

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

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*29/08/17*

**CR 9 of 2017**

**BETWEEN: REX**

**Prosecution**

**AND : SAIMONE VAKA**

**Accused**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Hearing : 22-23 August 2017.  
Date of Ruling: 29 August 2017.**

**Counsel : Mr. 'A Kefu SC for the Prosecution  
The accused in person**

**RULING**

- [1] The accused Saimone Vaka elected trial by judge alone on one count of rape contrary to section 118(1)(a) Criminal Offences Act (Cap 18). The trial proceeded over two days.
- [2] I suppress publication of the name of the complainant and any details which may identify her.
- [3] Evidence for the prosecution was given by the complainant, who I shall refer to as 'C'. The only other witness for the prosecution was C's older sister, who I shall refer to as 'S'.
- [4] Mr. Vaka, was the only witness for the defence. He represented himself. Mr. Vaka was an intelligent and able advocate in his own

defence. He was well prepared and had a clear theory of his case which he pursued throughout the trial.

- [5] The prosecution case is that Mr. Vaka persuaded C to drive with him to a bush area in 'Anana where he had non-consensual sexual intercourse with her in the front passenger seat of his car. Mr. Vaka maintains that he did not have sexual intercourse with C. He says that C and S falsely accuse him of rape to avoid paying a debt of about T\$200 for electrical work.
- [6] The burden of proof rests on the prosecution to prove all elements of the offence beyond a reasonable doubt. The elements of the offence are:
- (a) That Mr. Vaka had sexual intercourse with C;
  - (b) That C did not consent to sexual intercourse; and
  - (c) That Mr. Vaka knew that C was not giving her consent to sexual intercourse or was reckless as to whether she consented.

**The evidence**

- [7] What follows is a summary of the evidence of each witness.

*C's evidence*

- [8] C is 24 year old and married. She has no children. In October 2016 she was assisting S in a shop on Taufa'ahau Road owned by S's husband. She first met Mr. Vaka when S asked him to connect the electricity to the shop. Mr. Vaka made a number of visits to the shop. He said that he was married with five children. C believed that Mr. Vaka was attracted to her but she was not attracted to him. He told her that he had seen her husband with another woman but she did not believe

him. On one occasion Mr. Vaka had given her a kiss on the cheek and ran off. She did not tell S about this because S would laugh at her.

[9] On Friday, 7 October 2016 Mr. Vaka asked S to go with him to pick up some electrical equipment from his workplace and confirm to his boss that he was fixing the electricity to the shop. S said she was too busy and would not go. Mr. Vaka was insistent and C said she would go with him. She said that she trusted Mr. Vaka. Mr. Vaka and C got into his car. He drove and C sat in the passenger seat. They took Hala Salote towards 'Anana. Mr. Vaka again said that he has seen C's husband with another women. They drove to 'Anana to a bush road. C asked Mr. Vaka where they were going and he said that his workplace was just ahead. As she could see only bush she asked him if they were nearly there yet. They reached a road where there were a lot of bushes around. They were near the lagoon. Mr. Vaka parked the car and then climbed over onto C and said that they should 'do it' because her husband was cheating on her. She shouted at him and threatened to have him charged. Mr. Vaka held C's hands above her head with one hand whilst he used his other hand to unzip and pull down her trousers. She was wearing loose trousers with a zip. She struggled against him until she had no energy left. C pleaded with Mr. Vaka to stop but he ignored her.

[10] Mr. Vaka inserted his penis into C's vagina and had intercourse with her. He then took his penis out of her vagina before he ejaculated and wiped himself on his t-shirt. He then climbed back into the driver's seat and said that they had to go and get the equipment.

[11] Mr. Vaka then drove to his workplace near Small Industries. C saw some male workers but she did not get out of the car or complain to them. She felt embarrassed and ashamed, her trousers were dirty and she thought males would laugh at her. Mr. Vaka collected the electrical

equipment and returned to the car. They then drove back to S's shop where Mr. Vaka dropped off the equipment and left. C then told S that Mr. Vaka had raped her. S said that she would take C to a clinic at Tofoa for a test. C did not know what the test was for. They drove to a pharmacy and S went in but when she returned she said that they did not have what she was looking for. S then took C home. S then phoned Mr. Vaka and put him on loud speaker. He initially denied that he had done anything to C but when S said that C had told her everything he apologised. Mr. Vaka said he would come the next day and finish the electrical work and hung up.

[12] C was afraid her husband would blame her for what had happened and he has been physically abusive towards her but that night she told him she had been raped. He told her to press charges and she went to the Police Station the next morning to make her complaint.

