

Public Prosecutor v Karu Hosea

JUDGMENT

In December 1983 the Complainant was working as a telephone operator at the Post Office and on the night of 22nd December she did not finish work until 9.30 pm. She then walked to the BESA Club where she met up with two friends, Jenny Malep and Heggarr Dumli, as they were all staying at Murray Hostel at Freshwater. The two friends did not finish work until 11.30pm and all three of them then started to walk to Freshwater. Their route took them near the Catholic Cathedral, and it was here that they came across a group of youths, one of whom was known to Jenny (Pw2). Although she said in evidence that she did not know this boy's name, yet in the statement she made to the Police she is recorded as saying, "When we reached the Catholic Cathedral we met three boys one of which I knew very well by the name of James from Ambrym." Suffice it is to say that James took Pw2's hand as they walked down the steps near George Pompidou hospital, and they continued across the road and onto what is a passage - way dividing the tennis courts on one side from the stadium on the other side.

At this point Heggarr was ahead of James and Jenny, and the C. was some yards behind this couple, as is borne out by the C's testimony, from which I quote, "Jenny and the boy she knew were ahead of us; Heggarr was in front of me. The other two boys were ahead of me following Jenny and the other boy. Two boys followed us; I did not know their names. One of the boys held me; he held me tight but I refused. I don't know boy who held me. I would not recognise him if I saw him. This happened on corner between stadium and tennis court. When he held me, the other two girls were ahead. He wanted to hold my hand but I didn't want him to. I tried to run away but the other two girls were ahead of me. He held me around waist. I screamed out to the two girls; then he blocked my mouth. I begged him to let go of me. I don't remember if he said anything to me. Whilst I was struggling I fell down. Then he sat on me; he sat on my leg and blocked my mouth. He tore my pants. Then he had sexual intercourse with me. Then he let me go."

The accd gave this account of the incident, "James spoke to one of the girls on steps and he was holding her hand on the way down. A boy by the name of Jonathan James took Jenny's hand and then approached the other girl; she is Pw1. I spoke to her and told her that I would accompany her home. She did not reply. Conversation took place near fence of tennis club and where stadium wall is; we were in passage-way. I held her hand, she shouted out and was laughing so I did not think there was anything wrong. She shouted out loudly. When I held her hand she did not do anything; we were walking at this time. She said to me, "Let me go," and I said, "No," I would accompany her. She was not angry; she was smiling. When we walked along. I tripped her and she fell on ground. She did not do anything; she just remained quiet. I was not holding her. Whilst she was on ground, I had intercourse ("fuckem") with her. Whilst I was having intercourse, she was quiet; I did not do anything to her or hit her. When we had finished, I took her to road; we were still walking when taxi came down road. We did have conversation after intercourse; she said that she was going and I said that I would accompany her."

The C. was a well-built girl of 19 years, probably of equal weight as the accd., who is only of medium height. It is clear that initially she objected to the accd's approaches but any resistance she offered at the start was certainly over by the time she was lying on the ground. The learned Prosecutor relies on the fact that the C's panties were torn as indicative that the accd used force prior to the act of sexual intercourse, but this is an extremely tenuous contention because it is notorious how flimsy such garments are.

The acd. has explained how this happened; at the time the C. was lying on one side, and probably, in his eagerness the acd pulled the free side with more vigour than was required.

The words of Lord Parker, C.J. in R v. Howard (1966) 50 Cr. App. R. 56 at p. 58 are very much in point to the facts of this case. "The court thinks it as well to repeat that it seems to this court that in the case of a girl under sixteen, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist." Where a girl is over the age of sixteen years, as was the C., one would look for some evidence of resistance, and in the absence thereof, it can only be presumed that there was no resistance at the time when the acd commenced to have sexual intercourse with her.

The prosecution in this case did not discharge the onus of proof to show that the C. was subjected to having sexual intercourse without her consent and for this reason the information was dismissed.

Dated at Port Vila this ^{13th} day of September 1984.



M.J.R. COAKLEY

Ag. Judge