

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

CR 89 of 2020

BETWEEN:

R E X

-Prosecution

AND:

TONGAMOA KAKAU

-Accused

VERDICT

BEFORE: JUSTICE LANGI

**Counsel: Ms 'Aunofo 'Aholelei for the Crown Prosecution
The Accused In Person**

Date of Verdict: 18 September, 2020

The CHARGE

1. Mr. Kakau stood trial on one count of Serious Indecent Assault contrary to section 124(1) and (3) of the Criminal Offences Act.
2. The charges relate to an incident alleged to have occurred on 21 September 2019, at Houmakelikao, where Mr. Kakau is alleged to have entered the complainant's house and went into her bedroom and touched her vagina without her consent;

3. Mr. Kakau denies the charges and claims that none of this occurred and that this is a case of mistaken identity;

A. BURDEN AND STANDARD OF PROOF

4. The onus of proof lies on the Prosecution at all times, and it is to the standard of proof beyond reasonable doubt in relation to the charge and every constituent element of the charges;
5. The Court is presented with two different versions of events. One advanced by the complainant and one by Mr. Kakau. There is substantive corroborating evidence to support the Prosecutions account, but given that the accused is unrepresented and with limited knowledge of the law, I believe it is important that close regard should be given to the standard and burden of proof;
6. I also remind myself that I must base my decision on the evidence which I have heard in this Court. On the basis of the burden and standard of proof, the Prosecution case must stand or fall on the evidence that the parties choose to call before me.

B. THE ELEMENTS OF THE OFFENCE

7. Section 124 (1) of the Criminal Offences Act states:
“Any person who shall commit an indecent Assault on any person shall be guilty of an offence under this section”
8. Before I can convict Mr. Kakau for a charge of serious i indecent assault, the Prosecution must prove the following elements beyond a reasonable doubt:
 - a. That Mr. Kakau;
 - b. On or about 21 September 2019;
 - c. Assaulted the complainant by intentionally and without her consent, touched her vagina; and
 - d. That the assault was indecent, in that right-minded persons would consider what was done offensive to contemporary standards of modesty and privacy.

C. THE EVIDENCE

THE CROWN'S EVIDENCE

PW1: 'Avalisi Kolo

9. The complainant is 21 years old, married and lives with her husband at Houmakelikao.
10. On the night of 21 September 2019, she was sleeping with her husband inside their bedroom when she sensed a strong smell of alcohol and felt someone touching her vagina;
11. She immediately woke up and saw someone lying beside her and at first, she thought it was her husband. However, upon closer inspection she realized it was not her husband and that it was someone else. She yelled out to her husband and the intruder got up and ran out of the bedroom.
12. She stated that the house has two bedrooms and she and her husband occupied one bedroom and the other bedroom is used by 'Ana Kolo and her husband Paea. The two rooms are separated by the living room.
13. On the night in question, the living room lights were on. She stated that she was able to look directly at the intruder's face for a few seconds before he jumped off the bed and ran out.
14. On his way out, the complainant was able to see the clothes he wore and described them as long sleeved black shirt and navy trousers. He did not have any shoes on.
15. When the intruder ran out of her bedroom, 'Ana Kolo came out of her room and asked the complainant whether a man had just run out from here. She told the complainant that a man had showed up at her door and she had chased him out.
16. The complainant went to the Police Station to lodge a complaint at around 9am. She returned home with the police and when she got out of the vehicle she saw the accused a few meters away inside his car. She immediately recognized him and told the police that the accused was the person who had come into her house. He was still wearing the same clothes she had seen him wear earlier that morning when he ran out of her bedroom.

