

REX

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TEVITA TOLO KAFOA

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Mr Kefu for prosecution
Mr Tu'utafaiva for accused

Date of hearing: 12 and 13 June 2000

Date of judgment: 14 June 2000

Judgment

The accused is charged with common assault, contrary to section 112(a), and rape, contrary to section 119(1)(a), of the Criminal Offences Act. The offences are alleged to have occurred in the night of 13 and 14 August 1998 at Patangata.

On the application of the prosecution, I have made an Order under section 119 of the same Act that the name of the complainant and details of her evidence shall not be published or broadcast.

There is no dispute that sexual intercourse occurred between the complainant and the accused that night. The issue for the Court and a matter of sharp dispute is whether or not it was with the consent of the complainant. The accused denies that the assault occurred at all.

The prosecution case is that the complainant was playing cards with a number of other people in a house on the accused's 'api. They were gambling and there was an arrangement that they paid a small sum to the accused for the use of the house and for fuel for the paraffin light. That

evening the group included the complainant's sister and, some time towards midnight, the sister asked the complainant to go to a nearby shop to buy a loaf of bread for her husband and some cigarettes to sell to the other players. The complainant left and, shortly afterwards, the accused who had been watching the game got up and left the house as well.

The complainant walked along the foreshore to reach the shop and, when returning by the same route, was grabbed by the accused who was waiting by a pandanus tree next to the beach.

She told the court that he punched her on the right upper chest with sufficient force to cause her, in her words, to blackout. She came to her senses when he threw her onto the sand of the beach. She was on her back and he knelt above her so he could pinion her arms with his knees. He used one hand to hold her mouth and the other to remove her shorts and underpants. He then removed his own trousers and had sexual intercourse.

When he had finished he walked away along the beach. The complainant put on her shorts and continued to the house where the card players were. Her shorts had been torn but she was able to hide that by wearing her T-shirt outside. The shorts were produced in court and they were torn near to the zip and were very grubby.

On her way back to the house, the complainant met her sister and another of the people from the house, Kika. They had come looking for her because she had been away too long.

The sister asked the complainant why she had taken so long and was told that the accused had punched her and carried her to the beach. The sister told the court she saw the complainant was crying and had asked her why. Later, as they walked towards the house, the complainant told her the accused had sexual intercourse with her.

The three women returned to the card game and stayed there. The complainant told the court she did not play any more but just lay on a bed in the room.

The accused returned to the room some time later and was asked by the complainant's sister why he had hit her. He denied it and said she could take it to the police.

The complainant had no vehicle. She waited until the first bus arrived and then went to the police station and made a complaint. It appears that her first complaint was one of assault and indecent assault. However, some days later, the officer in charge of the investigation interviewed her further and realised she was in fact complaining of rape. The complainant said she had been too embarrassed to tell the whole story.

Kika also gave evidence of these events and it is right to say that her evidence contradicts that of the complainant and her sister on several significant points. She confirmed that the accused left the card game after the complainant but says there were jokes that suggested people thought they were going to meet. She also told the court that, when they met after the events on the beach, the complainant was not distressed or crying and was all right. She did, however, agree the complainant had said that the accused had assaulted her and forced her. She specifically noticed that her clothes were not torn. She had noticed that the shorts, which were white, had been clean

and still were when the complainant returned from the beach. She said the complainant rejoined the card game and continued playing.

The police interviewed the accused on 30 August 1998 at the police station. He wrote his answers to the questions himself and they amounted to a complete denial of any force. He said they had agreed to have sexual intercourse and went to the beach and removed their own clothing. He had put his trousers on the ground for her to lie on and they had sexual intercourse in which she was a willing participant.

At court he gave evidence on oath and told the court that she had consented. He said that she had, earlier in the afternoon, asked him to give her \$3.00 with which to play cards and offered sexual intercourse in return. When they left the house they were together and they walked towards the shop holding each other. As they approached the shop, the complainant suggested he should wait on a seat by the shore until she returned. When she came back, they went to the beach and had sexual intercourse. He denied any violence or threats and certainly did not tear her clothes. He pointed out that the shorts are made of strong material and suggested they could not have been torn in the way described.

When they had finished sexual intercourse, she had used her underpants to wipe him and herself and they then got dressed. The complainant suggested he should walk along the beach so no one would realise they had been together. He did so and went to a faikava.

When he later returned to the card game, the complainant's sister asked him why he had punched the complainant and he denied it.

I remind myself that the burden in this case is on the prosecution to prove every element of its case beyond reasonable doubt. The burden remains on the prosecution to disprove consent to the same standard and the accused has to prove nothing.

The complainant gave her evidence in a firm manner. At the outset she was clearly embarrassed but as her evidence progressed showed no distress and little further embarrassment. I found her a credible witness. She was skillfully cross-examined at some length and I am satisfied her answers were truthful.

I did not consider the witness Kika was accurate or truthful. Her manner in the witness box was unconvincing and I am satisfied beyond any doubt she was deliberately avoiding saying anything that might give the complainant support.

The complainant's sister, on the other hand, impressed me as truthful and I note the consistency between her evidence and that of the complainant.

The accused was a confident witness and maintained his case that there was consent. In the witness box he told the court that the whole basis of the events that evening was the request for \$3.00 and the offer of sexual intercourse in return. He told how she asked for payment at the end of the intercourse. He put his trousers on and then paid her. In view of the importance of the point, it is remarkable that, when interviewed by the police, he mentioned nothing of that matter.

I am satisfied he was willing to say anything which he felt at the time might help his case with little or no regard for the truth

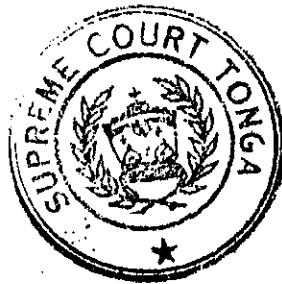
When he was asked in cross-examination about the police interview he said that he had told them he would give his answer in court. He only gave the answers recorded in the record of interview because the officers threatened him with a bush knife. No such allegation had been put to the officers.

In his evidence in chief he accused the complainant of being known to have sex for money.

I did not believe his evidence. I am satisfied beyond any doubt that he was lying on the matter of consent.

On the evidence before the court I am satisfied beyond any doubt that there was no agreement to have sexual intercourse and that the accused followed the complainant out of the house and grabbed her in the way she described. He punched her and took her to the beach. I equally have no doubt that he tore her shorts in removing them and that they were grubby as a result of the attack. I am satisfied beyond any doubt that she did not consent and he knew it. I do not believe the story that there was talk of \$3.00 or an offer to have sexual intercourse in return. There is no doubt there was penetration, it was against her will and he is convicted of rape. The punch to the complainant's chest is charged as a separate assault. I am satisfied it took place and that is an assault.

He is convicted on both counts.



A handwritten signature in black ink, appearing to read "C. Wand.", is written to the right of the court seal.

NUKU'ALOFA: 14th June 2000.

CHIEF JUSTICE