

R v Holani

Supreme Court, Nuku'alofa

Hampton CJ

Cr No. 1235/96

24 January, 1997

*Criminal law - rape - sentence - sleeping complainant**Sentence - rape - sleeping complainant*

The defendant, 20 years of age, with no previous offending, raped a sleeping 19 year old woman friend. Both were intoxicated. The defendant apologised immediately, admitted his offending and pleaded guilty. The complainant had forgiven him.

Held:

1. There were a number of factors to be taken account of in favour of the defendant, including the guilty plea, the apology and time in custody on remand.
2. The starting point here was in the range of 3-3 1/2 years, but would be discounted to 2 years, a very lenient sentence.

Counsel for prosecution : Ms Bloomfield

Counsel for defendant : Mr Tu'utafaiva

Judgment

Under section 119 of the Criminal Offences Act, I make an Order directing that the identity of the complainant shall not be published in the Kingdom in a written publication available to the public or be broadcast in the Kingdom.

You have been convicted on your plea of guilty to a charge of rape brought under section 118(1)(b) of the Criminal Offences Act. That is the offence of a male raping a female, the male being aware that the female is in a state of insensibility whether due to sleep intoxication or other cause.

I have before me the summary of facts, a pre-sentence report from the Probation Officer, the victim impact report, a letter from the victim and a reference from a rugby football club.

The form of rape with which you have been charged and which is described in a summary of facts is not a particularly usual kind of rape. Both you and the complainant were quite drunk/intoxicated.

You are now 20 years of age, the complainant is 19. You and the complainant were part of the same group of friends. She, the complainant, seems to have been a girlfriend of one of your male friends. After a prolonged bout of drinking, she went and lay down and went to sleep, and was quite insensible. You, after a rather stupid remark from one of your other friends, and not being fully in control of yourself through alcohol, went and took advantage of the sleeping intoxicated complainant.

The pre-sentence report mentions a rather casual attitude in you towards sex and may be that is a result of the lack of parental guidance in your life. It can, I suppose be said to your credit (i) that you desisted, you gave up, once the complainant awoke; (ii) that apart from the sexual act itself, and I do not minimise that in any way, but apart from that act there was no other violence by you; (iii) and that you have apologised both immediately, which is important as a mitigating factor in my view, and subsequently.

It would seem that both you and the complainant, in the last 10 months or so, have resumed contact in that same group of friends that I had spoken of earlier. You have been together socially since these events. Your apologies have been accepted by the complainant, apparently, and you are ashamed of what you have done. From the materials before me I accept the genuineness both of the acceptance of your apology and of your shame.

Your position before this Court is eased considerably by the attitude commendable in my view, the attitude of the victim/the complainant towards you. And that attitude is found in the report in this way and I quote: "largely due to her choice to get on with her life and to allow the defendant to get on with his, the complainant seems to have had no physical or emotional after effects and, after a short time, was able to meet the defendant normally in a social situation. She has accepted his apology and has told him she has forgiven him. She wrote a letter and does not seek an excessive penalty."

That statement, and the letter from her, demonstrates a practical and generous approach to life and to you. She is, I suspect, far more secure in her life and in her background and upbringing than you are.

You are now 20 years of age, you have no previous criminal convictions of any kind. You were about 19 and a half at the time of these events. It seems you are enthusiastic about your sport and have a degree of expertise in it. That is desirable and, in my view,

helpful that you have that interest and contact and that is one that should not be too long disrupted.

I take full account of your plea of guilty given immediately by you in this Court. In my mind, the starting point for an offence of rape always has to be imprisonment, given the maximum term provided in the Act of 15 years. Given the unusual circumstances and nature of the event I have already described, the lack of other violence other than the intercourse itself, your age and the lack of previous offending, in my view, the starting point for such an offence would be in a range of 3 to 3 1/2 years.

50 I am prepared to discount that level of sentencing to imprisonment by a quarter, for your immediate guilty plea, and even further for your immediate apology to the complainant. I take account also of the fact that you have been in custody since the 3rd December last, that is about 6 1/2 weeks in custody. And I make allowance for that time in custody in coming to the final sentence.

I have reached the view that in all the circumstances the appropriate sentence in relation to you on this charge is one of 2 years imprisonment. For rape, some will say that is a very lenient sentence. And it is, but I have given it because of the circumstances I have referred to.

100 I have been asked by your counsel to consider suspending that term of imprisonment in whole or in part. I would be failing in my duty if I were to do so in my view. Such a crime must be properly publicly denounced and you must be properly sentenced for it.

The sentence therefore is that you are committed to imprisonment for 2 years on the charge.