17. In cross-examination the accused put to her that she was mistaken and that it was not him that went into her bedroom. He put to her that if it was him, he would not have come back to the area to get his car. But the reason he had come back in the morning for his car is because he knew that he had not done anything wrong.
18. The complainant maintained that it was him and the next morning when she returned from the police station she immediately recognized him and pointed him out to the police. They had argued and the accused had told her that his phone and shoes and tools were missing. She had told him that she did not care about his missing goods but he was the person who had entered her house and touched her vagina.
19. The accused also put to the complainant an inconsistency in her statement in court and her statement to the police. In her statement to the police, the complainant had said that the accused wore black shorts. In court, she stated that the person she had seen had worn long black navy pants. The complainant agreed that she had told the police that he had worn shorts, but that was because he had pulled the leg of his long pants up to his knees.
20. The accused also put to the complainant that it would be impossible for him to have climbed onto the bed given the complainant had slept next to the wall and her husband on the edge of the bed. He asked where he would have been able to lie on the bed in those circumstances as her husband would have obviously woken up.
21. The complainant replied that on that night her husband had been drinking earlier and was in a deep sleep. When she woke up, she was laying on her husbands left hand, and the space between her and the wall was where the accused was laying on his side facing her. He jumped up and ran out when she yelled calling her husbands name when she realized it was an intruder.
22. The accused also put to the complainant that when he went back to his car the following morning, she had not been able to identify him because she had called another witness, 'Ana Puafisi Kolo, to come over and confirm that it was him they had seen earlier that morning.

The complainant replied that when she saw him in his car that morning, she had immediately informed the police that he was the same guy she had seen in her room and that he was still wearing the same clothes he wore earlier. She said that she had called 'Ana Puafisi Kolo to come after she had already told the police that it was him she had seen earlier that morning.

PW2: 'ANA PUAFISI KOLO

23. She and her husband and children lived with the complainant at Houmakelikao. In the early morning hours of an unknown day in October last year, at around 3 – 4am she woke up to breastfeed her baby. The lights inside the room were on and she was laying on the bed breastfeeding when someone appeared at the door to her bedroom. She had never seen this person before and she asked him what he wanted. The accused turned and ran away.
24. After a few minutes the same person appeared again at the doorway and asked her whether she knew the house of someone she could not recall the name. She said no and chased him to get out of the house. The accused turned and ran away and she estimates that about five minutes later she heard the complainant yell out from her room.
25. She was able to get a good look at his face and the clothes he was wearing because the lights in her room were on, and also the lights from the living room. She stated that he wore a long sleeved black shirt with black navy pants. He did not have any shoes on.
26. After the accused ran off, Sinisa Kolo from the house next door came running into the house asking if a man had been inside their house.
27. The witness identified the accused in court as the same person she had seen inside their house and who had stood at the doorway to her room on the night of the offending.
28. She also stated that around 8am that morning she again saw the accused when he came back to take his car which had been parked close to their house.

29. In cross examination the accused put to her that the incident the trial is for occurred in September and not October as she had stated. She replied that she does not recall the exact date but it was only her approximation that it was around October last year.
30. The accused also put to her that she had her times mixed up because she stated in her evidence that she had seen him again at 8am that morning when in fact he had come to take his car at around 9:10am.

PW3: SINISA KOLO

31. She lives next door to the complainant. On the night of the offending, she had been drinking alcohol inside her house with her husband, her brother in law and two other boys named Paea and Viliami and the complainant's husband.
32. During their drink-up, the two boys Viliami and Paea went outside and after a few minutes they came back inside with the accused;
33. She had never seen the accused prior to this night but she assumed that he was a friend of Viliami and Paea. She stated that when he joined them the accused was already very intoxicated and after a short time he passed out drunk;
34. She asked Viliami and Paea who he was and they told her that they had met him outside while they were smoking and had invited him to join them;
35. They continued drinking up to around 2am and she told Viliami and Paea to take the Accused outside from her house. They told her that he had come in his own vehicle and so they lifted him and took him to his vehicle.
36. Her husband and the others had all gone to sleep and she was still awake to make sure all the doors were closed. As she was closing the windows facing the complainant's house she saw the accused running out of the complainant's house. She approximates the distance from where she was standing to where the accused ran out to be around 4 to 5 metres.

37. She saw him running outside wearing a white shirt with navy pants. She went to the complainant's house and they stood outside talking while Paea and Viliami went around the area looking for the accused.
38. They came back and said that he had disappeared. This was around 3-4am.
39. She said that no one else had been wearing navy pants that night.
40. In cross-examination, the accused put to her that her statement in court was inconsistent with her statement to the Police. In her statement to the police, she had stated that when the Accused joined them, he sat on a chair and passed out. Her statement in Court was that he came and sat on the floor and later passed out. The witness replied that she recalls he had sat on the floor.
41. The accused also put to her that the clothes he had worn that night was a blue long-sleeved shirt and not white as she had claimed. The witness replied that she recalls he had worn a shirt that had two colours. She stated that she is not sure whether he had changed his shirt but she is positive that it was him that she had seen running out of the complainant's house that morning.

