

Solicitor General.
15/03/16

"The complainant's name is not to be published"

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

CR 69 of 2015

BETWEEN: R E X - Prosecution

AND: HEMILITONI TEULAKA - Defendant

BEFORE THE HON. JUSTICE CATO

Counsel: Ms Moa and Ms Kausea for the Crown

The accused appear in person

VERDICT AND REASONS

[1] The accused, Hemilitoni Teulaka, was charged with one count of rape contrary to section 118 (1) (a) of the Criminal Offences Act. The particulars were that on or about the 14th March 2015 at Talafo'ou, he had carnal knowledge of the complainant against her will.

[2] In order for me to convict the accused of rape I must be satisfied beyond reasonable doubt that;

- i. It was the accused
- ii. who carnally knew that is had intercourse with the complainant by inserting his penis into her vagina.
- iii. against her will

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- iv. knowing that she did not consent to the intercourse or being reckless as to whether she consented or not.

The Evidence

- [3] The complainant who was aged 21 with two young children, one aged 4 and the other an infant, gave evidence that on the 14th March 2015, she was at home alone with her eldest son when the accused had visited together with a friend Samisoni. She said that Toni came over and in response to a question by the prosecutor, "do you know Toni?" she said that, "it was Samisoni that she was acquainted with". That was at the time, her husband was away fruit picking. She said that the time the men arrived was about 11pm to 12am. She said they wanted cigarettes. She did not give them any. Samisoni did not stay long, about half an hour. There was no mention about the men watching movies then, or at any other time.
- [4] The complainant said that Soni went home and the accused remained behind leaving her alone in the residence with her eldest child. She said she took the child to the bathroom. They had been watching cartoons on television before the men arrived. After that, she went back to the living room to watch cartoons. The accused approached her having, she said, ascertained she was alone with her son and said that they should make a baby. He forced her against the wall in an area between the living room and the kitchen. She said she thought he was joking. She realised he was not when he forced her again against the wall. He forced her to the floor. She said they struggled and she swore at him. He said he loved her. She said she was screaming. She said she was crying and swearing at him. He grabbed her, took off her underwear and tried to insert his penis. She shouted to him to let her go. Her son ran over and called out

mummy. She said Tony said to remain still or he would kill her son.

[5] She told her son to watch television in the lounge. She said she gave up her body to do what he wanted. She said he put his penis inside her vagina and ejaculated. She asked him to let her go. He threatened her that if she told anybody he would kill her. He let her go and she went into the living room to get her phone. She led him to the kitchen. He did not want to go. He saw a hammer there and took it up and threatened to kill her and her son if she talked. He left about 2am.

[6] She said she texted a person Tevita to come but he did not come. She said she had told Tevita about what had happened. She had also told a person by the name of Tangini on the 16th March what has occurred. She then made a complaint to the police. Her husband returned about three days after the complaint was laid with the police, and she told him what had happened. She had not made a complaint immediately she said to the accused, when asked by him in cross-examination, because of his threat. Evidence was given that she had made a complaint on the 23rd March 2015.

[7] Detective Vehala gave evidence of taking a record of interview on the 24th March 2015 the day after the complaint was made. The accused was co-operative. It was a lengthy record of interview. The accused admitted that, after Samisoni had left, he had intercourse with the complainant. He said that he and Soni had watched movies at the complainant's residence after drinking with others earlier in the evening. He said we went to watch movies because it was where they usually watched movies. He denied threatening the complainant. He said he asked for intercourse twice. He said this took place in the dining kitchen area and her son was in the living room. He said,

however, that he knew the complainant was angry at him because he had ejaculated and she had chased him away. He also admitted to holding a hammer afterwards but he said he did not threaten her with it. He was asked when he did this, and he responded, ' When [the complainant] chased me and we walked and stood at the door where the hammer was placed and I was touching the hammer. He said she was afraid because she saw me holding the hammer.

[8] The accused who was 19 at the time of the alleged rape gave evidence of having been at the complainant's house before going to have a drinkup. According to him she told him to come back to her after he had a drinkup. He and Soni went back after the drinkup and watched movies. Soni left. The complainant said to Soni that the accused should stand guard for her. He said, subsequently, they had sexual intercourse on a rug in the kitchen after she had agreed to it. He suggested again it was when he ejaculated inside her that she became angry. She kicked him out. He admitted again to grabbing hold of the hammer and the complainant said she was afraid. He said I asked her why she is afraid I am not a ghost. He denied under cross-examination forcing or threatening the complainant. He denied threatening her with a hammer.

