

REGINA -v- FIASI ALUALU AND SUSUI BAKELOA

HIGH COURT OF SOLOMON ISLANDS
(F.O. KABUI)

Criminal Case Numbers 214 and 215 of 2004

Date of Hearing: 19th, 20th, 21st & 22nd April 2005 at Auki

Date of Judgment: 22nd April 2005 at Auki

Henry Kausimae for the Crown

Michael Ipo for the 1st Accused

Raudiffe Ziza for the 2nd Accused

JUDGMENT

Kabui, J: Fiasi Alualu is charged with two counts of rape, contrary to section 137 of the Penal Code Act (Cap.26) (the Code). The first count is that he raped Esther Ethel on 3rd April 2004 at Gwaunasu'u village in the Malaita Province. The second count is that he raped Julian Thanorii (Wanete'enia) in the same place and on the same date also in the Malaita Province. He pleaded not guilty to each of these charges laid against him. He was however acquitted on count 2 at the close of the case for the Crown for lack of evidence against him on that count. He however had a case to answer with regards to count one concerning his rape of Esther Ethel on the same date and place in the Malaita Province. The other accused is Susui Bakeloa also charged with the rape of Esther Ethel on the same date again at the same place also in the Malaita Province, contrary to section 137 of the Code. He pleaded not guilty and also had a case to answer at the close of the case for the Crown.

The Issue to be decided

The issue to be decided by this court is the issue of lack of consent by Esther Ethel when she was allegedly raped by Susui Bakeloa and Fiasi Alualu. Penetration as an issue was admitted by each of the accused. The evidence adduced on behalf of the two accused is clear on these two issues.

The burden of proof

The Crown bears the burden of proof beyond reasonable doubt in this case. I remind myself of this requirement in this case. It means that the Crown must prove beyond reasonable doubt the lack of consent by Esther Ethel, the complainant. At the close of Crown case, I indicated to the defence under section 269(2) of the Criminal Procedure Code Act (Cap.7) (the CPC) that each accused had a case to answer and invited any argument to the contrary from the defence. The defence agreed that there was a case to answer in each case. However, they pointed out that the Crown must prove its case beyond reasonable

doubt. Mr. Ziza for Susui Bakeloa, cited **R. v. Nasusu Tome**, Criminal Case No. 259 of 2003, a murder case, decided by Brown, J. in which the matter of the proof beyond reasonable doubt was an issue. That decision went up to the Court of Appeal. Counsel did not produce a copy of the judgment of the Court of Appeal. Counsel said that there were going to be inconsistencies in evidence in this case. That sort of intervention had put me in the position to invite Counsel to address me on a no case to answer and for me to rule on it. Both Counsels for the defence declined being satisfied that there was a case to answer in the case of each accused. I would however say this. The discharge of the burden of proof beyond reasonable doubt only arises at the end of the whole of the case, beyond the close of the case for the Crown. This appears to be the position in **Woolmington v. DPP** [1935] AC 468 as stated by Viscount Sankey, LC at 481-2. This authority seems to say that the issue of proof beyond reasonable doubt does not arise at the close of the case for the Crown because any successful no case to answer submission at that stage would suggest that the case for the Crown should not have been instituted in the first place for lack of evidence. Any proof beyond reasonable doubt would in that regard, have lacked credibility at the close of the case for the Crown and failed to be considered by the Court.

Conflicting Evidence

The evidence of Esther Ethel stands alone against the evidence of the two accused and Julian Thanorii, (Wanete'enia). The Crown called no further evidence to support its case. The strength or the weakness of the case for the Crown therefore lies in the credibility of these witnesses.

