POLICE v TO'ALUA (UITIME FESOLA'I),
TAUPULEGA (SIO VA'AGA),
SI'OMIA (NIKO),
SIO (TO'AFA POLUTELE),
SIO (OSOOSO POLUTELE)

Supreme Court Apia
3, 6 December 1974
Donne CJ

CRIMINAL LAW (Practice and procedure) - Application for retrial (New evidence disclosed after trial) - Trial (with assessors) on charges of rape resulting in guilty verdicts - Evidence of doctor at trial contradicted by him at later trial in Magistrate's Court of another defendant charged with indecently assaulting same complainant shortly before alleged rapes - Evidence concerning injuries to complainant and highly relevant to question of her consent - Court concluding there had been a miscarriage of justice since it was "reasonably probable" that had the doctor given his later evidence at trial the assessors would not have returned guilty verdicts: R v Wann (1912) 107 LT 462 at 463 applied - Retrial ordered.

APPLICATION for retrial pursuant to s 108 of the Criminal Procedure Act 1972.
Retrial ordered.

Stevenson for applicant.
Slade for Police.

Cur adv vult

DONNE CJ. This is an application made under Section 108 of the Criminal Procedure Act 1972 for a retrial of the informations charging the above named accused of the crime of rape. The trial was held before me sitting with assessors, who on the 14th, November 1974, found each accused guilty of the offence as charged. The grounds upon which the application is made are stated as follows:-

1. THAT Dr. Semo Koro in the course of his sworn evidence for the prosecution before the Magistrate Mr. W.A. Wilson on the 19th day of November 1974 concerning the alleged Indecent Assault on Rhoda Wendt by one Kositele Apulu Afele. The said doctor made statements that directly contradicted his evidence given in the above-mentioned trial against the said defendants in the Supreme Court on the 12th day of November 1974.
2. THAT having regard to the importance of the medical evidence in ascertaining the causation of the injuries sustained by the Complainant in the former trial it is reasonable to believe that the assessors may well have reached a different verdict if this new evidence were put before them.
3. THAT the said doctor's evidence differed in the following

respects:

(a) In answer to the Police Prosecutor's questions as to what object caused the injuries mentioned, the doctor on two occasions stated that the injuries would have been caused by any "sharp" object.

(b) That the said injuries were far more likely to have been caused by a fingernail than a penis as a penis is a blunt object.

(c) That in cross-examination the record of his examination in chief in the former trial was put to the said doctor for his affirmation. (appearing at Page 7 of the record).

Q. I am asking you whether the injuries, the violence you observed was in your opinion a mere matter of opinion consistent with sexual intercourse or is it possible that these injuries were caused by sexual intercourse?

A. I would say it is possible, it is normal to me because there is evidence of force being used to cause that bleeding. The said doctor disagreed and stated that was not the answer he intended to give to that question but stated "that it was impossible for the said injuries to be caused by sexual intercourse. The penis is a blunt instrument and therefore injuries not a normal result of sexual intercourse.

4. THAT the inference from the Complainant that the acts of sexual intercourse caused the bleeding - (appearing on Page 19 of the record) - would now be negated due to the doctor's opinion that a fingernail was responsible for the injuries sustained to the Complainant.

Since the notes of evidence in the trial were subject to some criticism as to their accuracy, I have had the relevant sections thereof checked with the shorthand notes recorded at the time, and I am satisfied the following correctly records the evidence as given:-

At page 6, commencing at line 22, to page 7 line 7, the record should properly read:-

Q. What in your opinion caused these injuries the lacerations and the profused bleeding - before you answer that you mentioned here that the patient complained and a medium size speculum was inserted into the vagina - was there any swelling?

