteen minutes and then he left. Then a group of boys came to them. That group of boys threatened them and threw bottles at them. Actually, he was kicked by someone in that group. Under cross-examination, Walter Nadu said that the unknown man had come to them from the direction of Sol-Lanka store. He said the group of boys who came and claimed the two girls as their sisters had come from the same direction the unknown man had come. In reply to a question by the Court, Walter Nadu said that when the group came back, the unknown man was with them. He said that he did not know whether there were other groups besides his group. Chris Tevata said in fact two men came to them. They left and then returned. Under cross-examination, he said only one man came to ask for coca cola. He was the same man from whom they had asked for a lighter. The man had hot stuff. After the man returned to his group, he returned with another boy. He said the boy's group was further up towards the goal posts in the direction of Sol-Lanka store. One of the two boys lit a match to enable him to see them and the girls. He recognized the man who had asked them for coca cola earlier on and when searched by the Police, an underpant was found in his pocket at the Central Police Station. That man was one of the men who had dragged the complainant. In re-examination, Chris Tevata recalled that Niulifia was one of the men dragging the complainant in the Town Ground field. In response to questioning by the Court, he said he stopped Niulifia in the Town Ground field just before the Police arrested him. Only Bruce Rawson said that the group that attacked them had come from the SMI direction. He confirmed in his evidence in

chief that one of the two boys who had come to his group was Niulifia because he had told them that he was Niu or something like that. Under cross-examination, he confirmed that the same man whom they had asked for a lighter came with the group that attacked them confirming Chris Tevata's evidence that the same man had asked them for coca cola in the first place. Niulifia, in his evidence in chief, did not dispute that he and Idu went to the complainant's group and sat with them before they left that group. He admitted it was he who asked for coca cola. He admitted that he had been asked for a lighter. He admitted that it was him who suggested that sugar be obtained. It was him who asked for money for that purpose and he did the mix of sugar and water which Chris Tevata gave the complainant and Josephine to drink which they did. So Niulifia and Idu were present with the complainant's group and then they left as they said they had ran out of smoke, (cigarettes).

### **The identity of those who attacked the complainant's group in the Town Ground field.**

This is crucial because according to Nulifia and Idu, they both had left the complainant's group. However, the complainant described the man who raped her as being fat in size, had bushy hair and had a beard. She later saw her underpant at the Central Police Station that same night. Her underpant was discovered in the pocket of Niulifia when searched by Police at the Central Police Station. P.C. Murray Galvin, (PW 5), confirmed that he recovered a woman's underpant in the pocket of Niulifia when being searched whereupon the complainant claimed it as her underpant. Chris Tevata, (PW3) said that the group that attacked his group threw bottles at them. He could only confirm that two men grabbed the two girls from his group. He could not identify the two men though in cross-examination he described one of them as the man who had come to them earlier. However, he confirmed that the men pulled the complainant towards the Leggakiki road and the fact that she was calling out for help from her friends as she was being pulled away. When cross-examined by Counsel, Mr. Ipo, the complainant said that if the men did not pull her away as she had said, she would not have ended up in a different place. She said she was being pulled along the ground facing up. She said that when they first pulled her she was sort of being lifted up and dragged along with her legs still touching the ground. When cross-examined by Counsel, Mr. Ziza, she said although she and Josephine were lying on the ground, they were not fully drunk when Niulifia and Idu visited them earlier that night. When confronted with an earlier contradiction about the star marked on the sketch plan, Exhibit E, she said she was raped near a Christmas tree which she had marked in red in photograph 2 of Exhibit D. She could not explain why she had said earlier that she had been raped at the spot marked with a star on the sketch plan. In fact, in her evidence in chief, she said one of the men lay her down in the centre of the Town Ground perhaps just seconds before she was dragged. Nowhere did she say that she was raped in the center of the Town Ground than the star marked on the sketch plan, Exhibit E. It is obvious that her remark about being laid in the centre of the field was misunderstood by PC Coleman Kona, (PW8), as the spot where the rape took place when it was not. The instructions upon which the sketch plan was drawn were being given by the complainant six months after the event. The complainant did not identify who attacked her group in the Town Ground field. She did not conclusively establish the identity of the two men dragging her towards the Christmas tree near the Leggakiki road. However, she was able to say that the man who raped her was one of the two men who had dragged her and he was a bit fat, had bushy hair and had a beard. In the dock during the trial both Niulifia and Idu were a bit fat, had hair and beards. Only Niulifia has dreadlocks. At no time did the complainant say that she had been raped by two men. The complainant pointed out Idu as the man who raped her that night. She had first seen Nulifia and Idu on 4<sup>th</sup> April 2003 at the Central Police Station eighteen months ago. Dock identification is not always reliable. The newly constructed dock in Court one is seven metres away from the witness-box where the complainant was giving evidence. In fact, the complainant made a mistake in identifying Idu as the rapist. Idu, according to the Crown case, was the man who assisted in the commission of rape against her. In any case, Niulifia did admit having sex with her

