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

CR 96 of 2014

BETWEEN: REX

Prosecutor

AND: KEFU KALAVI

Accused

BEFORE THE LORD CHIEF JUSTICE PAULSEN

Date of Hearing: 20 & 21 July 2016.

Date of Ruling: 25 July 2016

Counsel: Mrs. L. Fakatou for Crown

Accused in person (self-represented)

RULING

- [1] Mr. Kalavi is charged with offences of housebreaking, attempted rape and common assault arising out of incident that occurred at Ma'ufanga in the early hours of the morning of 26 May 2014.
- [2] At the beginning of the trial Mrs Fakatou sought an amendment to the indictment to state that the Prosecution were pursuing a charge of serious housebreaking (rather than simple housebreaking) under Section 173 (1) (a) (b) and (5) the Criminal Offences Act. There was no objection from Mr Kalavi to the proposed amendment and as I could not see that he

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might in any way be prejudiced in the preparation or presentation of his defence I have allowed the amendment.

The evidence

- [3] The complainant, Sela Tu'ipulotu, gave evidence that at around 2am on Tuesday, 26 May 2014 she was at home with her baby son. Her house is a modest tin construction on Salote Road opposite the Free Wesleyan Church at Ma'ufanga. She had just fed her son when she heard someone walking around outside. She placed her son on the bed and went to see who it was and saw someone trying to get into the house by ripping off the tin cladding. She was afraid and called the Police on her cellphone and asked for help. She said that the man, who she identified as the accused Mr. Kalavi, entered the house and took her cellphone and threw it, strangled her and asked for sex. He was wearing a short sleeved checkered shirt and dark brown shorts. She tried to talk to him to delay matters until the Police arrived but he dragged her by the hair and throat outside the house to a nearby mango tree at the rear of the property where he removed her pants and underwear with his hands and knees. Mr. Kalavi then took his pants off and told Mrs. Tu'ipulotu that he was going to have sex with her and kill her before the Police arrived. She said that she then heard the Police arrive and she was able to shout out, at which point Mr. Kalavi punched her around the face and then ran off in the direction of the neighbours' pig sty. The Police Officers who attended the scene were Police Officers Tongamoa and Lelenoa. Police Officer Tongamoa was dropped off the vehicle at the rear of the property and after hearing Mrs. Tu'ipulotu call out he found her. Mr. Kalavi had gone. Mrs. Tu'ipulotu put on her pants but could not find her underwear. She was taken back to her house. Although the Police Officers initially

intended to take her immediately to the Police Station they received a call to wait for another Officer to arrive to take photographs of the scene and while they were waiting a neighbour arrived who said that he had noticed a man walking around outside and then pointed out a man spying on them from the Free Wesleyan Church compound across the road. Mrs. Tu'ipulotu said that this was Mr. Kalavi because when the Police called out to him he climbed over the fence and walked under a street light where she could see him. The next time she saw Mr. Kalavi was at the Police Station the next day when she identified him following his arrest.

- [4] In relation to the identification of Mr. Kalavi as the offender Mrs. Tu'ipulotu said that he was in the house about 1 meter away from her for around 3 minutes and she had a candle lit and could see and recognise Mr. Kalavi. She said that she knew his face as she had seen Mr. Kalavi talking and having a smoke with her husband at the Fasi Magistrates' Court a week earlier when her husband was standing trial. She also said that she was able to describe the clothes that the offender was wearing to the Police Officers, that she told them that she knew the attacker's face but not his name and that Police Officer Lelenoa told her that his name was Kefu as they had earlier chased him from the bars on the coastal road, a short distance from her house. Mrs. Tu'ipulotu also said that a couple of days after seeing him at the Fasi Magistrates' Court, Mr. Kalavi had walked past her house with other people and shouted out a message that her husband wanted her to bail him out of prison. She said that when she saw her husband the next day he asked her if someone had passed on a message to her and that the person was called Kefu. She said she did not tell Police Officers Tongamoa and Lelenoa that the person who had attacked her was called Kefu because at the time she did not remember that. Finally, as I have noted she said that when Mr. Kalavi

ran off from the Wesleyan Church she could see him because he ran under a street light.

