SUPREME COURT OF TONGA
Criminal Case No. 3-4/92

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REX -v- MALAKAI TUPOU
DALGETY J

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Williams for the Crown
Veikoso for the Accused

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Trial : 20th, 21st, 22nd, 23rd, 24th, 30th and 31st July : and 7th August 1992 (8 days)

Judgment : 11th August 1992.

J U D G M E N T

1. - The Accused has been charged on Indictment with Rape and Indecent Assault namely:-

1. That he did on or about 1st November 1991 at 'Emeline Beach rape Lepolo Mahe, contrary to Section 118 of the Criminal Offences Act (cap.18): and

2. That he did on the date and at the place aforesaid indecently assault Lepolo Mahe, contrary to Section 124 of cap.18.

He pled not guilty to both Charges. The case proceeded to trial before Judge alone over eight days in July and August 1992.

2. - Rape is the carnal knowledge of a female by a male person - s.118(1)(a) - and is completed by penetration of the woman's sexual organ. Penetration to any extent is sufficient, even if it is not complete. It follows therefore that a eunuch may be guilty of rape. Similarly the crime of rape may be established even where the victim's hymen remains unbroken. The penetration, to whatever extent, must be against the will of the victim. Her "will" must have been overpowered or overcome by her assailant. In the ordinary case of forcible rape it must be shown that the woman's resistance was overcome by violence, and that she did not consent to sexual intercourse. But violence is not an essential ingredient for there may be cases where no violence is necessary at all because although the woman is capable of refusing consent she is not capable of putting up any resistance. All that is necessary in any case is to show that the woman's will to resist was overcome. The important matter is not the amount of resistance put up but whether the woman remained an unwilling party throughout. If she remained unwilling, the fact that she is a weak vessel who gives up the struggle as hopeless at a time when she might have continued to struggle is not a barrier to a conviction of the man for rape. Rape can be committed by threats of imminent harm. It is a question of fact whether the woman's will to resist was overcome by the threats used.

3. - The victim in this case is a well educated, sophisticated, thrity-one year old virgin. She impressed me as a woman of high moral values, of integrity and of scrupulous honesty. I have no hesitation whatsoever in accepting her testimony as reliable. Her evidence was to effect that:-

a : On 1st November 1991 at about 2300-2400 hours she was engaged by His Majesty's Government as a liaison officer to a delegate from Papua New Guinea attending the South Pacific Forum Conference in Tonga and, in the course of these duties escorted

said delegate to his overnight residence at Hamula in motor vehicle registration number PM.30 then being driven by the accused.

b : This was the second day she had worked with Tupou as her driver. The previous evening after she had escorted the said delegate to his residence, Tupou had immediately driven her home. She expected him to do the same again on 1st November 1991. She had already told him she was tired and asked him to let her alight at her home en route from Nuku'alofa to Hamula but he dissauded her from this course of action saying that said delegate might regard this as impolite. She agreed, because she "trusted" Tupou. After the delegate had been escorted home the Accused informed the victim that he was taking her home.

c : Instead, he drove her at speed by roads unfamiliar to her, roads which he claimed were a shortcut to the main road, to 'Emeline Beach. The locus was near the sea, bordered on one side by trees, some distance from the nearest habitation so far as she was aware, and deserted. There was no moon that night. She was "shocked", "surprised" and "confused" to find herself there.

d : He informed her that he had brought her there to have sexual intercourse with her and that she was not leaving until he had achieved his declared objective.

e : He asked her several times to do as he wanted and when she declined and "begged him" not to he became angry and threatened her with violence. In particular he held a clenched fist to her face and told her that if she continued to resist "I will punch you : just once - that is the end of you". She believed he would kill her if she continued to resist.

f : She never consented to have sexual intercourse with him.

g : Given his threats, she just relaxed.

h : His penis started to get hard and he then used his hand to put it into her sexual organ. She felt his penis start to enter her per vaginam. It did not fully penetrate her for she managed to pull it out. He than inserted it into her anus.

i : She was and remains VIRGO INTACTA.

Both in examination-in-chief and cross - examination she adhered to this version of events. I believed her.

4. - Doctor Makameone Taumoepeau, a Consultant in Obstetrics and Gaenacology at Vaiola Hospital, medically examined the victim at about 1300 hours on Sunday 3rd November 1991 and found a small red area at the lower end of and just inside the victim's vagina at the base of her still intact hymen. He had a clear recollection of this examination and of his findings and I have no reason to doubt his reliability. The area of redness would take three to five days to disappear and could have been caused either by an erect penis or the forcible insertion into the vagina of a finger. The mark was one centimetre past the VULVA into the vagina in an area rather hard for a mouth to reach. Although possible, he was clearly of the view that the area of redness was not caused by intercourse per os. The doctor's evidence, although not corroboration, is at least consistent with the complainer's evidence of partial vaginal penetration.

