IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

CR.NO.230/97.

REX

-V-

TEVITA TALIFATONGIA TEISINA

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : Mr Kefu for the Crown,
: Mr Sione Teisina Fifita for the Accused.

Date of Hearing: 13rd - 15th January, 1999.
Date of Judgment: 18th January, 1999.

JUDGMENT

The accused is charged with three offences alleged to have been committed on the same date against the same woman, Kafa Ulakai. I have made an order under section 119 of the Criminal Offences Act that there should not be any publication of her name or her evidence. Count one charges the accused with abduction contrary to section 128 of the Criminal Offences Act, count two with rape contrary to section 118 and count three with indecent assault contrary to section 124 of the same Act.

Kafa is 25years old and from Kolofo'ou. On 21 September 1996 she went with another woman, Sanitina, to a party in Vaini at the invitation of Seilose at whose house the party was to be held. The accused was not at the party at that time and had not been invited but he called at the house later with a female friend, Lupe. Seilose and Kafa came out from the party and spoke to them. Kafa and Lupe then went with the accused to fetch some cigarettes and, on the way back they stopped and talked at a hall nearby. After that they all attended the party.

It had been planned that Seilose's husband would drive the two women back to Nuku'alofa when they wished to return but, by the time they wanted to go home, he was drunk and asleep. As a result, the accused was asked if he would take them in his van

and he agreed. There is some dispute whether or not he was told he would be paid by Seilose for the driving but it is not in dispute that they set off to Nuku'alofa. In the vehicle, besides the accused, was Kafa in the front seat next to him, with Lupe and Sanitina on her left. In the tray of the van was another man 'Ofa.

Kafa told the court that she was very drunk by that stage and leaned back in the seat and closed her eyes. For part of the time she was also asleep. The accused disputes this and suggests she was not drunk neither did she go to sleep. I shall return to that later.

After the van had traveled a short distance, it broke down. The accused was able to effect some sort of repair and they continued on their way only to break down again. On this second occasion, the people in the van had to push the vehicle to start it and all except the accused and Kafa alighted. Their efforts were successful and the engine started but, instead of stopping to allow those who had been pushing to get back on the van and despite their shouts of protest, the accused accelerated and drove off with only Kafa in the vehicle with him.

The prosecution case depends on the evidence of the complainant, Kafa. She gave evidence that she was so drunk that she was not even aware that the van had stopped the second time. She only became aware of the incident when she was woken by the calls of the people left behind but she was too drunk to know what it was about. She told the court that she asked the accused where the others were and he told her they had got off. She leaned her head on the passenger's door and went to sleep. When she awoke the vehicle had again stopped and she had no idea where they were. She was aware that the place was dark, she could see no lights and noticed there were trees lining the road on both sides.

She asked the accused why he was not taking her home and he said she would have to pay the fare. Kafa had no money and told him that, if he took her to her house, she would give him the money. He still refused to take her and eventually he said that the fare would be what he wanted and that she should give it because it would take only a short time.

He grabbed her hand, pulled her towards him and kissed her but she pulled away and told him not to do it. He then got out of the van for a short while and when he returned, he came over to her, pushed her down in the seat, pulled her trousers and pants down and had sexual intercourse. The victim said that she was too drunk to resist very effectively and that he was very strong but she insisted she did resist as well as she could throughout. She said that, when he came back at her in the car, she realised he had no clothes on. She said he was unable to achieve full penetration because, she thought, of the position in which she was lying but she as aware that there was some penetration and he eventually ejaculated outside her vagina.

Prior to the sexual intercourse, he had pushed his finger into her vagina a number of times despite her protests and her attempts to stop him.

She told the court that, at the end, he stood up and said that he was sorry but he really needed to do it. The woman told him what he had done was wrong and he again apologised. Kafa then said; "All right, take me home."

It is not disputed that they stopped for a short time outside the Queen Salote Memorial hall and then he drove, at her direction, to her home. Her account is that she asked him to stop at the Memorial Hall because she has a friend who worships at the Pentecostal Church nearby and Kafa thought she may already be there decorating the church. She hoped to seek her aid but she was not there. By this time it was nearly dawn.