PW4: PAEA KOLO

42. He is married to PW2 ('Ana Puafisi Kolo) and they live in the same house with the complainant and her husband;
43. On the night of the offence he had joined Sinisa and her husband and others in drinking alcohol at Sinisa's house. At around 11-12am he went outside to use the bathroom and to have a smoke.
44. While he was standing outside the accused arrived in his vehicle. The accused told him that he was looking for a friend who he had dropped off at this house. He is not acquainted with the accused but he invited him to join them and they went inside the house to where the others were drinking;

45. He stated that the accused wore a white long-sleeved shirt with long navy pants and safety boots. After about an hour the accused passed out drunk.
46. When they finished drinking, Sinisa told him and Viliami to take the accused out of the house. They led the accused to his vehicle which was parked on a nearby dirt road next to the complainant's house. He opened the accused's vehicle and put him inside and returned back to the house.
47. He stated that around 2am he heard the commotion and went to his wife and asked her what had happened.
48. In cross examination it was put to him that he had given a statement to the police which had stated that he had taken someone who he had assaulted to the vehicle. The witness replied that he had told someone named Sia that he had beaten the accused when he took him to the car but in fact he had not assaulted him.
49. The accused also put to the witness that he had been wearing grey long pants and a dark blue shirt and brown boots. He stated that the shade of blue was that of the St. Andrews school uniform. The witness maintained that he wore black navy pants and a white long sleeved shirt.

THE DEFENCE EVIDENCE

50. I had explained to the accused that he is not required to prove that he is innocent and that it was the Prosecutions duty to prove guilt but he may give evidence or call witnesses if he wished to do so. If he did give evidence then he will be cross-examined by the prosecution. He understood and elected to give evidence.
51. He stated that on the night of 21 September 2019, he had been drinking alcohol at the Bill Fish Bar at around 9pm. He had about 3-4 jugs of beer shared between himself and 6 workmates;

52. He had gone to the house at Houmakelikao because he had dropped off a friend there earlier and was going back there to look for a girl. He met two boys there named Paea and Viliami, who invited him to join them in drinking alcohol inside a house.
53. He joined them and had about 2 shots of alcohol before he passed out next to the entrance to the house. He woke up at around 2.30 – 3.20am and the others were still sitting around on chairs facing him. He heard someone saying ‘he is up’. He then remembered his car. He also saw that his phone was missing and his watch. His shoes were also missing.
54. He then got up on his own and walked back to his car. He saw that his car was not parked where he had originally parked it. He recalls he had parked facing a tree but when he went back it was parked facing the road. The car keys were still inside his pocket.
55. When he tried to turn on the car it did not turn on. He later found the car battery had been taken out and the speakers inside the car had been stolen. He walked back to his house which is about 15 minutes away. He arrived home at around 3.45am.
56. The next morning at around 10 – 10.30am he returned with his next-door neighbour to where his car was parked. He had asked his neighbour to help him start his car. However, they were unable to start the car and he saw that the tyres were also damaged.
57. While they were still trying to fix the car, the police arrived together with the complainant and she walked right up to him and accused him of doing something to her. He denied that he had entered her house. He thought the police were there about his missing items. He stated that if he was the person who had entered the house he would not have returned for his car. The only reason he went back was because he had a clear conscious and knew he had not done anything wrong.
58. He stated that he had worn a long sleeved dark (St. Andrew shade of blue) shirt and grey long pants and brown safety boots. He said that when he went inside the house to join them, he had taken off his safety boots and left them at the door;

59. He stated that he had never gone inside the complainant's house as he would never go inside a stranger's house because you never know what could happen;
60. In cross-examination, it was put to him that he was lying as there were two eye-witnesses who had seen him that night inside the complainant's house. He replied that both the eye-witnesses were lying. He stated that the only thing he remembered about that night is that he had woken up after he passed out and had gone to his vehicle.