5. - It was a matter of concession by Crown Counsel in this case that the effect of Section 11 of the Evidence Act (cap.15) is that there must be corroboration of rape before a conviction therefor can ensue. The only possible corroboration

in this case comes from the Accused himself. In evidence he admitted that on arrival at the beach he informed the complainer that he had brought her there for the purpose of sexual intercourse : That she refused six times; that although married he had a need at that time for intercourse and wanted it with her; that he knew she was a virgin; That he did not take her home after her first refusal and was not going to until she did what he wanted; That they remained at the beach, both inside and outside the car PM.30, between 25 and 35 minutes. The accused has put himself at the locus and freely admitted his purpose in taking the complainer to the beach. His evidence then deviated from that of the complainer. Tupou would have me believe that the victim freely consented to gratify him sexually provided always that in so doing she remained a virgin, and did in fact willingly satisfy him. The depravity of this suggestion beggars belief. I do not believe him at all. It is a monstrous lie concocted by him which I have no hesitation in rejecting. I do not believe his oral evidence that he never inserted his penis into her vagina. Corroboration of the complainer's evidence can also be found in statements emanating from the accused himself and spoken to by police witnesses. First, there is his answer to the Charge of Rape, namely that this was "true". I accept the police evidence that this was his answer. Secondly, there are a number of damming answers in the Record of Interview especially Answers 30 (drove to beach at a speed of 70-80 kilometres her hour); 32 (confirmation of his intention to have sex with her when they arrived at the beach); 50 (confirmation that he repeatedly threatened her and threatened to punch her to death if she declined to have sex with him): and 58 (an admission that his partially erect male member partially penetrated the complainer's sexual organ). Some of these answers he denied giving. I prefer the Police evidence that the Record shows the answers he actually gave. He also attempted to avoid the consequences of his Reply to the Charge and the content of the Record of Interview by saying that he only gave that reply and these answers as he had been deprived of food and water by the police while in

their custody between breakfast-time on Saturday and lunch-time on Sunday, was desparately hungry and thristy and in a very weakened state. Such fanciful evidence I have no hesitation in rejecting : there was no support for it from any other source. The police officers who processed the accused were not responsible for feeding and watering him : none of those who were gave evidence at the trial. Accordingly I reject this evidence as untrue.

6. - There is ample evidence in this case to warrant a conviction for Rape. I am satisfied with such evidence. Therefore, in respect of Charge 1 (rape), the verdict of this Court is "GUILTY".

7. - From the Complainer, the Record of Interview and Answer to Charge 2, and the Accused's own evidence in Court there is no doubt in my mind that the Complainer was subjected to the further indignity of an indecent assault in that the Accused did -

- . kiss her "open - mouthed" several times;
- . suckle her beared breasts;
- . repeatedly lick and suck her vagina;
- . insert his penis into her anus; and
- . ejaculate into her anus.

He made no attempt in evidence to deny such conduct, his defence being that all this he did to her with her consent. I do not believe his defence. I shall according find him guilty also in respect of Charge 2 (indecent assault)

8. - Cases of rape and sexual misconduct require to be handled with extreme sensitivity by the Police and I regret that was not done here. Matters progressed to the stage that on the day following the rape the police took the accused to the locus and <u>in the presence of the victim</u> made him

demonstrate where he parked the car and how the reclining mechanism on the front passenger seat of PM.30 was operated. Such insensitive conduct is unpardonable. I refuse to take any account of the evidence gleaned by the police at this so-called reconstruction of the events of the night of 1st November. Nor have I taken any account of the Confession Statement for I am not satisfied this was given voluntarily. The Police told him they wanted a Statement and he obliged. He erroneously believed he had no option. I am wary of confessions unless it is clear beyond peradventure that they were freely given.

9. - I have listened with great care to Mr Veikoso's plea-in-mitigation. I take into account the whole circumstances as made known to me. I now turn to sentence. Malakai Tupou, you are a disgrace to manking. On a dark moonless night at a secluded beach your lust for sexual gratification was visited upon a totally innocent and virtuous maiden. You subjected her to the foulest of indignities, sodomised her and knew her carnally. Her courage in comming to Court to complain is commendable. Your attempt to sully her name by pretending that she was a willing partner in your depravity is to be deprecated. Her reputation is intact in my judgment. You ought to have been charged with the vile and unnatural crime of sodomy but through the incompetence of the police you were not. I cannot think of a worse case of indecent assault than this one. It fully merits the maxium punishment of two years imprisonment, and that is my sentence in respect of Charge 2. As for the rape charge only a custodial sentence is appropriate in this case. I feel obliged to have regard to the views expressed by the Court of Appeal in R-v-Billam [1986] 1 All E.R. 985. The English tarriff for rape commences at the low figure of five years. More is justified where there are aggravating features and in this case there clearly were, particularly (1) your responsibility as an ad hoc government driver to see the complainer, your assigned liaison officer, home in safety at the end of a day's work; (2) your

virtual abduction of her to a deserted beach in an official car with a Prime Minister's Office number plate for the admitted purpose of sexual intercourse, having lied to her and lulled her into a sense of false security by saying you was taking her home; and (3) the obvious pre-planning which had gone into this assault - you knew where you wanted to go, drove there at speed quite a considerable distance, and camoflagued the ultimate destination from the complainer by deceipt. In the whole circumstances I do not believe justice would be done by a sentence of less than 9 years. In imposing that sentence upon you I take into account all your counsel has told me, and your previous criminally blameless existance until the age of 42 years. I am not much impressed with the suggestion that the Government is partially responsible for what happened to Lepolo Mahe for pairing a female liaison officer with a male driver. The sentence on both Charges shall run concurrently.

NUKU'ALOFA, 10th August 1992.