When the accused finally dropped her, she went to a house where her mother was staying and told her about the incident but her mother, who had not wanted her to go to the party in the first place, was angry and spoke harshly to her. The complainant decided to go to bed and sleep off the effects of the party. Later that morning, she telephoned Seilose and told her she had been raped. She threw away the clothes she had been wearing and did not report the incident to the police until after 8.00pm on the Monday.

Seilose gave evidence of Kafa's recent complaint in the same terms as had been described by the complainant.

On 24 September, a police officer arrested the accused in his 'api and took him, after collecting Lupe, to the Central Police Station. He was interviewed under caution the following morning. That interview has been challenged by the defence on the basis that the answers attributed to the accused were, in fact, made up by the officer. The accused signed them and wrote two short statements because he was still frightened the officer would assault him if he refused to do so.

Counsel did not seek a trial within a trial. He should have done so. It is true, as counsel says, that, where the judge is trying the case himself and is judge both of fact and law, a trial within a trial is to some extent rather an artificial exercise. However it is still important that one is held. The prosecution may, in order to prove the statement was not induced, wish to call evidence that it would not, otherwise, consider necessary. More important than that, an accused who does not intend to give evidence in the trial proper, may still dispute the voluntariness of an alleged confession. It would be wrong if, in order to challenge that, he has to give evidence generally and expose himself to cross examination on the case as a whole thus effectively losing his right to remain silent.

I shall consider the admissibility of the interview and of the subsequent statements of the accused as a separate issue now.

The accused told the court that he and Lupe were taken by the officer to an upper room at the police station and, when the accused persisted in denying rape and insisting Kafa had consented, the officer threatened him. He said he would beat the shit out of him, would stab him in the eye with the pen he was holding at the time and would lock him in the cells if the accused did not tell the truth. The accused was then put in the cell. The next day when he was interviewed, he was in the room alone with the same officer and was

still very frightened. He said he was alone with the officer until near the end of the interview.

Lupe was a prosecution witness and agreed she had heard the officer threaten to beat the shit out of the accused. She said the officer told the accused to stand up and stop telling lies or he would be put in the cells.

The officer told the court that the interview was properly taken and that the accused made the answers recorded voluntarily. He denied any threat. The accused was locked in the cell at some time shortly after 1.10pm and was brought out for the interview at 10.30am the following morning. He said two other officers were present throughout the interview. As already indicated, I have considered the evidence on this aspect of the case separately. Had there been a trial within a trial, the prosecution may have called those other officers but I must assess the position on the evidence before me.

The burden is on the prosecution to prove that the interviews were properly conducted and the answers were those of the accused and were freely and voluntarily given. I find that the prosecution has not discharged the burden in relation to the threats on the day the accused was first brought in. I accept the evidence of the witness Lupe that threatening words were used to the accused and he was told the officer considered he was lying when he denied the allegation. It is true that the accused had the strength to persist in his denials whilst he was in the company of Lupe but, by the time the interview took place, he had been locked in the cell for eighteen hours in accordance, it must have seemed, with one part of the officer's threats.

Having not been satisfied about the truth of the officer on that aspect of the case, I am equally unable to accept his evidence that the other officers were present throughout the interview on the following day. In such a situation, alone in a room with the officer who had threatened him and caused him to be locked up, I accept the accused's fear of the officer's threats may still have affected him sufficiently to sap his will.

However, on his own account, he and the officer were no longer alone in the room by the end of the interview. It was after that he says he wrote the two brief confessions himself. I do not believe he continued to feel so frightened of the interviewing officer that he was forced to write them.

I am not satisfied to the required standard of a criminal trial that the accused made the answers recorded in the interview or signed them freely and willingly and so I shall exclude the whole interview from the evidence I am to consider. The two written statements are different. I do not believe the accused was forced in any way to make these statements. He was no longer alone with the officer who had threatened him and I do not believe the officer dictated them for him to write in front of two other officers. I am satisfied beyond any doubt they are voluntary and they are admissible.