- [5] Mrs. Tu'ipulotu was cross examined by Mr. Kalavi. His questions focused on two issues. First, whether the events described happened at all and secondly, whether he was the offender. He put it to Mrs. Tu'ipulotu that she did not know him and that until she gave evidence he did not know who she was. He also suggested in an oblique manner that others could have been wearing the clothes she described in Ma'ufanga that night. The questions put to Mrs. Tu'ipulotu resulted in her restating her evidence but did not at all weaken her conviction that it was Mr. Kalavi who had attacked her.
- [6] Police Officer Tongamoa gave evidence that at around 1-2am on 26 May 2014 he was working with Constable Lelenoa and they got a call regarding an incident at Ma'ufanga. When they arrived on the scene he was dropped at the rear of the property and he heard a scream and ran to the scream where he found Mrs. Tu'ipulotu who had no clothes on the bottom part of her body. She was crying. He said that Mrs. Tu'ipulotu said that the offender was called Kefu and that he had ripped the door from the house and dragged her to the back of the property. He said she described the offender's clothing and this was the same clothing that he had seen Mr. Kalavi wearing whilst on patrol of the bars on the coastal road a short time earlier that night. Police Officer Tongamoa said that Mr. Kalavi was wearing a checkered shirt and shorts and a cap and he had seen him in the area of the bars from a distance of about 5 metres. Police Officer Tongamoa was unclear about what happened next but after some prompting from Counsel he said that whilst talking to Mrs. Tu'ipulotu Police Officer Lelenoa had said that there was someone spying

on them from the Free Wesleyan Church compound and when they ran towards this person he disappeared but he could not see this person as it was dark and he did not do any chasing. Police Officer Tongamoa was not cross examined by Mr Kalavi but in response to a question from me said that he noticed Mr. Kalavi when patrolling the bars earlier as he was the only person that he knew there.

[7] Tofelusi Latu gave evidence that he is 18 years old and that on 27 May 2014 he was staying at a house in Ma'ufanga with other boys. He said that Mr. Kalavi came to the house that day looking for his pants. Mr Latu said he knew Mr. Kalavi as he always came over to Ma'ufanga. Mr. Kalavi said that he had been chased by the Police and had thrown the pants to the house where Mr. Latu was living. The shorts had been found at the back of the property on the ground but the woman of the house had taken them because she thought they belonged to her child. He asked his friend, Lolohea, to get the shorts which were retrieved and handed to Mr. Kalavi. He said the shorts were checkered brown. He also said that Mr. Kalavi said that there was a comb and some money in the shorts but only the comb was found and the money was missing. Mr. Latu was cross-examined by Mr. Kalavi and asked to confirm that he was sure it was him who had come to get the shorts, which he did. He was also asked how he knew Mr. Kalavi to which he replied that Mr. Kalavi usually walked down the road of the house he was living in at Ma'ufanga.

[8] The next prosecution witness was Lolohea La'iafi who is 19 years old. He is a friend of Mr. Latu. He said the house in which he was living on 27 May 2014 attaches on to the backyard of Mrs. Tu'ipulotu's property. He recalled that Mr. Kalavi came to the house at around 7 or 8am and asked for his pants. He recalled that Mr. Kalavi asked him if he noticed any

trousers that were outside the house and he told him no, but he asked his grandmother and she said she had picked up the trousers thinking that they belonged to a boy called Saia. The shorts were given to Mr. Kalavi who said that there had been a comb and more than one hundred dollars inside them. Mr. La'iafi's grandmother said only the comb was inside, there wasn't any money. Mr. Kalavi then left the property. Mr. La'iafi was cross-examined by Mr. Kalavi and confirmed that it was Mr. Kalavi he had seen and spoken to that day. In answer to a question from me Mr. La'iafi said that when Mr. Kalavi came to the property he did not know a crime had been committed but Mr. Kalavi had said that he was chased by the Police. He said that he did not report this.

- [9] The final prosecution witness was Police Officer Lelenoa who was working with Police Officer Tongamoa on the night. He said that he recalled clearly that they had seen Mr. Kalavi around the Billfish bar and he was wearing a checkered shirt and dark coloured or brown trousers. While on duty they received a call to attend an incident at the property where Mrs. Tu'ipulotu lives and they drove to the back of the property where Police Officer Tongamoa got off the vehicle and he drove around to the front of the property opposite the Free Wesleyan Church compound. He said he noticed someone spying from the compound and called to this person who was wearing a checkered shirt, dark trousers and a hat but they ran off. He said that Mrs. Tu'ipulotu was standing with him and saw this person who was about 6-7 metres away and he could see his face. He said Police Officer Tongamoa was searching the residence at the time. Police Officer Lelenoa said that after contacting Head Quarters they went and spoke to boys living at a nearby residence where Mr. Kalavi lived and they told the Police Officers that Mr. Kalavi was wearing the exact same clothes as the Police Officers had seen him wearing earlier in the night. Mr. Kalavi

