

11/10/17

"There is to be no publication of the complainant's name."

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

CR 36 of 2017

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BETWEEN: R E X - Prosecution

AND: LIUA FAKATAVA - Defendant

BEFORE THE HON. JUSTICE CATO

Ms Aleamotu'a for the Prosecution

Mr Tu'utafaiva for the Defendant

VERDICT

[1] The accused, Liua Fakatava, stood trial for rape contrary to section 118(1) (a) of the Criminal Offences Act before me as a Judge sitting without a Jury between the 1st - 4th September 2017. The particulars were that on or about 21st September 2016 at Ma'ufanga, he did carnally know A against her will. Further, he stood trial for serious housebreaking arising out of the same incident the particulars being that he trespassed into the residence of A and committed a crime therein.

[2] The Crown case was that the accused, who was a neighbour of A's and had been for several years, had entered her home which was next door to his mother's residence where he was residing in the early hours of the 22nd September 2017 whilst she was asleep and had raped her. The accused had denied this, but

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[Signature]

admitted having intercourse with her which, he said, had been consensual. After the incident, the complainant was seen to be upset, had approached her grand aunt for assistance to go to the police and a complaint to the police was made on or about the 23rd September, 2016. The accused was arrested shortly after and in his record of interview claimed that intercourse was consensual.

THE EVIDENCE

- [3] The complainant, A, gave evidence that, on the 21st September 2016, she had been to a funeral and after the burial she had gone for dinner with family to a bar where she had some liquor, (she said two bourbons and coke), and dinner. She went after that to a bar in town and was there for a short time arriving at about, 9.00pm. She then went to another bar until about 12.30. She said she drank another rum and coke (Woodstock) at the second bar. She went home where she was alone, her young children being with her grandmother.
- [4] She noticed she did not have her phone and went over to the accused's mother's residence because she noticed a light was on. She asked for a phone so she could call her phone for a ringtone. She searched for her phone but could not find it. Later, the mother came to her house and they talked. One of her sons was asked to track down the road with her to see if he could find the phone. She said, as they were doing this, the accused came past in a car and they greeted each other before the car drove on. She said that she returned to her house, asked for cigarettes, and mother said she would ask for these from her boys who had accommodation in a building at the rear of her property. She said she gave the mother money to pay for credit on the phone and cigarettes. She thought this occurred at about 3 or 4 am.

- [5] She said that she spent a long time looking for the phone. The mother had come over and they had talked she thought for about half an hour. She said she told her she was going to go to sleep and she went to sleep in her bed in the living room which was the main room in the house. She said she did not know if the mother had locked the door. She went to sleep at about 4pm, she thought.
- [6] She said she woke up with a person on top of her. She said that it was still dark. There was some light from the kitchen, however. She knew the person on top of her was the accused and she swore at him. She said he had taken off her bottom wear, her short pants, and was biting her neck and having intercourse with her. He was copulating into her, she said. The accused said that it was OK because it was him. She pushed him away and he got up to collect his clothes. He went home calling out that it was not like the first time you have ever done it. She said she swore at him and went and put her pants on. Then she went outside the house. The mother came over and called to the accused but he kept on walking.
- [7] She said that he was going to where he slept at the house at the back. The mother came into her house and apologized for what her son had done. She asked her not to go to the police. She said that she told the mother that she would go to her grandmother and asked her to return her money. She went over to her grandmother's home, she said crying. It took her about 4-5 minutes to get there. She said she was angry.
- [8] She said her grandmother asked her what happened but she could not tell her. She asked her to take her to the police station. They went there about 7am, and she made her complaint. Later, she went to the hospital for a medical examination.

- [9] She said that the accused's mother residence was about 15 metres from her residence. She said she knew the accused as they grew up but he had only moved in with his mother last year. She said they would meet regularly and say hullo, but she never expected anything like this. She said, as neighbours, they would help each other.
- [10] Under cross-examination, she admitted that she had gone to a bar night club where evidence was given that the accused worked in security, and that she would talk to him there and ask him to let her in for free. She denied a suggestion that she had invited the accused on one occasion to meet her under the mango tree at her house. She said she was not sure about the accused's living arrangements at the time. She thought he might come and go but she knew the boys shared separate accommodation at the rear of the property. She agreed she had arrived home with a ride from a friend about 1am. She said that she was not too drunk. She said she had about 4 bourbons and was very tired. She did not drink much when tired. She had not been to sleep because of a wake and the funeral for many hours.
- [11] She did not know what time it was when the car with the accused drove past. She said she did not think credit would have been deducted because she only used the phone to ring hers. She admitted however, giving mother money for the phone and for cigarettes. She said the door was closed when she went to sleep but she did not know if mother had locked in when she went home. She seemed to agree that she spent several hours looking for the phone and talking to the mother. She said, at about the time of the alleged rape, people were getting up to go to the flea market. She denied meeting the accused and having a cigarette that night. She denied inviting him back into her house and allowing consensual intercourse to take place. She denied