[13] After the complaint was made C was present when Mr. Vaka called S and offered money if they would drop the charges. C told Mr. Vaka that S would have the final say as she did not know what to do. She had already forgiven Mr. Vaka for what he had done. That was the last conversation she had with Mr. Vaka. S told her to let the Court decide the matter.

[14] Mr. Vaka asked C why she had not told the Police that she had gone to his workplace after the rape. C said that she had told them what had happened and someone else wrote down her statement. C acknowledged that she had not mentioned in her evidence that on the way back to the shop they had stopped at BSP bank. She said this was because she was confused. Mr. Vaka challenged C on her description of the area where he had parked the car but I could take little from that particular exchange.

[15] A good deal of Mr. Vaka's cross examination concerned why C had not escaped from the car or made an earlier complaint. C said she could not open the door of the car because Mr. Vaka had parked beside a large hibiscus tree. She said she had not complained to the men at Mr. Vaka's workplace because they were males and she did not know them and was embarrassed. When asked why C had not asked for help from people around the BSP bank or gone to the Police Station she said that she was shy and embarrassed and had dirt on her trousers. Mr. Vaka also asked why C had not complained when he dropped her back at the shop and C again said she was shy and embarrassed. C denied that she had not complained because her story was lies.

[16] Mr. Vaka also cross examined C on the lack of physical evidence that she had been raped. C accepted that her trousers and zip were not ripped or damaged and that there were no bruises on her hands or on her legs. Mr. Vaka put it to C that there would have been bruises had he been gripping her hands tightly in the manner she described. C did not accept that because he had not punched or scratched her. C also appeared to accept that there was no substance on her (presumably blood or semen) to indicate rape but said this was because Mr. Vaka had ejaculated after taking his penis out of her vagina and wiped it on his t-shirt and that she was not a virgin.

[17] I asked C to explain what she meant when she had said that her trousers were dirty. She said that her trousers had got dirty from dust and dirt on Mr. Vaka's clothes. In answer to a further question from Mr. Vaka she said that he had dirt on his hands and on his clothes.

*S's evidence*

[18] S is 34, married with 6 children. She runs a handicraft store on Taufa'ahau Road. S knew Mr. Vaka because they had been in the same

class at High School but did not know him well. Mr. Vaka offered to connect up the electricity to the store and S accepted. On the first day he came to the shop Mr. Vaka told S what work he could do and he offered to have S and her husband join him for dinner at 'Anana but S did not want to go as she did not really know him. The next day the owner of the property, Victor Mataele, told Mr. Vaka to stop work as he had his own electrician. Mr. Vaka and Victor argued and S told Mr. Vaka to leave the shop but the work was not finished. On Friday, 7 October 2016 Mr. Vaka came to the shop and asked S to go with him to his workplace to pick up some electrical equipment that was needed for the shop but she said she was busy and could not go. She had a child with her who was just 2 months old. Mr. Vaka then asked if C would go. Initially S said C could not go but C said she would go.

[19] S waited for almost an hour for C and Mr. Vaka to return and then she called Mr. Vaka as C did not have a phone. Mr. Vaka said that they were coming. When C and Mr. Vaka returned to the shop Mr. Vaka said he couldn't get what they needed and left. C then told S that Mr Vaka had raped her. S asked C why she had not got out of the car and C replied that there had been trees that blocked the car door and that Mr. Vaka had locked the door and was holding her, pulling her pants and that he threatened to punch her if she screamed.

[20] Before closing the shop S called Mr. Vaka and put him on speaker phone. She asked him how he could do such an evil thing to C. Mr. Vaka said that nothing had happened but when S said that C had told her everything he confessed and said that he was sorry. S told Mr. Vaka that he had to talk to C and her husband but Mr. Vaka said that he could not face C's husband because he knew him. C was sitting next to S during the conversation. After the phone call S and C closed the shop and on the way home stopped at a pharmacy. S was thinking about

collecting evidence against Mr. Vaka but also wanted a douche to clean S up so that her husband did not find out what had happened. She said that they did not go to the Police because C had not spoken to her husband about it and she wanted to see how he reacted. S did not get what she wanted at the pharmacy and took C to S's home at Havelu where C took a bath. She then took C to her home at Kolomotu'a. Mr. Vaka called and apologised again and offered to pay money. Mr. Vaka was again on speaker phone. S told Mr. Vaka that they did not want money but he begged them and was concerned that his wife did not know what he had done. After the call S and C talked for hours before S went home. When S returned to pick C up the next day C had already made her complaint to the Police.

