REGINA .V. TONY FERRIS

High Court of Solomon Islands
(Palmer CJ)

Criminal Case No. 308 of 2003

Date of Hearing: **5th October-7th October, 13th December 2004**
Date of Judgment: **22nd December 2004**

For Prosecution: *S. Balea*
For Defendant: *D. Hou*

Palmer CJ.: The Defendant, Tony Ferris is charged with one count of rape and one count of defilement contrary to section 137 and 143(1)(a) of the Penal Code respectively, that on 20th December 2002 at Mount Austen, he did commit the said offences. He pleaded not guilty to both charges at the beginning of the trial. At the close of Prosecution case however, the dates of the charge were changed to an unknown date between 1st November 2002 and 31st December 2002. When the charges were put afresh to the Defendant he pleaded guilty to the defilement charge but maintained his plea on the rape charge. The Defendant accordingly was convicted on the defilement charge and remanded in custody pending determination of his rape charge.

The Prosecution alleges that the victim Maera Paul ("**the Complainant**") was taken against her will by the Defendant in a taxi on the night of the 20th December 2002 to an isolated part of the road on Mt. Austen and raped before being taken back to Polyn Firebae's place where she spent the night. The Defence on the other hand does not deny that sexual intercourse occurred; they say however that it occurred on the night of the 16th November 2002 and that the Victim was a willing participant.

The evidence relied on heavily by the Prosecution consists primarily of the evidence of the Complainant herself. I bear in mind the warning at the outset of convicting the Defendant on the uncorroborated evidence of the Complainant. The burden of proof remains the same throughout however, that of proof beyond reasonable doubt.

The Defence rely on the evidence of the Defendant, Polyn Firibae ("**PW5**") and Kadi Firibae ("**DW2**"). PW5 and DW2 are brother and sister and the Defendant is a close relative. He was the driver of the taxi that night. The Complainant is a friend of PW5.

Prosecution alleges that the Complainant was tricked into accompanying the Defendant that night. Complainant says she accompanied them to go to Didao Service Station ("**Didao**") that night. On the way however, PW5 dropped at a spot marked "A" in the sketch map near the SIWA

tank in the pretext to go and look for a person called Nigel. The Complainant was told to remain. They drove all the way down to Didao before returning to the same spot where they had earlier dropped PW5. On arrival, DW2 dropped in the pretext again it seems to go and look for his sister. The Defendant however drove off suddenly with the Complainant at the back of the vehicle. Complainant says she resisted the advances of the Defendant even attempted to lock the back doors when the Defendant went out but he managed to pull her out of the car. She also managed to run behind the car but the Defendant caught her by her hair and pulled her causing her to fall down. The Defendant then lied on top of her and raped her.

Defence on the other hand says no trick was involved. They say the Complainant and PW5 decided on their own volition to accompany them to go to Didao. They had made arrangements with a friend to meet outside the Kukum Hot Bread shop to buy a bottle of hot drink from him for $100.00. They had planned to celebrate DW2's graduation the next day with a bottle of hot drink. Shortly after leaving their house however, PW5 asked to be dropped off. In her evidence in court she says she was scared at the way the Defendant was driving and when hearing them talk about drinking beer. DW2 and the Defendant both confirmed that she asked to be dropped off. They did not explain however why she was dropped off. DW2 says he thought the Complainant would go out with PW5 but when he asked her she replied and said "flow", which was a slang to indicate consent or agreement. He said he thought then that she and the Defendant may have had some plans which he was not aware of. The Defendant on the other hand says he thought the Complainant was with DW2.

After returning from Didao, on their way back, they stopped at a roadside shop and bought some soft drinks before stopping again near the same place where PW5 had earlier dropped off. By then, according to the evidence of DW2, it had become apparent to him that there was some plan or arrangement underway between the Defendant and the Complainant. He says when he got out the Complainant did not go out with him. Defence say the Complainant was a willing participant throughout.

Issue of Consent

The crucial issue in this case is whether or not there was consent. That sexual intercourse occurred is not in issue. The burden of proof remains with Prosecution throughout to prove beyond reasonable doubt that consent was absent. The Defence merely has to raise reasonable doubt in the mind of the court. The issue of consent in this case however is tied closely to issues of credibility, accuracy in recall of events, consistency and correctness of the evidence adduced and versions presented in court.

I bear in mind the possibility on one hand, that the Complainant may now wish to cry rape to exculpate herself, or to appease others. On the other hand, it is possible the other two crucial witnesses who were present with her immediately prior to and after the incident may deliberately seek to protect the Defendant as he is a close relative and to protect themselves and tailor their story to fit in with that of the Defendant.