cross-examined Police Officer Lelenoa as to his ability to identify the person who was in the church compound. In answers to Mr. Kalavi's questions Police Officer Lelenoa said that the person he saw was inside the compound and that there was no street light inside the fence of the compound. The only street light was situated next to his van which was where he was standing. The van had its lights on. In answer to questions from me Police Officer Lelenoa said that he could see the person in the compound quite clearly and that he was wearing a checkered shirt, khaki coloured shorts and a black cap but he could not recall the style of cap. He also confirmed that they had spoken to the boys who lived nearby that night but he could not recall the time. He also said he had no notes about what occurred that night as they had all been burnt in a fire at his residence.

[10] The Crown then closed its case. Mr Kalavi chose not to give evidence or call any witnesses in his defence.

Elements of the offences

[11] The first offence with which Mr. Kalavi is charged is serious housebreaking under section 173(1)(a)(b) and (5) of the Criminal Offences Act. In relation to this offence the Prosecution must satisfy me beyond reasonable doubt as follows:

[11.1] That on 26 May 2014 Mr. Kalavi entered Mrs. Tu'ipulotu's house; and

[11.2] That when he entered the house he was trespassing in that he entered without any lawful excuse; and

[11.3] That when he entered the house he either intended to commit a crime or he did commit or attempt to commit a crime.

[12] The second count in the indictment is attempted rape contrary to section 120 Criminal Offences Act. In relation to this offence the Prosecution must prove beyond reasonable doubt that:

[12.1] On 26 May 2014 Mr. Kalavi formed an intention to rape Mrs. Tu'ipulotu by having carnal knowledge of her knowing that she did not consent or being reckless as to whether she consented or not; and

[12.2] That for the purpose of carrying out that intention to rape Mrs. Tu'ipulotu he did some act, forming part of a series of acts or omissions which would have constituted the offence if he had not been interrupted. In this case the acts relied upon by the Prosecution are that Mr. Kalavi forced Mrs. Tu'ipulotu to the ground, forcefully took off her pants and underwear, demanded to have sex with her and lay on top of her intending to have sex with her.

[13] The third count of the indictment is common assault contrary to section 112(a) Criminal Offences Act. The Prosecution must prove beyond reasonable doubt that:

[13.1] On 26 May 2014 Mr. Kalavi struck Mrs. Tu'ipulotu in the face with his hand; and

[13.2] That Mr. Kalavi did this intentionally; and

[13.3] That Mr. Kalavi did this without any lawful justification.

The defence case

[14] Mr. Kalavi cross examined most witnesses but only briefly. In his submissions he argued that the Prosecution was a 'set up', by which I understand him to mean a scheme to falsely incriminate him of the offences with which he is charged, or that the Prosecution failed to prove that he was the offender to the required standard of beyond reasonable doubt.

Discussion

[15] I reject immediately Mr. Kalavi's submission that this prosecution is a 'set up' because there is absolutely no evidence to support that submission nor was there anything in the evidence to suggest to me that either Mrs. Tu'ipulotu or any of the other witnesses had cause to falsely accuse Mr. Kalavi or give untruthful evidence against him.

[16] To prove that it was Mr. Kalavi who attacked Mrs. Tu'ipulotu the prosecution case relies upon the following evidence:

[16.1] Mrs. Tu'ipulotu's visual identification evidence that it was Mr. Kalavi who attacked her; and

[16.2] The evidence of Police Officers Tongamoa and Lelenoa that they had seen Mr. Kalavi on the coastal road that

evening wearing clothes which were the same as what Mrs. Tu'ipulotu said the offender was wearing; and

[16.3] Police Officer's Lelena evidence that Mr. Kalavi was the person spying from the Free Wesleyan Church compound who then ran off when seen; and

[16.4] The evidence of Mr. Latu and Mr. La'iafi that Mr. Kalavi had come to their house on 27 May 2014 and asked for his trousers, which had been found on the ground, and that he had said that he had been chased by the Police.