[21] Mr. Vaka called S again the next week and said that the Police had been to see him and again apologised and offered money to erase the complaint. S again told him they did not want money and that the matter would be decided by the Court. Mr. Vaka contacted her again when he came to the shop and dropped off the switchboard and asked her to cancel the complaint but C said that they could do nothing about it.

[22] Mr. Kefu asked S to clarify whether during the first telephone conversation with Mr. Vaka (before they closed the shop) C had spoken to Mr. Vaka. She said that she could not recall. S said she did not hear C telling Mr. Vaka that S would have the last say about whether to drop the charges. She could not remember either if there was an understanding that she was to have the final say on whether to drop the charges. She also said that when C entered the shop she noticed that she looked like she had been crying and that she had dust and dirt on the front of her trousers.

[23] In cross examination Mr. Vaka challenged S that she failed to include in her statement to the Police that he had invited her and her husband to dinner or that on the Friday he had first asked her to go with him. S said she did not remember what was in her statement but she did not make up stories. Mr. Vaka also put to S that whilst in her evidence she said that he had not returned with C and electrical equipment he had given her four breakers that day. S initially denied this but later said that she could not remember. S said that they did not go to the Police immediately because S had to speak to her husband first. S denied that Mr Vaka had made calls to her asking her for money for his work and said that he had not finished the work or asked for payment and that he called her to apologise for what he had done to C.

[24] In answer to a question from me S said she had no record of the phone calls Mr. Vaka had made to her as the Police had not contacted her about them and she had cleared the calls.

*Mr. Vaka's evidence*

[25] Mr. Vaka is 34 years old, married with three children. He had been working on a pizza store near to S's shop. S asked him to set up the electricity supply to her store and he agreed. He knew her as a classmate. On Thursday, 6 October 2016 he started work but Victor Mataele told him to stop work as he had his own electrician. He stopped work but there was still a switchboard required. He told S to let the owner complete the work but that he would bring the switchboard the next day after lunch. After he finished work Mr. Vaka went for a cigarette outside and C came out of the shop and asked him for a cigarette and a T\$5 phone card which he gave her. He then left and told S he would return the next day.

[26] On Friday, 7 October S called Mr. Vaka and asked for the switchboard. He did not have a switchboard but only what he referred to as breakers and S asked him to drop those off. At that time he needed some materials for the house of a cousin called Sami Kavakava. He called Sami and was told to pick up a cheque from Sami's wife at Palu Aviation in Tungi Colannade. He picked up the cheque and then stopped off at S's shop and told her that he wouldn't be able to get her a switchboard and he only had the breakers. While he was talking to S, C waved at him and asked for a cigarette and he gave her his remaining cigarette. He then walked to his car and C was in his car. He went back and asked S why C was in the car and she told him to take C with him to get the breakers as they were urgently needed. He was busy but S said if he dropped off the breakers she would buy the switchboard. He then drove with C to his workplace. He collected the breakers and then they drove to TCC and spoke to Sami. C then asked him for a T\$5 phone card. As he only had the cheque they went to BSP so he could cash it. He then went and bought some coffee at a cafe facing the bank to break up the notes. He then gave C T\$5 and drove to S's shop. He estimated that from the time they left and then returned to S's shop was within an hour. He delivered the breakers to S and C went to have a cigarette. He then asked S for half of his money for his work and she said that she would pay him when he brought the switchboard and he agreed to that.

[27] On Wednesday, 12 October Mr. Vaka delivered the switchboard to S and asked for his money. S said she would pay him on the Friday. Mr. Vaka told her that he needed the money for his children. He called on the Friday and S asked him what he had done to C. He said he did nothing to C and wanted his money. He called again 1 or 2 days later but S didn't answer the phone. After a week the Police called and he learned that C had made a complaint.

[28] In response to Mr. Kefu's questions Mr. Vaka said that C was lying about the rape. He said she was lying because S owed \$T200 for his work and also because C was concerned her husband would learn that she had got into the car with him.

[29] Mr. Kefu challenged Mr. Vaka that he had failed to put aspects of his evidence to C and S. He had not asked C whether she had given him cigarettes and phone cards, that they had gone to TCC, the reasons he advanced as C's motive for lying and about the arrangements concerning the switchboard.

[30] I asked Mr. Vaka why C would get into his car and why he had not asked C why she was in the car. He said he was surprised C was in the car and when he saw her he turned back and asked S and learned from S that it was so that C could go with him and return with the breakers. He said he also thought she was in the car to ask for cigarettes and money. Mr. Vaka said he gave C cigarettes and money because he is an affectionate person. He also said that when he dropped C back to the store he had not had an argument with C or S and he thought that S and C were also lying about C going to the Police the next day because it was some weeks before the Police contacted him.