D. THE LAW

61. At the commencement of the trial I had explained to the accused the essential elements that the Crown must prove beyond a reasonable doubt before I can convict him of a charge of indecent assault. The fundamental issue is whether the Crown has established beyond a reasonable doubt that the accused committed the offence in the manner described, that is, touching the complainant's vagina without her consent. There can be no doubt that if that is proven, the assault was indecent.
62. It was clear from the outset that the main issue in this case is identification and that the case against the Accused depends on the evidence of his identification. The Accused's defence was that he had never gone inside the complainant's home and that this was a case of mistaken identity.
63. When identification is in issue, the court must, of course, always take particular care because of the realm of the criminal law cases involving mistakes as to identification resulting in miscarriage of justice are legendary. The leading authority on identification cases has long been the UK Privy Council case of *R v Turnbull* [1977] QB 224. Giving the judgment of the Court, Lord Widgery set out at p228 the guidelines for directing juries in such cases. This is not a jury trial, of course, but sitting as a judge alone I have taken into account all the factors Lord Widgery listed; in particular, the need for caution in relying on the correctness of an identification bearing in mind the possibility that a mistaken witness can often be a convincing one.

64. Factors which are important to consider also are whether the witnesses knew the accused (if so for how long), the opportunity for observation, the distance, the light available in the area, whether there was any impediment to observation, the period of observation, the time lapse between the original observation and any subsequent description given to the police, and any material discrepancies in the statements given to the police of the offender and any other specific weakness.
65. Where the evidence is in the nature of a fleeting glimpse, it should not be relied upon as identification unless there is supporting evidence. In this regard, I should remind myself that, even in cases of recognition, mistake can be made of even close relatives or friends.
66. I therefore warn myself of the dangers of such evidence and also the fact that in this case, the accused has throughout denied having entered the complainants house. If he is to be convicted, the court must be satisfied beyond a reasonable doubt that he was the person seen and satisfied, to the same standard, that his denials are untrue.

E. VERDICT AND REASONS

67. I am satisfied that the accused was not speaking the truth. I did not find his evidence credible. His nonchalant demeanour in court and some of the questions he asked in cross examination suggested to me that he was fishing for a lifeline to get himself out of this predicament. In his closing submissions, he stated that no one will believe him because he has no witnesses and that he just wished for this matter to end as he has more important things to deal with.
68. The accused's sworn evidence did not help his case as it only served to corroborate the evidence of the Crown witnesses and strengthen the Crown's case, ie, he was in the vicinity, he had been intoxicated, he had worn a dark coloured long sleeved shirt and had left Sinisa Kolo's house without any shoes. He had also contradicted himself in cross-examination and when he gave his evidence. For instance, when he cross-examined 'Ana Kolo, he put to her that he had gone home at around 4am. In his sworn evidence, he stated that he had walked to his house and arrived there at 3.45am. He also put to her that he had gone back to his car

the following morning at around 9.10am. However, in his evidence he stated that he had gone back to his car at 10.30am.

69. It also came out during the cross-examination of the complainant that an apology had been made to the complainant and that there had been an agreement for the complainant to withdraw the charges against the accused. It was put to the complainant that she had received some money in order for this matter to be withdrawn. This line of questioning by the accused did not advance his defence and seeing that he was unrepresented by counsel, I intervened and advised the accused to stick to matters that were relevant to his defence. He must have realized his mistake and immediately put it to the complainant that he had nothing to do with the apology and that it was his sister and his mother who approached her only because they were ashamed of the stories they were hearing. The complainant agreed that he had not personally apologised to her but that did not mean that he was not the person who had indecently assaulted her. She maintained that he had committed the offence.
70. On the other hand, I am satisfied that the Crown has proven the charge of indecent assault beyond a reasonable doubt. I accept the evidence of the Crown witnesses as truthful and credible. Even though there was a discrepancy in the colour of the accused's shirt as seen by witnesses Sinisa Kolo and Paea Kolo who both stated he wore a white shirt that night, it is possible that he had changed his shirt. Had the identification evidence relied solely on the colour of his shirt, then I believe a reasonable doubt would have been raised. However, there were other incriminating evidence against the accused that has led me to believe without a reasonable doubt that he is guilty. These evidences are as follows:
- a. The accused was in the vicinity where the offending occurred: The witnesses Sinisa Kolo and Paea Kolo both gave evidence that they had been drinking with him that night. Sinisa Kolo gave evidence that her house is situated next door to the complainant's house. The accused himself accepts he was drinking alcohol at Sinisa Kolo's house.
 - b. Visual identification of the accused: Both the complainant and 'Ana Kolo had seen the accused inside the house. The witness Ana Kolo had seen him standing at the door to her bedroom where the lights were on as she was breast feeding her child.