[17] The Prosecution does not rely on the identification of Mr. Kalavi as the offender by Mrs. Tu'ipulotu at the Police Station following his arrest. Given the circumstances under which that identification occurred they are correct not to do so and I take nothing whatsoever from this evidence.

[18] Given that importance of identification as the central issue in this case I have taken special care in my consideration of the evidence that bears on this issue. Specifically I have taken the step of warning myself that:

[18.1] The Prosecution has the burden of proving the reliability of the identification evidence beyond reasonable doubt; and

[18.2] The wrongful admission or acceptance by the Court of identification evidence may (and has) resulted in serious miscarriages of justice; and

[18.3] Identification evidence is often unreliable and a mistaken witness may also be a convincing one; and

[18.4] Even though there may be more than one identification witness it is a possibility, which the Court must consider, that all of the witnesses are mistaken; and

[18.5] That in assessing the quality of identification evidence it is useful to consider a range of factors which include, but are not limited to, things that might affect a witness's ability to observe and describe the events in question (such as whether the witness has a prior acquaintance with the person observed, the distance of the witness from the person observed, the lighting and whether the witness was under stress), factors particular to the witness (poor eyesight or bias), any racial or ethnic differences between the witness and the person observed and the time lapse between the observation and the recording of the evidence.

[19] My assessment of Mrs. Tu'ipulotu, Mr. Latu and Mr. La'iafi was that they were all truthful, reliable and credible witnesses. Importantly, all of these witnesses had some, albeit largely indirect, prior acquaintance with Mr. Kalavi. Their evidence that he was the person they observed or spoke to is therefore a form of identification evidence commonly referred to as recognition evidence, where the witness identifies a person as being at or near a scene through prior acquaintance between that person and the witness. Whilst mistakes may still occur, such evidence can be

considered more reliable than if, for instance, the person observed was a complete stranger.

[20] In the case of Mrs. Tu'ipulotu, she said that she had observed Mr. Kalavi speaking to her husband at the Fasi Magistrates' Court a week before the offences occurred and a few days later when he had yelled out a message to her. She was specific as to the days upon which these events occurred. There was no evidence called to dispute Mrs. Tu'ipulotu's version of events. For instance, there was no evidence to suggest that Mr. Kalavi did not attend the Fasi Magistrates Court on 19 May 2014 from which doubt might be cast on Mrs. Tu'ipulotu's version of events. I have no reason to disbelieve Mrs. Tu'ipulotu and I accept her evidence.

[21] I have had full regard for the fact that the offences occurred at around 2am in the morning and there was little evidence as to the lighting in and around Mrs. Tu'ipulotu's house. Against that her evidence was that her house is very small, that when Mr. Kalavi entered the house a candle was lit so that she could see his face and that he was in the house for about 3 minutes within 1 metre of her. She said she talked to Mr. Kalavi and she was able to describe his clothes with some particularity. She was then dragged from the house and Mr. Kalavi removed her pants and underwear whilst she lay on the ground, again providing an opportunity to observe him. Mrs. Tu'ipulotu's evidence about these events was not challenged with any success in cross examination. She was a resolute and convincing witness and it appears to me, and I am satisfied, in those circumstances that she did observe and recognise her attacker and that her evidence that the attacker was Mr. Kalavi is reliable.

[22] I have not overlooked that Mrs. Tu'ipulotu's evidence was that she did not tell the Police Officers that her attacker was Kefu, which one might have thought she would have done had she recognised him. Against that, the events she described were no doubt entirely traumatic and she did tell the Police Officers that she recognised her attacker. It is not at all surprising that at the time she did not recall that her husband had mentioned to her that the person who gave her the message was called Kefu.

[23] In his submissions Mr. Kalavi said little to cast doubt on the credibility or reliability of Mrs. Tu'ipulotu. He did raise the following matters. First, he said that Mrs. Tu'ipulotu's evidence that he had punched her should not be believed as there was no medical evidence called of her injuries. He said that he has a hard punch and would have caused injuries or even killed her. I do not accept this submission as the force with which the offender was said to have punched Mrs. Tu'ipulotu, and whether she suffered any injuries as a result, was not explored in cross examination and Mrs. Tu'ipulotu did not say she had suffered any facial injuries as a result of the blows to her face. Secondly, Mr. Kalavi pointed to apparent differences in the evidence of Mrs. Tu'ipulotu and the Police Officers and asked, who is telling the truth? I will deal with this point when analysing the evidence of Police Officers Tongamoa and Lelena but it will suffice to say that to the extent that there is a conflict between the evidence of the Police Officers and Mrs. Tu'ipulotu I prefer Mrs. Tu'ipulotu's evidence and consider it reliable.