though at a different time and place with her full consent. Idu also agreed that Niulifia had sex with the complainant at a different time and place. In her evidence in chief, the complainant said,

**"I stayed with Police all night. I saw the man with big hair at Police Station. I recognized him as the man who had sex with me... I saw the man with big hair being searched. They took my underpant from his pocket on the side of his pocket. The ribbon was recovered from the same man with big hair."**

The man with big hair at the Police Station was Niulifia, confirmed by PC Murray Galvin, (PW 5) who searched him and found the complainant's underpant on him. PC Akao's evidence also contradicts the version of facts given by Niulifia and Idu. PC Akao said in evidence that on receiving a report, he and other police officers went to Town Ground by private car but saw no one at Town Ground. They went back to the Police Station and returned in a Hilux vehicle. They dropped off two police officers at Town Ground and he and others went to Leggakiki and turned eastwards and stopped opposite a building owned by SMI. He got off the truck and followed a driveway down the slope and stood and waited. Then he saw two males carrying a female coming up towards him and they walked past him. He was not in uniform that time. The female looked drunk and was calling someone's name. He asked the two men where they were taking the lady and one of them said she was their girlfriend. One of them turned back and he grabbed his right hand. The other one dropped the female and ran away. The female was wearing a trousers and singlet. Under cross-examination, PC Akao said that the female was between the two men, being supported up the slope by the two men. The female looked drunk and talkative, calling someone's name. She smelt of alcohol. Niulifia who had run away was later arrested in the Town Ground field, having been identified by Chris Tevata, when he returned with the Police and was looking for the complainant. The version of facts given in evidence by Niulifia and Idu was flatly rejected by the complainant under cross-examination as being nothing but untrue. In re-examination, the complainant said,

**"They were trying to carry me to the bush. This was after sex. They carried me across the road. There were bushes on the other side of the road. I was beside the road in the grass."**

These statements seem to explain why the complainant ended up across the road in front of the Sol-Lanka store and eventually found with Niulifia and Idu by PC Akao. Under cross-examination by Mr.Ziza, Chris Tevata, (PW3), said,

**After he left, he then came again with another boy. Their group was further up near the goal posts towards the store. I only saw the two boys come from their group. The same two boys lit the match to identify us. I could not tell who raped Elsie but she did. I only recognized the boy who was searched and underpant was found in his pocket. I only recognized the boy we gave him the coke. They lit the match to identify the girls. It was that time that they kicked Walter. It was that time that they shouted, "kill them." I was not really drunk. I recognized the man who came to us. The other one I could not recognize because he was not with us for long. I only saw 2 of them holding on to Elsie's hands. One of them was the man who had come earlier. They kicked Walter and he ran away. I only recognized the one who had earlier come and we gave him coke. I can recognize one of them in the dock. He was one of them dragging Elsie. He is the one on the left side. They were the group".**