#### **Discussion**

[31] Where much hinges on my assessment of the credibility of the witnesses I must be satisfied that the prosecution has proved beyond a reasonable doubt every element of the offence. Whilst there is no requirement in criminal proceedings for sexual offences that a complainant's evidence be corroborated, caution should be exercised before accepting and convicting on such evidence (*Teisina v R* [1999] Tonga LR 145; *Uhi v R* [2013] Tonga LR 88).

- [32] The first element that the prosecution must prove is that Mr. Vaka had sexual intercourse with C. Mr. Vaka denies that sexual intercourse occurred. The resolution of this issue requires me to make a finding of the relative credibility of C and Mr. Vaka. That is, as Mr. Kefu submitted, the main issue in this trial. I consider C was a more credible witness than Mr. Vaka. I was very much impressed with C as a witness. She was quietly spoken and thoughtful and although upset about the events she described she gave her evidence plainly and without embellishment. C did not appear to hold any animus towards Mr. Vaka and said she had forgiven him and I believe her. C's evidence was supported in its important respects by the evidence of S.
- [33] Mr. Vaka challenged C's credibility on the ground that her Police statement and evidence in chief were not complete. He put to her that she had not mentioned in her Police statement that they had visited his workplace. This is of little significance as C referred to this in her evidence in chief and Mr. Vaka accepts that they did visit his workplace. C also accepted without hesitation that in her evidence in chief she had not mentioned that Mr. Vaka had stopped at the BSP bank on the way back to S's shop. She did not attempt to hide that this had occurred.
- [34] Mr. Vaka was sometimes evasive when Mr. Kefu asked him questions and he sought to redirect the focus of exchanges back to the lack of physical evidence of rape. He also failed to put a number of important matters to C and S. I do not place too much importance on this as Mr. Vaka is not a lawyer and would not understand all of the rules of advocacy.
- [35] More importantly however, Mr. Vaka's evidence in chief was illogical in important respects. He said that on Thursday, 6 October when leaving the shop he told S that he would bring the switchboard the next day. He later said that when S called him the next day he said he did not

have the switchboard and would deliver breakers. He did not explain what had changed. He did not explain either why when he first went to the shop on Friday, 7 October he did not take the breakers with him or why it was necessary for him to go to the shop and again tell S that he would deliver the breakers. I do not accept his evidence that C was in his car or that having seen her he went back into the shop and asked S why she was in his car. I believe that in giving this evidence Mr. Vaka was attempting to conceal that he insisted that S or C go with him to collect the breakers. I can see no reason why C would have chosen to sit in his car uninvited. If, as Mr. Vaka said, he believed C wanted cigarettes or money she could have asked in the shop as he said she had done the previous day. I cannot see any logical reason either why Mr. Vaka would not simply have asked C what she was doing in the car. It is far more likely, as both C and S said, that C got into the car and went with Mr Vaka because he had asked that someone go with him to collect the breakers. I also consider it very unlikely that Mr. Vaka, who said that he was in need of money, would give money or phone cards to a young women whom he barely knew or go to the extent of both cashing a cheque at the BSP bank and incurring the cost of coffee to break notes in to smaller denominations to do so.

- [36] C made a complaint very soon after Mr. Vaka had returned her to S's shop. A recent complaint in cases of rape and kindred offences is evidence of consistency of the evidence of the complainant. Mr. Vaka challenged C on the fact that she did not make a complaint at his work site or at the BSP bank or when he was present upon their return to the shop. It is entirely understandable that a women who was raped in circumstances as C described would not complain to strangers or whilst in the company of her attacker. It is far more likely that she would wait until she felt safe. I also accept it is reasonable that C would not go to

the Police because she had not spoken to her husband particularly when she was fearful as to how he would respond.

[37] Mr. Vaka's main challenge to the prosecution's case focused on the lack of physical evidence that C had been raped. C accepted that there were no bruises or scratches on her hands or legs or any bleeding. Mr. Vaka put it to C that there would have been such injuries if she had been raped. The Court must approach this argument with a good deal of care. It is not to be thought that the victim of a sexual assault must prove that she/he put up a physical struggle against the attacker and certainly not to the extent that they suffer injuries. In a particular case the nature of the complainant's allegations may be such that the Court would expect physical injuries to be apparent, such as if the complainant is beaten with a closed fist or a weapon. This is not such a case. C says that Mr. Vaka moved across on to the passenger side of the car where she was sitting. C was in a confined space which would have limited her ability to struggle against Mr. Vaka. Mr. Vaka is a young, apparently healthy and athletically built man. C is petite by comparison and it would be relatively easy for Mr. Vaka to control her without inflicting injuries.