A. There was no swelling.

Q. Why did the girl complain when you inserted this medium size speculum?

A. Perhaps she did not want me to do it she did not like it.

Q. What in your opinion caused the laceration and the profused bleeding?

A. In my opinion I think there was an evidence of violence by an object penetrating that accounts for the laceration.

Q. Did the violence occur not very long before you saw her?

A. That is so.

Q. In your opinion was such violence consistent with sexual intercourse?

A. I would say it could be an object. The nature of the wound is consistent with a fine object being used.

Q. I am asking you whether the injuries of violence you observed were in your opinion, a mere matter of opinion, consistent with sexual intercourse, or is it possible that these injuries were caused merely as the result of normal sexual intercourse?

A. I would say it is possible but not normal because as I said there is evidence of force being used to cause that bleeding.

Again at page 8 (lines 12 to 20):-

Q. I'd like you to help me now with the wound inside the vaginal canal. I'd like you to consider it carefully. If a patient were to have had two fingers inserted into her vagina for a period of three to five minutes would not this bleeding have been caused by this?
A. It is possible to have that.
Q. Would it not be more likely that this wound be caused by a sharp instrument, that is, a fingernail rather than a penis?
A. Yes it is possible.

The learned Magistrate who presided at the trial of one Kositelo charged with indecently assaulting the Complainant immediately prior to the alleged rapes, has made available to me his notes of the evidence of the same doctor who was called by the prosecution in both trials. The notes are recorded as follows:-

P.W. 1 Dr Semo Koro
Attended patient Rhoda Wendt. Prepared report produced and marked Exhibit A. (No objection by defence counsel). The injury to vagina possibly caused by sharp instrument. Possibly fingernail (Objection by defence counsel upheld).
XX Q. Injury inside or outside?
A. Outside. Rather at entrance.
Q. Remember giving evidence last week on a Rape charge?
A. Yes.
Q. Is it possible to cause this injury with normal sexual intercourse?
A. I might say impossible.
Q. Did you say in evidence last week (Reads)?
A. Well I meant it is possible for any object to cause this injury, but unlikely a penis - something harder.
Q. This the only injury on her whole body?
A. Yes.
REXX Would think a fingernail more likely than a penis.

These notes substantially support the interpretation of the doctor's evidence before the Magistrate as stated in the application.

Now, I have no hesitation in finding after a careful study of the doctor's evidence in the trial before me and in that before the learned Magistrate, that the evidence in the former trial is clearly weighted in favour of a conclusion that sexual intercourse caused the injuries to the girl and the resultant bleeding, whereas in the latter the doctor would appear to be almost unequivocal in his opinion that sexual intercourse could not have produced those results.

That being so, I feel the correct approach is to consider the doctor's evidence as given in both trials, ascertain the main purpose of calling him to give evidence at the trial of the accused, and determine whether had he given his evidence in the way most favourable to the accused, it would have been reasonably probable that the assessors, after considering it, and all the other evidence, and the submissions thereon, would not have returned a verdict of guilty. If it could be so concluded then there could be a miscarriage of justice entitling the order for retrial as sought as was said by Lord Alverstone in R v Wann (1912) 107 L.T. 462 at page 463:-

> The only question in this case is whether there has been any miscarriage of justice . . . In the sense in which those words are ordinarily used we think there has been no miscarriage of justice and we must therefore again consider the words "miscarriage of justice" which were intended to give the court a wide discretion. It is sometimes said that there has been a miscarriage of justice where the evidence has been incorrectly or not fully stated to the jury. Mere misstatements of facts is not necessarily misdirection where the case has been fully heard by a jury . . . The effect of the cases on this subject

> is stated in Ross on The Court of Criminal Appeal at p. 113, as follows: "To have any effect in itself the misstatement of the evidence, or the misdirection as to the effect of the evidence must be such as to make it reasonably possible that the jury would not have returned their verdict of guilty if there had been no misstatements." With the alteration of the one word "possible" to "probable", we think that this statement is correct.

In this case, of course, there is more than a misstatement of the evidence of the doctor. Rather is it a matter of conflicting evidence by him on substantially the same set of facts.

As to the purpose of adducing the doctor's evidence, I have no doubt that its main value to the prosecution's case was to negate consent on the part of the Complainant. It would be of little significance in establishing that sexual intercourse took place, since four of the accused admitted it, and the medical evidence would be of no assistance in proving the act insofar as the fifth accused was concerned.