Niulifia was the one on the left in the dock. On re-examination, he recalled that one of the two men who dragged Elsie was Niulifia. It is not in dispute that the first person who visited the

complainant's group and asked for coke was Niulifia. Apart from identification of Niulifia at the Central Police Station and the fact that the complainant's underpants and ribbon were found on him, the evidence of identity of Niulifia being with the complainant up to the rape place near the Christmas tree along the road going to Leggakiki can only be described as circumstantial. The circumstantial evidence of identity, especially against Niulifia is however strong. Chris Tevata's evidence was attacked by Mr. Ziza on the ground that he had been sitting in court during the time the complainant was giving her evidence. This was not disputed by the Crown but with the qualification that he was present only during the cross-examination of the complainant. His evidence is no different in value than that given by Bruce Rawson and Walter Nadu except he was the last to see the complainant being dragged away by two men from the attacking group. He was an eye witness to that fact. Although he said in evidence in chief that he did not identify any of the two men dragging away the complainant, he corrected that in cross-examination by Mr. Ziza to the extent that one of the men was the man who had come to them earlier that night. Other than that, he did not see who raped the complainant. That is the only value one can give to his evidence. It is of no consequence as proof of rape. I warn myself of the danger of relying on identification evidence. In fact, according to Niulifia's evidence, he and Idu entered the Town Ground field from the eastern direction and were walking past the goal posts there when the complainant came to them, and hung on Niulifia, saying that her group had been attacked and was looking for her friends. Niulifia's evidence puts the rape taking place elsewhere than in the Town Ground field because the goal posts are nearer to the Christmas tree, the place the complainant marked red in photograph 2 in Exhibit D as being the place she had been raped unless she had been raped at that spot earlier by someone else before Niulifia and Idu arrived. According to PWs 1, 2, 3 and 11, they were attacked in the Town Ground field at a place further away from the goal posts and the rape spot near the Christmas tree. That explains the fact that the complainant had been dragged away from them for some distance before she was raped. I have come to the conclusion on the evidence that Niulifia was one of the men who attacked the complainant's group in the Town Ground field.

#### **Identity of the persons who abducted the complainant from her friends in the Town Ground field.**

The guilt or innocence of Niulifia and Idu really turns on who were telling the truth in Court during the trial. Both the complainant and Niulifia and Idu had been drinking that night. They were strangers to each other than Niulifia and Idu being with the complainant's group for sometime earlier on that night. One would like to think that there was no reason why anybody should see fitting to attack the male friends of the complainant and Josephine. I think the two girls were the reason for Niulifia and Idu attacking their group that night. Niulifia and Idu decided to threaten the male friends of the two girls so that they could take the two that night. They had scouted the area and seen the two girls as easy prey for them that night. There might have been other boys with Niulifia and Idu but they deserted them when they decided to embark on their plan to take the girls from their male friends or that they were the only other persons drinking in the Town Ground field that night and time. If there had been more boys with the same intention, pack rape would have been the result. I believe that Niulifia and Idu had made up their minds to take the girls, one each that night but Josephine escaped and Idu had to accept the fact that he had not been successful and simply waited for Niulifia to finish his business with the complainant. He joined them later and they made their way up the hill when they met PC Akao who arrested Idu. Niulifia escaped and later was arrested that same night. Idu might have helped Niulifia to drag the complainant but his identification is rather doubtful. It is an irony that Niulifia had acted as a good Samaritan in the first place by suggesting that a mixture of sugar and water be given to the two girls to ease their state of drunkenness earlier on that evening and then changed his mind later to have sex with one of them. The idea was his in the first place. The motive for doing that could have been sinister in that he wanted the girls to be sober so that he and Idu could have sex with them. The complainant's group sought no assistance from anyone or from Niulifia and Idu for easing the state of drunkenness of