[9] After cross-examination, had been completed, I asked the accused how well he knew the complainant before the incident. His answer was that we had already shared a relationship by sleeping together. He had known her some weeks. He said he had watched movies with her before with Soni. He said there was no reason why he picked up the hammer. He said he had shared a relationship with her one week before the incident. On that occasion, she had asked Soni that he remain guard. He said she had already laid on a bed in a living room only wearing tight shorts and singlet for a top. The prosecutor then put to him

that the complainant had not consented to the second intercourse on the 14th March 2015, and he said she had.

[10] The accused called Soni known as Samisoni Taulafo. He said he was a distant relative of the accused. He confirmed he knew that the accused and the complainant had a sexual relationship prior to the 14th March, 2015. He confirmed that on that occasion they had watched movies and the complainant had asked the accused to remain back on guard. He said Tony had told him the next day. He said he had known the complainant for ages – it was a regular place for drinkups and the complainant drinks. He said he was related to the complainant. The accused was not.

[11] Because the fact of a previous sexual encounter had arisen quite unexpectedly, I informed the Crown, Ms Moa, that if she wished the complainant could be recalled. In any event, I had the power to do this, in these circumstances, Archbold, 2016, at paras 803-805. The Crown agreed that the complainant should be recalled. When she was recalled, the complainant said she had known the accused for a few weeks. He would come at night time. She admitted that the accused would stay when Soni left because she had joked to Soni about Toni staying guard with her. She admitted that, on one occasion about 2 days before the present allegation, she had intercourse with the accused.

Findings

[12] Having heard all the evidence, I am concerned that the complainant was less than frank when she had said initially in her evidence that she knew Soni and, in answer to the prosecutor concerning her knowledge of the accused, had said only that Toni came over with Samisoni and Samisoni is the one I am acquainted with. I was concerned when I had read the accused's record of interview when he said that he and Soni had

been present to watch videos that evening, as they had been before, that the complainant may have been better acquainted with the accused than she had admitted. I was very surprised, however, when the accused responded they had a prior recent sexual relationship. Plainly, this was relevant to the issue of consent. For those reasons I adjourned the hearing for the Crown to take instructions and consider its position. I also wished to consider my position to have the witness recalled. This seemed to me to be very relevant evidence upon which any competent defence counsel would have cross-examined the complainant. The accused was unrepresented and had not cross-examined the complainant about this matter, or really anything of substance, at all.

[13] Before I had heard the complainant after she had been recalled, I had heard the evidence of Samisoni. The complainant on recall admitted the previous act of consensual intercourse in circumstances similar to that that arose here. The accused had attended with Samisoni at her house. She had gone home and consensual intercourse took place, after that. I have no doubt, that both the accused and the complainant were more familiar with each other than the complainant had testified to in her evidence. Indeed, she said the men had come around for cigarettes not that they watched movies before Soni left. I found her apparent lack of candour particular concerning her knowledge of Tony very concerning.

[14] This case involves credibility. There is no supporting evidence that anybody heard the complainant screaming or distressed on the night in question. There is no evidence of any sexual complaint, although the complainant said she had told others about the rape. Whilst the answers given by the accused in his record of interview and in evidence that she was angry he thought because he had ejaculated inside her and his admissions

as to holding a hammer are suspicious and may lend some support for the complainant's contention that she did not consent to intercourse and the accused well knew this, and further that he had used a hammer to threaten her to remain silent, to my mind they prove no more than that. They are not admissions by the accused that, at time of intercourse, he knew she was not consenting and carried on regardless nor that he had threatened her with the hammer. Faced with a situation where I have evidence admitted to by the complainant on recall that she had recent consensual intercourse with the accused in apparently not dissimilar circumstances, (that is after attendance on her by Samisoni and the accused and with Samisoni leaving the accused alone with her apparently on the pretext of being a guard), and with no independent evidence of her distress on the 14th March 2015, I am left in doubt as to where the truth lies. I found very unsatisfactory, as I have said, the complainant's assertion and to my mind her lack of candour when she suggested that it was Samisoni and not the accused with which she was well acquainted, when that was plainly not the case. I also note that whilst in a separate charge from the accused admitted to the crime of rape, his lengthy record of interview of denial made before charge, together with his evidence at trial and the subsequent disclosure of a prior sexual relationship means that I do not think any such admission can carry any weight or be regarded as a reliable basis for conviction. He was unrepresented also at the police station.

[15] For these reasons, I do not find the case against the accused of rape on the 14th March 2015 proven beyond a reasonable doubt.

Verdict

Acquittal. The accused is discharged.



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JUDGE

DATED: 4 AUGUST 2016