Esther Ethel's evidence

Esther Ethel stated that on 3rd April 2004, she and Julian went to the Matakwalao Market in the morning part of the day. They then returned home. They played locker (a card game) with others and then left to harvest cocoa. After harvesting cocoa, she went to sell the cocoa beans to a man called Sale Baeta. She returned and shared the money between herself and Julian, each of them having two dollars. She then went into the Taba River to have a wash and Julian was near her on the dry bed of the river. Whilst she was in the river, Susui Baekloa jumped at her from underneath the cocoa trees and pulled her and dragged her away. Fiasi Alualu did the same to Julian and moved away in another direction. Susui Bakeloa pulled her into and under the cocoa trees. She refused to go but Susui Bakeloa threatened her with a knife to follow him or else he would cut her with his knife. She cried but Susui Bakeloa continued to pull her and again threatened her with his knife to prevent her from crying or else he would cut her with his knife. She wanted to shout but Bakeloa shut her mouth with his hands. When they reached the bottom of a bread-fruit tree, Susui Bakeloa told her to lay down but she refused. He told her to remove her clothing but again she refused to obey him. Susui Bakeloa then removed her clothing and his own and tripped her leg and she fell to the ground. He then separated her legs and lay on top of her and pushed his penis into her vagina. He later ejaculated after which he stood up and shouted "**Anyone more**", a kind of invitation for gang rape of her. He then

wore his clothing and left the scene. She was putting on her clothing and ready to leave when Fiasi Alualu arrived and ordered her to remove her clothing and to have sex with him. Fiasi Alualu had a knife and threatened her with it. She wanted to shout but Alualu shut her mouth with his hand. She refused to remove her clothing and he did it for her by force. He told her to lay down and she refused and he pushed her down to the ground and lay on top of her. He separated her legs and pushed his penis into her vagina until he ejaculated. After that he stood up and left first. She also stood up and left the scene and went to the river. After she and Julian had their bath in the river, they returned to the village. She and Julian revealed the rape on Monday on being questioned by their brothers after arriving late at home on Sunday night. They were whipped and had their hair shaved off as punishment for their behaviour. When cross-examined by defence Counsels, she refuted the version of facts for the two accused being put to her by Mr. Ipo and Mr. Ziza. She was adamant that the defence version of acts was incorrect. She was adamant that she and Julian had harvested cocoa by themselves and not together with Susui Bakeloa and Fiasi Alualu as alleged in the defence's version of facts.

The twist of her evidence by Julian

When Julian was called to give evidence for the case for the Crown, she made an about-turn in the witness-box and retracted all she had told the Police about her being raped by Fiasi Alualu. She said she had told lies to the Police because her relatives forced her to accuse Fiasi Alualu of rape. Her evidence supports the version of facts put forward by the two accused. She was a Crown witness who retracted in the witness-box without being declared a hostile witness, though asked why she lied to the Police. She had deliberately decided to destroy the Crown case against Fiasi Alualu being accused of raping her. She said that they had planned to go and have sex in the bush. She said she was to go with Fiasi Alualu and Esther Ethel to go with Susui Bakeloa and she agreed to go with Fiasi Alualu with the intention to have sex in the bush. He said they planned to do what they did, suggesting that any sexual intercourse between her and Fiasi Alualu and Esther Ethel and Susui Bakeloa was all done voluntarily without any force being used on them. I do not believe her. My view of her was that what she had told the Police was the truth. In her evidence in chief on oath, she said Susui Bakeloa pulled her hair and walked her into the bush. She refused but Susui Bakeloa persisted in pulling her until they sat down to talk that they agreed to have sex. She said Susui Bakeloa had pushed her to the ground and she sat down. She said she was not willing in the first place but she agreed when they sat down. On being cross-examined by Mr. Ipo she said Fiasi had been her lover and so they agreed to have sex under the cocoa trees. On being cross-examined by Mr. Ziza, she said they had planned to have sex under the cocoa trees. If indeed she had planned to have sex with Fiasi Alualu, why did she say she was not willing in the first places until Fiasi Alualu pushed her to the ground before she agreed to have sex with him. I find that Julian was lying when she adopted the version of facts being put forward by the two accused. I disregard her evidence as having any weight at all. I reject her evidence. The evidence by

Esther Ethel is therefore unaffected by the twist of events caused by Julian when she changed sides in the witness-box.

Fiasi Alualu's evidence

The relevant part of his evidence in summary is that after having sex with Julian, she returned to the Gegeramo, Susui and Taloifana. He went to Esther Ethel. When he got to her he asked her for sex and she nodded her head in agreement. She took off her clothing and also used it as a pillow to support her head. She then lay down faced up and opened her legs, and he lay on top of her having already removed his trousers. Again, Esther held his penis and pushed it into her vagina. He kissed her breast and they kissed each other. Esther was an active party in that love-making. This version of facts was denied by Esther Ethel in her evidence. Again, I do not believe the accused. I observed him in the witness-box. He did not impress me as a witness of truth. I reject his evidence.