the two girls. In fact, there was nothing to suggest that the state of the two girls was a concern to their friends. The complainant was lying on the legs of Chris Tevata, her boyfriend, when Niulifia and Idu visited them. Niulifia and Idu had been drinking earlier on that evening before they met the complainant's group. Idu had a bottle of hot stuff in his bag which later came into the possession of Niulifia when he was asking for coca cola. It is interesting to note that according to Niulifia's evidence, supported by Idu, the complainant told them at their meeting near the goal posts that her group had been attacked and that she was looking for her friends. One wonders what group attacked her group so that she was in distress when she met Niulifia and Idu near the goal posts, this northern side of the road, opposite the Sol-Lanka store. Bruce Rawson, (PW 2), on being cross-examined by Mr. Ipo, said,

“... The same man who asked for coke was the same man we saw running towards us in the field. I cannot confirm that he was one of the two boys who asked me for match (lighter)...”

It is not in dispute that it was Niulifia who had asked for coca cola from the complainant's group that night. Later on under the same cross-examination, he said,

“... The one who said, “kill them” was from the group of the man who asked for coke. The group of the person who asked for coke ran towards us...”

In answering questions put by the Court, he said,

“... 2 boys lighted the match and the other kicked Walter. It was not Charles Max. Charles Max lighted the match. After that, someone shouted, “kill them.” that the girls were grabbed...”

That is, two boys came. One kicked Walter. Nulifia lighted the match. On being cross-examined by Mr.Ipo, Walter Nadu, (PW 11) said,

“... I saw one person came to us. That person sat with us. He came alone to us. He came from the Sol-Lanka store direction. The person left after sitting with us. A group of boys came and claimed the girls as their sisters. The group came from the same direction the first man came from. The first man had big hair and a big body. He left us in the same direction he had come from ie. Sol-Lanka store. I was kicked. Only one person came and asked for coke and we were drinking...”

On re-examination, he said,

“... One man came to us. He asked for coke. Sugar and water mixed and given to the girls. The same person who came asked for sugar. After mixing the sugar and water, he left. I saw that same person coming back with that group...”

In answering questions put by the Court, he said,

“...When the group came back, the unknown man was with them...”

In short, the boy who had visited them had come from the Sol-Lanka store direction and then returned with the group that attacked them.

The person described by the Prosecution witnesses as "the unknown man" or "the matured man" or "the man who first came" or "the man who asked for coca cola or coke or money or sugar" or "who was asked for the lighter" was none other than Niulifia.