There are certain facts established from the evidence however which help shed light as to where the truth may lie in this case.

Was there consent? The gist of Prosecution's case was that on arrival at the scene, where the rape was alleged to have occurred, everything happened quickly. The Defendant's intentions had become plain when he took off hurriedly after dropping DW2. When they stopped at Mt. Austen and he came out of the car, he told the Complainant to come out but she refused, she had locked the back doors. The Defendant however unlocked them from the front, held her hand and pulled her out. She says she came out but managed to run behind the car. The Defendant came around the other way held her hair and pulled her causing her to fall down. He then lied on top of her and proceeded to rape her.

In cross examination, however, she conceded that when the Defendant came out of the car he first stood outside and had a smoke before calling out to her to come out. She also conceded under cross examination that when he came and opened her door he asked to have sex with her but she refused. These concessions contradict her evidence in chief in which she sought to portray that what happened was quick and entailed the use of force.

It is also pertinent to note that the Complainant conceded sitting in the front seat with the Defendant when she was dropped off. This is quite contrary to the behaviour or conduct of someone who had just been violently raped. One would have expected revulsion and disdain at the thought of having to sit beside the man who had just raped her. Rather I would have expected her to sit at the back seat. Such conduct is contradictory to suggestions that there was no consent. When cross examined on this point she offered no explanation.

Further, I note the Complainant did not return to her home which from the evidence was but a short distance away; within walking distance. She says she spent the night with PW5. This raises the question why she didn't return to her house and report the matter straightaway, especially when it is alleged she had been misled or tricked into going out by PW5 that night and being raped by her cousin? One would have expected her to return to her house and not spend the night in her friend's house. Bearing in mind that the act of rape is a traumatic violation of the will and personality, it is more probable than not to expect that the Complainant would prefer to return to her home and to have the matter reported to her adopted mother straightaway than to

spend a night with her friend. She was never asked why she did not return to her home that night to report the matter; no explanation has been provided for this. This behaviour in my respectful view is more consistent with the conduct of a consenting person than otherwise.

In her own evidence she also said that when she told PW5 about what had happened, PW5 merely laughed. This is quite strange behaviour coming from a friend, unless it may have also been obvious to PW5 that there were no outward signs of distress or trauma manifested by the Complainant.

The demeanour, behaviour and conduct of a victim immediately after such traumatic event are relevant matters for consideration in rape allegations. Apart from stating that she felt bad about what the Defendant had done, PW5 did not notice anything unusual about the Complainant. She was not even crying, emotionally upset, distressed or anything untoward, consistent with her assertions of having been sexually violated forcefully. She spent the night with PW5 before returning to her house the next day.

The evidence of fresh complaint (see The State v. Stuart Hamilton Merriam [1994] PNGLR 104 at page 110; Peter Townsend v. George Oika [1981] PNGLR 12; Jones v R. (1997) 143 ALR 52; Suresh v. (1996) 16 WAR 23) is admissible to show consistency and support of her story as stated in court and negativing consent on her part. It should also be made at the earliest opportunity according to the circumstances of the case (see R. v. Cummings [1948] 1 All ER 551; R. v. Valentine [1996] 2 Cr App. R 213; The State v. Stuart Hamilton Merriam [1994] PNGLR 104 at page 110; Birch v. The State [1979] PNGLR 7; R v. W. [1996] 1 Qd R 573; Suresh v. R (1996) 6 WAR 23). This raises the question as to what would have been the earliest opportunity given to the Complainant in the circumstances of this case? In my respectful view it would have been immediately after having been dropped off by the Defendant. The only evidence of some sort of complaint was what she told PW5 but was not taken seriously. It is pertinent to note however that this arose from a statement or conversation having made in answer to a question put to her by PW5. It was not voluntary or spontaneous (see The State v. Stuart Hamilton Merriam [1994] PNGLR 104 at 110; Bernard Touramasong & Others v. The State [1978] PNGLR 337 & Robertson, Ex parte Attorney General [1991] 1 Qd R 262). Nothing further was said or done.

The next opportunity would have been to make a complaint to her adopted mother, Ruth Momothe ("**PW6**") when she returned to her house the next day. This was never done. No explanation as well has been provided why no complaint was made to her. PW6 also did not notice anything unusual about the Complainant on her return, which was quite unusual given the circumstances of the allegations made. PW6 had raised the Complainant when she was a little child and therefore was very close to her. In spite of this, the Complainant did not make any

complaint to her. The only time she became aware of the allegations was when the matter was reported to the Police by the natural mother Josephine Toska Dudina ("**PW1**").