Susui Bakeloa's evidence

The relevant part of his evidence in summary is that when they reached Tabaa River, Esther Ethel went across to sell the cocoa beans to Sale Baeta. When Esther Ethel returned there was conversation about having sex and Esther Ethel agreed. He asked Esther Ethel for sex and she said it was alright so they went to the bottom of a bread-fruit tree. He spread a coconut branch on the ground and Esther Ethel removed her clothing and lay on the ground using her clothing to serve as a pillow under her head. Esther Ethel then spread her legs and he lay on top of her after removing his own clothing. Esther Ethel then held his penis and pushed it into her vagina and moved her bottom up and down and he did the same in response. Esther Ethel refuted this version of facts under cross-examination. I do not believe the version of facts in Susui Bakeloa's evidence. I observed him in the witness-box. He did not impress me as a witness of truth. I do not believe that Esther Ethel opened her legs wide lying on the ground and plunging Susui Bakeloa's penis into her vagina and going into the motions of sexual intercourse immediately. Susui Bakeloa was exaggerating to the point of lying to the Court. I do not believe him and I reject his evidence.

What then was the truth?

The truth lies in the evidence of Esther Ethel. She had observed that morning that Susui Bakeloa and Fiasi Alualu were drunk in that they were holding a bottle of home brew, perhaps kwaso, when they walked past her house. She said their speaking was wrong and were unsteady in their walk like being drunk. They saw Julian and Esther left to harvest cocoa and they followed them. They caught up with them at the bank of Tabaa River and accosted the girls there. Their version of facts is a cover-up because in that version of facts were things that do not make sense which they said, happened. For example, Fiasi Alualu having had sex with Julian went and did the same to Esther Ethel after Susui Bakeloa had had sex with Esther Ethel and had just finished. In fact, Susui Bakeloa had shouted for anyone else being willing to have a go at Esther Ethel after he finished. Fiasi

Alualu heeded Susui Bakeloa's call and came forward. Gegeramo and Taloifana were probably sober and remained sensible for none of them assaulted any of the girls though they were present near the two girls. The behaviour of Susui Bakeloa and Fiasi Alualu was strange at that time. I think the home brew that they consumed had awoken the demons in them. Julian had been an unwise girl who had been used by the accused yet again for their benefit. The argument that Esther Ethel had reported the rape on Monday 5th April 2004 due to pressure questioning by relatives is of no consequence because if there had indeed been rape so be it. The argument that Olomea reported the matter to the Police because five red money had not been paid as demanded is again of no consequence for the same reason. If there had been rape, let it be revealed to the Police even for the wrong reason. There is no evidence to sustain that argument. I reject these arguments.

Corroboration of evidence

Esther Ethel's evidence is not being corroborated by any independent evidence. As is already said, her evidence stands alone. I am aware that it is unsafe to convict on uncorroborated evidence in sexual cases such this case. I warn myself of the danger of convicting on uncorroborated evidence of Esther Ethel. However, I am also aware of the rule that conviction can be secured on uncorroborated evidence if the uncorroborated evidence is reliable. I regard Esther Ethel as being a reliable witness. She gave her evidence in a straight forward way without pretence, hesitation or fabrication. She was calm, steady, consistent and unpretending. She has no reason to accuse the two accused of raping her than that fact being the truth. Nor do the accused have any reason to point to for her accusation against them. I do not think Esther Ethel who is only 15 years and has not previous boyfriend and sexual experience can be that gullible and allowed herself to be gang raped for the fun of it. Mr. Ipo did raise the argument that her virginity could not be guaranteed without medical evidence. The law is that the slightest penetration is enough even if it is not deep enough to damage the hymen. If that happens, it is sufficient to constitute rape. She has spoken the truth and I must believe her evidence. I accept her evidence as being the truth of what happened to her. I find that there was lack of consent on her part. I am satisfied that the Crown has proved its case beyond reasonable doubt in this regard. I find Fiasi Alualu and Susui Bakeloa guilty of rape as charged and convict them accordingly. The verdict is that each of them is guilty of rape. They are entitled to appeal against their conviction.

Frank O. Kabui
Puisne Judge