He had been seen in the group of boys who attacked the complainant's group. If that should be truth, how can Niulifia and Idu say that the complainant's group had been attacked by some other group of men? Only Bruce Rawson said that the group that attacked them had come from the SMI direction. The significance of that statement is that there was another group of boys around in the Town Ground field besides the complainant's group and Niulifia and Idu. Photograph 2 of Exhibit D shows that it was possible for Niulifia and Idu to walk past the complainant's group, turned back and attacked them from the SMI (former G.Club) direction or else Bruce Rawson was mistaken and took the Sol-Lanka store as the SMI building. On the evidence, there were no other drinking groups other than the complainant's group and Niulifia and Idu. The others were betel-nut and cigarette vendors selling their wares under the mango trees east of the Town Ground field. The group perception was only a creation of the minds of the complainant's group. In fact, the group they were talking about all along comprised just Niulifia and Idu. There is sufficient evidence in the Crown case to dislodge the version of facts put forward by Niulifia and Idu on oath in the witness-box. Niulifia was an articulate and a confident speaker in the witness-box. Idu was the same. However, I believe PC Akao's evidence to the extent that when he arrested Idu, Niulifia dropped the complainant and ran away. It was then that PC Wanesiofa found the complainant near some flowers trying to put on her trousers properly. The police officers denied firing any gun-shots that night which Niulifia claimed as the reason for his running away after having sex with the complainant with her consent. I walked the foot path described by Niulifia, Idu and PC Akao last Sunday. It is a public footpath. The footpath begins behind the eastern end of the Sol-Lanka store. It goes up the hill and branches to the left at the top of the hill past the Scripture Union building. It continues slightly to the right and until it merges into a cement drive-way described by PC Akao. The footpath can only permit single file walking until one enters the cement drive-way. Niulifia and Idu could well be correct when they said they were walking up in a single file. It is however possible that they were walking abreast of each other in the manner described by PC Akao when he first saw them. They must have by then had gotten into the drive-way. If shots had been fired, all the residents of that area would have heard it at close range. I think Niulifia simply ran back the way they had come into the Town Ground field when he was arrested. There is no fence there which he had to jump over in to order to get to the Town Ground area and against which the complainant jumped and fell back. Niulifia did not realize that the complainant's friends had reported him to the Police and the Police and her friends had come to look for the complainant. He was recognized and challenged by Chris Tevata and then the Police arrested him. As I stated above, the complainant denied the version of facts put forward by Niulifia and Idu in cross-examination. She stood her ground under lengthy cross-examination by both defence counsels. In cross-examination, the complainant maintained that she did not consent to have sex with the man she described had sex with her that night without her consent. She identified Niulifia at the Central Police Station on the date of his arrest. Her underpant and ribbon were found on him during a search of him at the Central Police Station. When cross-examined by Mr. Ipo about the contradiction between a weak penis causing pain in her vagina, she agreed that it was a contradiction. What must be remembered however is that she might have meant weakness of the penis after ejaculation because there is no defence of lack of penetration of the vagina by Niulifia. Or the pain might have been due to vaginal infection as indicated in the doctor's report. I do not think there is any contradiction to that extent. I have also come to the conclusion on the evidence that Niulifia was one of the men who abducted the complainant from her friends in the Town Ground field.

The identity of the person who had sexual intercourse with the complainant near the Christmas tree in the Town Ground field.

The complainant had already described the person she said had raped in her evidence. The evidence though circumstantial points to Niulifia. The complainant identified him that same night at the Central Police Station. Her underpant was found on him. According to her evidence, her ribbon was also found on Niulifia. Her evidence in this respect is consistent with her statement to the Police recorded on 28<sup>th</sup> May 2003. PC Crawford Bradley, (PW9), I believe, was mistaken of this fact. Idu just did not know or explain how the ribbon was found on him. He had denied taking it from the complainant. I have no doubt in my mind that the complainant's underpant and ribbon had been taken by Niulifia, the man who had raped Elsie Fane. I find that Niulifia did have sexual intercourse with the complainant at a place near the Christmas tree standing on the side of the road going up to Leggakiki.

### Consent of the complainant.

The starting point is that she was abducted by force that night by Niulifia and another person. Her being raped is consistent with that fact. That is exactly what she told the Court in her evidence. She was raped. She did not consent to having sex with Niulifia who was a stranger to her. She had gone to the Town Ground field with her own boyfriend, Chris Tevata, and other friends to be together for their own purpose. Although she was drunk, she was conscious enough to know what was going on around them up until she was dragged away from her boyfriend. She said in cross-examination by Mr. Ipo that she was facing up when she was being dragged along. In that position, she was able to see the head part of Niulifia which she described in her evidence. The question of distance and bright light are irrelevant in this context. In that position, she was almost looking into the face of her abductor. She admitted that she was not a virgin but that is irrelevant in a rape case such as this where no consent had been given by her. Even if Niulifia had sex with her twice as he described in his evidence, consent was also lacking because she had maintained that she never consented to having sex with Niulifia that night at anytime. Having said that, it should be noted that she maintained that she had been raped only once that night and not twice. She had been abducted by force in the first place. Fear, distress and disorientation generated by the conduct of Niulifia and Idu could not have turned her into a passionate love making partner as alleged by Niulifia in his evidence. If that had been the case, why did she co-operate with the Police in accusing Niulifia and Idu? Was it because her boyfriend was there at the Police Station? What about if she was a married woman and her boyfriend was the husband? Would the husband not be concerned about his wife being dragged away in his presence, and if the suspect is taken to a Police Station, is it not normal that the husband would be present when the wife is making a statement to the Police? Chris Tevata was at the Police Station because he was the boyfriend of the complainant and had been looking for her since her abduction that night. I note that this is not a case of hue and cry from the complainant but from her friends who were concerned with her safety and welfare. She could have been raped, killed or hurt badly by her abductors. Well, she had been raped as she had told the Police. She had not been pleased with what Niulifia did to her and so she made a statement to the Police reporting that fact. That was normal and expected of a woman in her situation. Even if the Police did not find her that night, Police search would have continued and eventually the Police would have liked to find out what had happened to her that night. Her complaint would then be recorded by the Police. I find that the complainant did not consent to have sex with Niulifia at anytime or any place on the night of 4<sup>th</sup> April 2003 before the Police picked her up and took her to the Police Station.