taking any drinks home with her and drinking any cans of alcohol when the accused was present. She denied kissing the accused or sitting on the bed with him. She denied taking her clothes off. She said she was very tired and had fallen into a deep sleep and she did not know he had taken her underwear off. She said she was not drunk. She had stayed up all the previous night for the funeral wake and was tired. She said she was not too drunk but she was tired. She denied passing out through excess alcohol. She said that after copulation, that she had sworn at him and he got up and collected his clothes whilst she ran outside and swore at him. She said the accused did bite on her neck. She woke up to three or four love bites. She denied they were made by others. She said that the accused left his underpants and she picked them up and gave them to his mother that night to take to him. She said she was crying when she saw the mother and asked for money back. She wanted the money back because she said she was upset at her for asking her not to go to the police. She said she wanted the money to go to the police. She had no other money and told the mother she wanted it for her children whom she admitted was untrue. She said she had not told the mother what her son had done but that she had been standing at the house when she heard the swearing at him and his remark that it was not the first time that she had done this. The mother had come over and asked the complainant not to go to the police until she had spoken with him.

[12] The accused's mother was called to give evidence by the prosecution. She said that the complainant woke her up to ask for a telephone. She said she called for her younger son to help her look for the phone. Then, they talked and she was asked by A if she had cigarettes. The conversations she had with A took place at A's residence. She said she made telephone calls when there to other persons. She said that the complainant went to her boy's place looking for cigarettes and she had tried to get her

these from the boys. She said the accused arrived and said he had no smokes and he left again. She said they returned to her house and she made more calls to her mother using up all her credit both Ucall and Digicel and then she gave her \$50 to pay for the credit, and to keep the rest. She said she was still drinking Woodstock. She said she had returned home from speaking with A about 4 or 5am and engaged on her handicraft weaving. She said she got food for Taufui, a son, to give to the accused when he came home from work. She said it was still dark when she went home to her place, did some weaving and fell asleep. She was woken up by a daughter saying that A was screaming and she went to her residence and spoke to her. She said that she asked A why she was crying and she said the accused came into the house and they slept together. Mother said but Liua was still eating at the time you are referring to." She said she was crying and the mother suggested her drunkenness came out. The mother said she apologized if Liua had done that kind of thing. She said that she had given him food about 20 minutes before she went to sleep. She thought she had gone to sleep about 5.30am.

[13] Under cross-examination, she admitted that she had not told police that she had seen A drinking a Woodstock can but said it was true. She said that she had gone over to the room where Liua, her son, was sleeping after she had been told by A what had happened, and he was drunk, so that she had difficulty waking him. She said that he had told her to go to sleep that A was too drunk and that what had happened was between him and her because both were consenting to it. She denied ever apologizing and asking A not to go to the police.

[14] The complainant's great aunt gave evidence. She recalled A coming to her on the 22nd September 2016, early in the morning when the complainant came to her about 6-7am. She

was crying. She was told Liua had already satisfied himself with her. She went with her to the police station. Later that day, the accused' mother came to her to apologise to ask for forgiveness she thought.

- [15] A doctor's report was placed in evidence by consent. It confirmed 2 bruises anteriorly of about 2.1 cm, 1.1 consistent with love bites. Aside from this, nothing forensically was of value.
- [16] The accused's record of interview taken on the 23rd September, 2016 was put in evidence by consent. In it, the accused said he was well acquainted with the complainant. He said the matter happened at about 0300 hours or thereabouts. He said that he had been at the bar and came back to his home. He walked into the kitchen and saw A and talked at the front part of her house. They went inside and sat on her bed and kissed. They agreed to have sex and after that he went back to his house.
- [17] He said that he was drunk on the night but he still knew everything. He said that he went to the bar at about 7.30 and stayed till the bar closed. He then went home and did not go anywhere else. He said that after they had smoked they went into the house and smoked jokingly and then kissed and had sexual intercourse.
- [18] He denied doing anything else to her body. It was put to him by the police officer that he had picked up his clothes and left because she chased him and he forgot his undergarment and his mother had given it to him as A had told her to give it to him and he responded that was true. He said that as he saw her A was drunk but alright drunk. He said A took off her clothes. He said he did not ejaculate inside her because he was drunk. He maintained that he was aroused and they had agreed to have

sex. He later when charged said of both offences that it was a lie.

[19] The accused gave evidence and maintained that intercourse was consensual and that the complainant had entered her house with him after smoking a cigarette. He stayed in the smaller house at the back. He said he would see her in the bar, sometimes to get free entrance and, other times, to look after her. He was not working on the 21st. He said he went there at about 9.30. He was drinking red label. He said 5-6 nips. He said that was from 11pm to the bar closing. Then he went home with a co-worker named Soane. He said he felt that he was still under control. He said that he had played pool between 9.30 and 11pm. He said that he arrived home about 1-2 am. He said that when he had arrived home in the car, the complainant said hullo to him. They drove off again. The driver was a worker called Keveni, at the bar. He and Keveni went and finished their "drink up". That finished about 2.30. He finished his whiskey. He got back about 3am. He said he looked for food in the kitchen. He said that he saw the complainant with a cigarette at the frontage of our residence. She also had what looked like a glass. He went and smoked with her. They went into the house, kissed and had consensual intercourse. He said to her that he had to work the next morning so he had asked her to allow him to go and sleep. He thought he left about 4am.