I have examined the evidence carefully on the question of consent. There is convincing evidence supporting the defence submission that consent was given. The absence of protests, (apart from an alleged statement to one of the accused), or cries for help, (although it is clear there were fales in the vicinity), the Complainant's apparent acquiescence in going behind the hedge, her insistence in having her blood-stained clothes disposed of, her admission to the girl Teleise that she was in the wrong, her failure to complain when she returned home, and the absence of bruises on her body must be considered as evidence of substantial weight. On the other hand, apart from the Complainant's evidence supporting her contention that she did not consent, there is the evidence of her being surrounded by strong youths and of her shoulders being held to the ground by one of the witnesses at which stage she is alleged to have said, "Do you not love me?" This evidence is, in my view, not strong when balanced against the evidence supporting consent. However, the doctor in his evidence at the trial expressed the clear opinion that the "violence" of the injuries could have been the result of sexual intercourse that was not normal. It is true that the doctor conceded it was possible that a fingernail could have caused them. But the evidence led from the Complainant tended to establish the injuries were received from sexual intercourse, thereby rendering her weak and incapable of protest, and coerced her. Indeed, if accepted, this would allow compelling inferences to be drawn negating consent.

I move now to the manner in which the medical evidence was presented to the assessors by counsel and the Judge. Counsel for the prosecution submitted that while it had been suggested the girl's injuries had been caused by fingernails, the doctor had said they were consistent with sexual intercourse, that "there were signs of violence in the girl's vagina", and that normal intercourse should not produce such injuries. Counsel then put it to the assessors that if they accepted this evidence and were satisfied that this was the girl's first intercourse and that the injuries were caused by that intercourse rather than the fingernails, that would amount to force negating consent. Counsel for the accused submitted to the assessors that although the doctor said the wounds were the result of sexual intercourse, there was evidence of the inserting of the fingers into her vagina prior to the intercourse. He then suggested the doctor's evidence of no bruising raised a doubt as to her being raped.

In my summing up I said:-

> Both prosecution and defence use the doctor's evidence as to her condition, the former to show she could not have consented. The defence suggests she did not suffer any injuries from the acts of sexual intercourse, but rather as a result of sexual incident not related to any of the accused, which occurred with another prior to the actual intercourse. You have had that evidence adequately traversed by counsel. It is for you to put what complexion you consider on the evidence so far as the girl's virginity, the girl's previous sexual encounter, and the girl's condition insofar as it may relate to the sexual intercourse and

the question of consent.

A consideration of the evidence as a whole and the manner in which the doctor's evidence was put to the assessors has led me to the strong conclusion that his evidence could have assumed great significance to the assessors in their consideration of the question of consent. If the injuries had been caused by some sexual conduct before the accused came to the girl, then the fact that she continued firstly, without protest to anyone to go with them and allow each accused to have sexual intercourse with her and secondly, to render no resistance or protest throughout must be regarded in a different light than in the case where she as a result of a "violent" sexual onslaught by the accused suffered injuries which either rendered her incapable of consent, or forced her by fear into submission.

Excluding the doctor's evidence, the case supporting absence of consent must rest primarily on the evidence of the Complainant alone. I had the benefit of hearing her and witnessing her demeanour, and when that evidence is weighed against the evidence supporting consent, I am of the opinion that the colour added to the case by the doctor could have tilted the decision against the accused.

If, therefore, the evidence of the doctor most favourable to the accused had been adduced, and that evidence is undoubtedly the evidence given in the trial before the learned Magistrate, is it reasonably probable the assessors would not have returned their verdict of guilty? After careful consideration of all the matters to which I have referred, I conclude so. Consequently, I have decided to order a retrial. The conviction is quashed and accused will accordingly be remanded to appear for trial at the next sessions of this Court commencing 3rd February, 1975. They shall be granted bail on the same conditions as heretofore made.

Solicitor for applicants: R.P. Phillips.
Solicitors for respondent: Office of the Attorney-General.