### Corroboration.

The finding of the complainant's underpant and ribbon on Niulifia and the fact that she recognised them as what she wore that night she had been raped by Niulifia does corroborate her allegation that Niulifia raped her. Chris Tevata also saw Niulifia as one of the men who abducted the complainant from him that night before she was raped.

### Credibility of witnesses.

The complainant was telling the truth and I believe her story. I do not believe Niulifia's story. I also believe Chris Tevata when he said that one of the men who dragged the complainant was Niulifia being the man who had come earlier to his group that night. I find him guilty of rape and convict him accordingly. Niulifia is entitled to appeal against his conviction if he wishes to do so.

### The case of Idu, the co-accused.

There is no dispute that Idu was present with Niulifia with the complainant's group at the first meeting in the Town Ground field. He was not prominent in the eyes of the male members of her group at that stage. He was more or less in the shadow at that time. He was not well recognized at the time by Chris Tevata, Bruce Rawson or Walter Nadu. He however came under suspicion during the attack on the complainant's group and when the complainant was being dragged away from Chris Tevata and her friends. According to the complainant's evidence, two men dragged her. She described them in terms of size in her evidence. She said one held one hand and the other held the other hand. She was not able to identify or describe clearly the other man besides Niulifia. She said the other man was present although about ten metres away from her and Niulifia. Idu was recognized and arrested by PC Akao up the hill above the Sol-Lanka store. That was after the rape described by the complainant had taken place. There is no evidence to confirm that he was one of the abductors in the first place and was the "lookout" when Niulifia was raping the complainant. The complainant had not been able to identify Idu as one of her abductors and aided or abetted in the commission of rape against her by Niulifia. Chris Tevata was not also in a position to identify the other abductor besides Niulifia. The fact that Idu and Niulifia are related is not proof that Idu had aided or abetted Niulifia in the commission of rape. It is unsafe to assume that the abductor was Idu and aider or abettor was also Idu as from the point of abduction to the point of rape. The other man might well have been Idu but identification is lacking against him. I do have reasonable doubt in my mind that Idu can be found guilty of aiding and abetting in this case. I acquit him accordingly. He is free to leave the dock a free man.

### Viewing the scene of rape.

When I indicated that I would like to visit the scene, Mr. Barry, said that it was not the practice at least in the jurisdiction from which he came from in Australia that the accused and witnesses should go also with the judge. I did not press the point but reserved the choice to do so if I felt it was necessary to visit the scene of the offence. The practice in this jurisdiction is that a trial judge in a criminal trial may visit the scene of the offence in the presence of the accused and relevant witnesses. This practice is consistent with the views expressed by Lord Denning in *Tamshwar v. The Queen* [1957] A.C. 479 which was followed by Boreham, J. in *R. v. Hunter* [1985] 1WLR 613. Peter Murphy in his book, A practical approach to EVIDENCE, Fourth Edition, 1992 discusses the same matter at pages 550 to 551. I feel it is fitting to restate the position authoritatively in this jurisdiction.

F.O. Kabui  
Puisne Judge