Defence counsel also urged the court to exclude them on the basis that the officer did not tell the accused that he had a right to have a lawyer present and the officer agreed he did

not. Counsel cited an authority from the Papua New Guinea Law Reports in support. There is no such requirement under our law. I am satisfied beyond reasonable doubt that the statements were voluntary and the failure to advise the accused he could have a lawyer in attendance did not affect this.

Those two written statements are brief. In answer to the charge, he wrote; "It is true" and, at 12.36pm he wrote under caution; "This only happened because the girl came close to me and I am very remorseful".

The accused gave evidence on oath. He agreed with the complainant's evidence that he had never met Kafa before that evening. He described the earlier events of the evening and added that he felt, as they sat talking on the verandah of the hall, the complainant liked him because she thought he had money. He agreed with the account of the drive up to the time of the second breakdown save that he insisted Kafa was not really drunk and did not go to sleep in the van. At the time of the second breakdown, he told her to get out and help the others push but she replied that there were enough to push and stayed in her seat. As soon as the engine started, she told the accused to continue on. The accused said he did not fully understand what she meant but he complied and left the rest of his erstwhile passengers at the roadside. As he drove on, the complainant moved closer, put her arm around him and massaged his thigh. He asked where they were going and she said they were going off to have sex. He described how he parked the car and they had consensual sexual intercourse. He ejaculated outside her vagina at her request and, after chatting for about ten minutes, they had sexual intercourse again. She took off her own clothes and, far from protesting, told him during the intercourse that it was good.

On their way home they stopped at the Memorial Hall at her request and chatted again and, when they reached her home, exchanged telephone contacts and she kissed him as she left.

Counsel for the defendant submits that, on the basis of section 11 of the Evidence Act, the law requires corroboration of the complainant's evidence in a case of this nature. That section allows the admission in evidence of a recent complaint and, despite the use of the word , makes no requirement for corroboration in its legal sense in sexual cases. The word is used in section 11 in its normal English sense of confirmation. Of course the court will always look for evidence that confirms the evidence of the complainant in a criminal case particularly in cases such as rape where, because of the nature of the act, there are frequently only the opposing accounts of the complainant and of the accused.

There is no mandatory requirement for such evidence in the law of Tonga but, had there been, there is in fact corroboration in the two written statements of the accused.

I have considered the evidence of Kafa and I am satisfied beyond reasonable doubt that it is credible and accurate. I am equally satisfied that she was very drunk, as she told the court, and that she did not consent to the accused's advances.

I do not believe the account the accused gave to the court. I am satisfied his written statement that the charge was true and his admission of remorse related to his knowledge that he had committed the offences with which he was charged at that time, namely, rape and indecent assault.

I am satisfied beyond reasonable doubt that the accused drove off after the second breakdown with the intention of taking Kafa to have sexual intercourse and that, when he did so, she did not in fact consent. However, the evidence of the complainant was that, because of her drunken state, she had no idea at the time that she was being taken away. On the evidence of that and the fact that the accused had already formed the view that the complainant liked him, I believe he may have felt that she would agree. As a result he is acquitted on count one.

By the time he had stopped the van and tried to make advances to the complainant, however, I am satisfied beyond any reasonable doubt that it was very clear to the accused that Kafa was unwilling and was not consenting. I accept her evidence totally that she resisted him as soon as he started and continued to do so throughout. I am satisfied to the same standard that the accused had sexual intercourse against the will of the complainant in the van after he stopped. I accept the complainant's account of resisting in the way she described and totally reject the account the accused gave on oath. I have no doubt whatsoever that the accused was aware she was not consenting at the time he committed the offence. He is convicted on the second count of rape.

The count of indecent assault refers to the touching of the complainant's vagina by the accused immediately prior to the sexual intercourse. I am satisfied beyond any reasonable doubt that he did so assault her and she did not consent. That is an indecent assault and he is convicted on the third count.

NUKU'ALOFA, 18 January, 1999. CHIEF JUSTICE