He left and came back again to ask her if she knew another person's house. Both times he stood at the door and she had a clear look at his face. There was nothing covering his face and the lights in her room were on. She estimates that he stood for about 3 minutes at the doorway before turning to run away. The complainant had seen his face when she woke to see him lying on his side facing her. The next morning when she returned home after lodging a complaint with the Police, she immediately recognized him as the same person she had seen earlier that morning and pointed him out to the police.

- c. Time of offence: The complainant and 'Ana Kolo both state that the accused had entered the house between the hours of 3-4am. This is consistent with the time that Sinisa Kolo stated they had finished their drinking and she had instructed Paea and Viliami to take the accused out of her house. The accused had also put it to 'Ana Kolo when he cross-examined her that he had left the vicinity at around 4am. However, he later contradicted himself when he stated in evidence that he had gone home at around 3.20am when he woke up.
- d. The clothes the accused wore: While there were some inconsistencies in the evidence of the witnesses relating to the colour of the shirt the accused wore, I find that the Accused's own description of the clothes he wore that night corroborates in some way, the descriptions given by the complainant and 'Ana Kolo. Both witnesses claim he had worn a black long-sleeved shirt. The accused says he wore a dark blue long-sleeved shirt. The shade of blue is similar to the St. Andrews school uniform. I am aware of the St. Andrew school shade of blue and it is darker than navy blue and could easily be mistaken for the colour black. It is also ironic that the two witnesses say they saw him wear a long-sleeved shirt and he stated that he had in fact worn a long-sleeved shirt that night.
- e. Navy pants: All the witnesses claim to have seen the accused wear long black navy pants. The witnesses Sinisa Kolo and Paea Kolo had seen him wear the navy black pants with elastic cuffs at the bottom, when he first joined them. The complainant and 'Ana Kolo both state he had been wearing long black navy pants when they

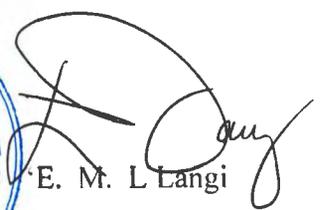
saw him inside the house. I find beyond a reasonable that he had worn long black navy pants on the night of the offence. I do not accept the accused's evidence that he had worn grey pants that night.

- f. Intruder was intoxicated: Another important feature is that the complainant had woken to a strong smell of alcohol, indicating that the intruder was very intoxicated for her to have been woken up because of the smell. The Accused admitted in his evidence that he had been drinking at Bill Fish before he joined the party at Sinisa's house. He also admitted that he had passed out after only two shots of alcohol, indicating that he had already been very intoxicated when he joined them.
- g. Intruder had no shoes: Additionally, the complainant and 'Ana Kolo both state that the accused had no shoes on when they saw him inside the house. This is consistent with the accused's own evidence when he stated that when he woke his shoes were missing. He had therefore left Sinisa Kolo's house without any shoes.

71. Overall, the evidence against the accused is overwhelming and I am left in no reasonable doubt that it was the accused, Tongamoa Kakau, who had entered the complainants house on 21 September 2019 and touched her vagina without her consent.

72. He is accordingly convicted.

NUKU'ALOFA: 18 September 2020

The seal of the Supreme Court of Tonga is circular, featuring a central emblem with a crown and a shield, surrounded by a wreath. The words "SUPREME COURT TONGA" are inscribed around the perimeter of the seal, with two stars at the bottom.
A handwritten signature in black ink, appearing to read "Langi", is written over the name "E. M. L. Langi".
E. M. L. Langi
JUDGE