Eventually a complaint was made to PW1 but that this was out of a statement or conversation having been made in answer to some questions from PW1. It was again not voluntary or spontaneous. In the context of this case whilst such statement is not inadmissible (see The King v. William Henry Osborne [1906] 1 KB 551 at page 556) its value as evidence is to be determined taking all the surrounding circumstances into account.

There was also some evidence adduced to the effect that the Complainant was having her period at the time the offence was alleged to have been committed and that a pad alleged to have been used by her was claimed to have been found at the scene when the Police visited the scene. Apart from that evidence, the Complainant was never directly asked in evidence by Prosecution to identify that pad whether it belonged to her, whether she used it that night, the circumstances in which it may have been lost or even whether she recalled using it. Again this does not assist the Prosecution case. She may or may not have been having her periods that night and the discovery of a pad at the scene of the crime in the circumstances and the manner in which this case had proceeded does not assist the prosecution case much on the issue of consent and whether a struggle occurred or not.

The Defence sought to point out that the report of the Doctor would seem to discredit any suggestions that the Complainant was having her period on the 20th of December. If she was having her period that night then she could not have been having any period when she saw the Doctor on 7th January 2003. The presence of blood which indicated that she was having her period would rule out any suggestions that she was having her period on the 20th of December.

I do not think anything conclusive can be made out of the Doctor's Report especially when he was never required for cross examination. His reference on that particular matter was as follows:

> "*On pelvic examination, the hymen was torn and there was a recent vaginal tear, which she is bleeding from. Other physical examinations were within normal limits.*"

If any conclusions were to be made on the face of the report, it would be that there was a direct reference only to bleeding resulting from the Doctor's observation of the vaginal tear, but nothing about bleeding from a monthly period. Despite strenuous cross examination on this point she remained firm that her period had more or less dried up by that time. The only explanation she could offer was that there may still be

some blood inside. These are matters which could only be properly answered if the Doctor had been required for cross examination and I find little to support any suggestions that she was still having her period at that time.

Date offence alleged to have been committed

The difference in the date being Friday 20th December 2002, which Prosecution alleges the offence occurred, with that asserted by the Defence being, 16th November 2002, is also relevant to the issue of consent. Whilst the Complainant, her mother PW1 and her adopted mother PW6, all say the offence occurred on that date, the Defendant, PW5 and DW2 say it occurred on a Saturday 16th of November 2002.

It is quite possible one of the parties is confused about the correct date. This is not unusual especially when the incident was alleged to have occurred some two years ago. Memories do fade and get mixed up over time and do affect powers of recall of witnesses.

I have listened carefully to the evidence of all witnesses on this issue. The Defence however has raised some uncontroverted evidence which throw doubt on the correctness of the date alleged by Prosecution. The 20th of December 2002 is a Friday, I take judicial notice of that. It is also a fact and judicial notice can be taken that the Seventh Day Adventists in the country have their Sabbath begin on or about 6.00 pm on a Friday through to Saturday 6.00 pm. It is also common knowledge that those who operate businesses normally close their businesses as from 6.00 pm on a Friday. This includes Didao which closes from about 6.00 pm on Friday to 6.00 pm on Saturday. According to the clear uncontroverted evidence of the Defence and confirmed by the Complainant in her evidence under cross-examination, Didao was open that evening they drove past at about 7.30 pm. Also the shop in which PW5 was working in was open that evening, when the Complainant walked past. These two facts indicate that that evening the offence was alleged to have been committed could not be a Friday. In contrast the date of 16th November is a Saturday and after 6.00 pm Didao and other businesses operated by Seventh Day Adventists would be expected to be open. The effect of these inconsistencies in the evidence of the Prosecution case and any benefits to be given must go in favour of the Defence case especially in terms of the reliability of their version of events.

Corroboration

Where possible in rape cases the court must always look for corroborating evidence. As often happens in such instances though, the evidence of a complainant would be pitted against the evidence of a defendant alone. A conviction in such instances should only be entertained where the standard of proof has been established to the clear satisfaction of a presiding judge (see R. v. Gere (1980/81) SILR 145 and R. v. Wilson Iroi (unreported Criminal Case No. 17 of 1991 at page 5).

Decision

I have thought carefully over the evidence adduced before this court, observed the demeanour of witnesses and the totality of its effect on this Defendant's guilt. As I pointed out in this judgment it is for prosecution to discharge the burden of proof. The Defence merely have to raise reasonable doubt on the evidence at the end of the day. To that extent they have succeeded and that benefit must go in favour of the Defence. The Defendant is acquitted of the charge of rape.

ALBERT R. PALMER

THE COURT