[38] Mr. Vaka's next argument was that C's clothing would necessarily have been ripped in the attack she described. C said that Mr. Vaka pinned her hands above her head and removed her trousers with the other. She said the trousers were loose and given what must have been a limited space to struggle it is not surprising that they were not ripped. It is relevant that C said that her trousers got dirty because dust and dirt was transferred to her from Mr. Vaka's clothes and hands. Consistent with this Mr. Vaka said in his evidence that he had worked that day smashing a flash box on a cement wall. S also said that when

C returned to the shop her trousers were dirty. There is therefore some physical evidence of the events C described.

- [39] Mr. Vaka referred to the lack of any semen on C's clothes. C's evidence was that Mr. Vaka ejaculated outside of her vagina and on to his t-shirt. It is not the case that there would have been any semen on her body. It is also the case that C took a bath and any semen or blood as may have been present would have been washed away. That said it is, as Mr. Kefu conceded, certainly regretful that the Police did not act quickly to examine Mr. Vaka's car and clothing.
- [40] Mr. Vaka argued that C and S made up the lie that he had raped C to avoid paying him for his work. There is no obligation on Mr. Vaka to prove that C and S had a reason to make up a false complaint against him. However, as he raised the matter I should say that I found his allegation to be absurd. I do not consider that C would make a false allegation of rape and risk bringing upon herself shame and embarrassment for the sake of a very modest sum of money particularly in circumstances where she was fearful of her husband's reaction and the possibility that he might blame her.
- [41] Finally in this analysis, C and S gave evidence about phone calls with Mr. Vaka. It was unsatisfactory that S had deleted from her phone any record of Mr. Vaka's calls but again this turns out to be little significance as Mr. Vaka did not dispute that he called S but says that he was asking for his money. I am mindful that there were differences in the evidence of C and S about when the phone calls took place and to an extent about what was said. S said that she called Mr. Vaka before closing the store and C said that S called him from home. C also said that she told Mr. Vaka that she would let S decide whether to drop the charges but S had no recollection of that. However both C and S said that Mr. Vaka acknowledged what he had done and offered money if they would not

pursue a complaint. The differences in the evidence of C and S did not detract from my assessment of them as reliable witnesses, and indeed suggests against any collusion between them. However given the differences in their evidence about the calls I do not think it would be right to rely on their evidence that Mr. Vaka admitted that he had raped C and I do not do so.

[42] When I balance all of the evidence I am satisfied that C was a more credible witness than Mr. Vaka, her evidence was supported by the evidence of S, that Mr. Vaka's evidence was in important respects illogical and I did not believe it, that C made her complaint of rape at the first reasonable opportunity and that she laid a complaint to the Police the morning after the attack and as soon as she had told her husband what had occurred. The absence of bruising, bleeding and ripped clothes does not lead me to doubt C's evidence that Mr. Vaka had sexual intercourse with her and there is some physical evidence congruous with C's version of events with the dust and dirt on her trousers which was noticed by S. The presence of dust on C's trousers is also consistent with Mr. Vaka's evidence of the work that he did that day. When I consider all of the circumstances of this case I can see no reason whatsoever for C to have made up such a wicked lie against Mr. Vaka for any of the reasons he advanced and no other reasons suggest themselves to me. I am satisfied beyond a reasonable doubt that Mr. Vaka did have sexual intercourse with C as she has alleged.

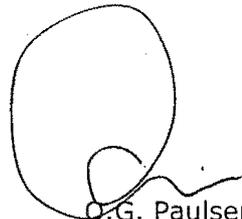
[43] The next two issues can be dealt with briefly. I must be satisfied beyond a reasonable doubt that C did not consent to the sexual intercourse and that Mr. Vaka knew that C was not giving her consent to sexual intercourse or was reckless as to whether she consented. As Mr. Vaka's case is that sexual intercourse did not occur he did not argue that S had consented to have sexual intercourse with him or that he did

not know that she did not consent. I am still required to satisfy myself that those matters have been proved and for the reasons I have given above I am so satisfied. The evidence satisfied me that Mr. Vaka was attracted to C and that he had her go with him in his car on the pretext that this was required to collect electrical materials for the shop intending to have sexual intercourse with her. I am satisfied to the required standard that C made it plain to Mr. Vaka that she did not consent to sex and that he forced himself upon her knowing that to be the case and notwithstanding her struggling against him.

**Result**

[44] I find the charge against Mr. Vaka has been proved. I convict him of the offence of rape and remand him in custody to 29 September 2017 for sentence.

**NUKU'ALOFA 29 August 2017.**



**D.G. Paulsen  
LORD CHIEF JUSTICE**