[24] The evidence of Mr. Latu and Mr. La'iafi was important because it corroborates the evidence of Mrs. Tu'ipulotu that the offender was Mr. Kalavi who had run to the neighbouring property upon the arrival of the Police. There is no evidence to suggest any other explanation for Mr.

Kalavi's pants being found on the neighbouring property. He also admitted that he had been chased by the Police. The evidence of both men was cogent and convincing and nothing put to them in cross examination caused me to doubt their evidence.

- [25] Mr. Kalavi submitted that the evidence of Mr. Latu and Mr. La'iafi was contradictory as one said that the trousers were thrown in the house and one said they were next to the house. In fact both said the trousers were found outside the house. He also submitted that in so far as the witnesses' evidence was complementary they had discussed the matter and agreed on their evidence. There was nothing to suggest the evidence was rehearsed. I reject that submission.
- [26] Both Police Officers said that they knew Mr. Kalavi and that they had seen him at the bars on the coastal road earlier that night, which in the absence of any evidence to the contrary I accept. This evidence is relevant because it puts Mr. Kalavi within a relatively short distance of Mrs. Tu'ipulotu's house at around the time of the attack.
- [27] However, in other respects the evidence of the Police Officers was not satisfactory. Neither appeared to have any contemporaneous notes of the events they described although Police Officer Lelenoa said he had taken notes but they were destroyed in a fire. Police Officer Tongamoa did not appear to have any clear recollection of events that occurred after he found Mrs. Tu'ipulotu in the rear of her property following the attack. Police Officer Lelenoa did purport to have greater recollection of events but gave evidence that was I believe incorrect in a number of respects and I consider his recollection is faulty and is not to be relied upon. Examples of this are his evidence that the offender ran from the Free

Wesleyan Church compound wearing dark shorts and a cap and that the Police Officers interviewed boys at a neighbouring property the same night as the offences occurred and his failure to mention that a neighbour had come over and had pointed out someone in the church compound as Mrs. Tu'ipulotu described.

[28] My conclusion on the evidence of identification is that I am satisfied beyond any reasonable doubt that Mrs. Tu'ipulotu had the opportunity and did observe her attacker and that she correctly identified the attacker as Mr. Kalavi, who is a person with whom she had a prior acquaintance. Her evidence that Mr. Kalavi was the attacker is corroborated by the evidence Mr. Latu and Mr. La'iafi that Mr. Kalavi collected his trousers the day following the attack and said at that time that he was being chased by the Police. I have not relied upon the evidence of the Police Officers except to the extent that they both knew Mr. Kalavi and did observe him around the bars on the coastal road within close proximity of Mrs. Tu'ipulotu's house a relatively short time before the attack.

Are all elements of the offense proved

[29] Having satisfied myself that it was Mr. Kalavi who attacked Mrs. Tu'ipulotu I now turn to consider whether all the elements of the offences charged have been proved.

[30] In relation to the first count of the indictment of housebreaking it was proved beyond reasonable doubt that on 26 May 2014 Mr. Kalavi entered Mrs. Tu'ipulotu's house uninvited and without any lawful excuse. He forced his way into the house by ripping away the tin cladding. It was also proved that he did so intending to commit the offence of rape. The

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evidence of that intention was his demand for sex, his strangling and then forcibly dragging Mrs. Tu'ipulotu from her home against her will, removing her pants and underwear and his own pants and stating an intention to have sex with her and kill her. It follows that the offence of housebreaking has been proved. It also follows on those proven facts that the second count of the indictment, the offence of attempted rape, is also proved. The third count of the indictment is common assault. In relation to this offence I am satisfied that as Mrs. Tu'ipulotu lay on the ground and was calling for help Mr. Kalavi struck her around the face intentionally and without lawful excuse before making off. That offence has also been proved to the required standard.

The result

[31] The charges in the indictment have all been proved to the required standard. Accordingly I enter convictions against Mr. Kalavi on all counts as charged.



A handwritten signature in black ink, appearing to read "O. G. Paulsen".

**O. G. Paulsen
LORD CHIEF JUSTICE**

NUKU'ALOFA: 25 JULY 2016.