[20] He went home and slept about 4pm. He went to work about 7.30 the next day. Police came to his workplace. He said that he was surprised. He denied that A had tried to stop him having intercourse. She did not try to push him away. He said she was lying when she said she was asleep. He said, in cross-examination, that he was not drunk that night and that he had not had sex with her when she was sleeping.

SUBMISSIONS

- [21] Mr Tu'utafaiva submitted that the complainant had been sexually attracted to the accused. She had talked to him in the nightclub and on occasions had asked him to get her in free and look after her. He said that she had on a previous occasion asked him to meet her under the mango tree (an allegation that she had denied).
- [22] He submitted that she was unreliable. He questioned her timing of events; also, the fact the mother had seen her drinking at home. The fact that she, so the mother said, had used up her credit ringing other people. He also questioned her evidence that she was not smoking and did not have cigarettes that night.
- [23] He criticized the prosecution for not producing her underwear. As a big woman, he submitted the accused would unlikely have been able to remove them she said without waking her up.
- [24] He submitted that the marks around the neck were consistent with kisses and she had embellished her evidence in this regard, suggesting that it was this that had woken her up.
- [25] He submitted that she was not a naive young girl or woman. She knew her own mind and was able to give consent and did.
- [26] The prosecution emphasized that the Court should accept the complainant's evidence beyond any reasonable doubt. There was no reason for her to make any complaint on the evidence and her evidence and conduct was consistent with the complaint of rape. Although there were some inconsistencies in the evidence, they were not material and she should be believed as a credible and truthful witness.

FINDINGS

[27] I believed the complainant's account beyond a reasonable doubt. There was no evidence to suggest that she had any motive to make a false complaint and her conduct afterwards in crying, when talking with the mother, then seeking the assistance of her grand aunt and, within a short period making a complaint to the police was consistent with her not having given her consent for intercourse as the accused's claimed.

[28] I prefer her evidence to that of the accused. I find that she wanted cigarettes that night, had not been given any and that the suggestion of the accused that she had been smoking with him before they went into her house, then chatted, kissed and removed their clothing voluntarily, before having consensual sexual intercourse, a fabrication.

[29] I accept her evidence that she was very tired that night, having attended a wake on the evening of the 20th September, a funeral and then dinner, before going to the nightclub and that she went to sleep quite late on the morning of the 22nd September having lost her phone and after contacting and speaking with the accused's mother.

[30] I accept her evidence that prior to waking up that she had only seen the accused in the car and had not had any previous association at home with him that evening before sexual intercourse took place.

[31] I accept that she was very upset and I consider that it is likely that the accused's mother knew why this was so because I find the mother, contrary to the accused suggestion, likely saw or heard the complainant protesting the accused's conduct as he left her house. Much of what the mother said supported the

complainant's account but I did not accept her suggestion that she saw the complainant drinking Woodstock. I think she was in a very difficult position giving evidence for the prosecution at trial. I think she knew enough to approach the complainant's grand aunt hopeful at least that police action would not be taken against her son.

[32] I find there is sufficient evidence in the evidence of the grand aunt, whose evidence I accepted, that the complainant was very upset and angry about what happened and, although the complainant did not say much to her, the fact both went to the police station for the purpose of a complaint being laid is supportive of the complainant's credibility in asserting intercourse was non-consensual.

[33] I accept that the marks on her neck shown in photographs were bites or, at least, occasioned by forceful sucking. They were mentioned in the doctor's report of an examination taken after the complaint. I accept that this and the fact of intercourse had caused her to wake from a deep sleep and I reject the submission that the accused could not have removed her underwear without her waking up, tired as I accept she had been.

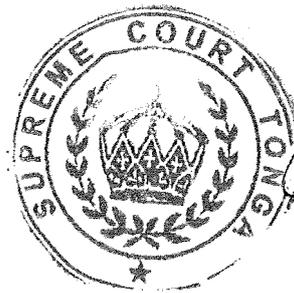
[34] I find that the accused, as he said in his evidence, was drunk although he suggested that he was not drunk at trial. He said that he was unable to ejaculate or maintain an erection in his record of interview because he was drunk. Likewise, I accept that he was chased by her from the house, as he admitted in his record of interview, and that he left an undergarment behind which the complainant had given to his mother. This is inconsistent with an orderly departure from the house after consensual intercourse.

[35] Accordingly, I reject beyond any reasonable doubt the accused's account of what happened that evening. I find, in the early morning of the 22nd September 2016, beyond reasonable doubt that the accused entered the complainant's home uninvited as a trespasser and had non-consensual sexual intercourse with her. I find there was no basis either for him to believe mistakenly that he could have consensual intercourse with her.

VERDICT

[36] Accordingly, I find the accused guilty of rape and serious housebreaking as indicted, and he is convicted of both counts.

DATED: 10 OCTOBER 2017



C. B. Cato
JUDGE