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Mr Lutini
DPP
Crown Law

**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NEIAFU REGISTRY**

CR 113 of 2020

REX

-v-

LIMONI TITO SIASAU

BEFORE HON. JUSTICE NIU

Counsel : **Ms. T. Kafa for the Crown.
Mr. V. Latu for the Accused.**

Trial : **1 & 2 March 2021.**

Submissions : **3 March 2021.**

Ruling : **9 March 2021.**

RULING (VERDICT)

Charge

[1] The accused is charged that on or about 20 February 2020 at Vaipua, he committed serious indecent assault on Fine Tonga by fondling her vagina, outside her clothing, without her consent.

The evidence

[2] The Crown called 3 witnesses, namely, the complainant, her husband and the complainant's co-worker. The accused was the manager of the employer, "Sunsail" formerly called "Moorings". The accused gave no evidence and called no witness.

- [3] **Fine Tonga**, female, aged 33 of Masilamea, Vava'u, said that she and other co-workers Mele Mahe and Sipola 'Ealelei were with the Manager (the accused) on 20 February 2020 at the boat yard of the yachts of the Company at Vaipua just after 8:00 am. She said that the accused told Mele to go and get water for them to drink and for her and Sipola to go with him into one of the cabins of the yacht "Kepa", it being a catamaran with two hulls. She said that he showed them the walls to be scrubbed with janola and silicone strips which were to be scraped off as well. She said that he then gave Sipola the key to the yacht "Euribia" and told her to go and scrub and scrape the same things in that yacht, and told the complainant that he wanted to talk to her about work matters before she would go and join the other two girls.
- [4] She said that she went up on deck and sat on a chair at the table there. She said that there were 11 yachts between the Kepa and the Euribia, a distances of about 100 meters. The accused came and sat on another chair on the side. Mele arrived with the water and the complainant asked for and was given one bottle. She said that the accused told Mele to go and work with Sipola in the Euribia while he would talk to her about work and she would then come over to them afterwards.
- [5] She said that the accused then asked her if she wanted to continue working for the company in view of her leave for 2 weeks she had taken previously, and she said that she told him yes, that she wanted to continue to work and that she had only taken the 2 weeks leave because her husband was ill.
- [6] She said that he then went down into cabin of the second hull and told her to come down so he would show her what to scrub and scrape. She said she went down into the cabin where the bed was and that he told her to scrub the walls with janola and to scrape the silicone. She said that she had her back to the bed and was looking at what he was showing her, when he pushed her backwards onto the bed and lifted both her legs and touched her on her vagina, but with her undergarment and tight pants she wore still on her.

- [7] She said that he pushed his fingers with the fabric of her pants and undergarment into her vagina and she said, "what are you doing?" and that he said, "For us to have sex and to make you climax". She said she struggled and that she pushed him off and that he got up. She said she wanted to make him think that she was not afraid and so she said to him that she had not had a bath and that whenever he would ring her at any time, she would be sure to be ready for him, the following day. She said that he asked her if she was being truthful and she said that she was.
- [8] She said that the accused then went up the stairs and stopped on the second stair (step) and turned around and pulled his pants down and held out his penis and told her to come and suck him. She said that she said no and she pushed the door of the cabin to shut but that he pushed it open and pulled her hand to hold his penis and told her to make him climax.
- [9] But just then, she said, his telephone rang and he answered it saying, "Yes, Sila, I am at Pacific Timber getting the stuff for Manu. As soon as this is finished I will run over".
- [10] She said that he then pushed her hand off his penis, saying, "No one will climax that way" and then masturbated himself and ejaculated onto the floor. She said he told her to get a pillow case from the bedroom and wipe up the floor and put the pillow case in the bathroom and to lock up the yacht and go over to Sipola and Mele and work there with them. He then left. She said she heard the sound of his vehicle start up.
- [11] She said that she telephoned her husband and said "Soni, come and get me from work", and that when he asked why so early, she said, "Come right away", and turned the phone off. She said she then got the pillow case and wiped up the semen on the floor and put the pillow case in the bathroom. She said that she then locked up the Kepa and went to the Euribia and called and that when Sipola showed up she threw the key to her and said, "You finish off the work. I am going home. I am not coming back".

- [12] She said that Sipola said she could see Soni at the gate already and that she came down and walked with her to the gate because there was a ferocious dog guarding the place. She said that she could not talk to Soni because another man, Mosa'ati, was with him, until they got home to Masilamea and took a walk by themselves so that they could talk.
- [13] She then related to him what I have related above and that when she told him about the accused pushing his fingers into her vagina with her pants still on, she said that Soni was very angry and that she told him to wait until she finished telling him because nothing had happened and she continued. But when she told him of the accused holding out his penis and telling her to suck it, Soni became angry again said that they must go to the work place right away. But she said, they could not because someone had gone in the vehicle, and so the complainant then related to Soni what happened right up to when she called him on the telephone.
- [14] She said that Soni then rang the accused and that when he answered, Soni said to him, "What did you do to my wife and caused her to leave work?" She said that the accused turned the phone off.
- [15] She said that Soni told her to ring and tell the office what happened, and that she rang the assistant to the Manager, Pisila Pasikala, and told her that she had left work and would not return to work anymore. She said that Pisila asked her why? What happened? She said she cried and told her that it was the same thing that had happened to Talita Veleika, who was another female worker. She said that Pisila then told her to go to the police because it was something that happened personally to her, the complainant, and that Pisila apologised to her for what had happened to her. She said that Pisila told her that they (the company) would take the matter up with the accused himself.
- [16] She said that just then, the accused rang up and Soni answered it. He said: "Yes, Limoni, come over I am waiting for you at home. There is nothing wrong with my wife's mind. She is telling me the truth". She said that they waited but the accused did not come at all.

- [17] She said that she then went with Soni to the police station at about 11 am that same morning and that her complaint was written by the police and they returned home.
- [18] She said that Sipola and Mele telephoned her on the speaker and asked for some food and that she told them that she had no food because she and Soni had been to the police station and had complained about what the accused had done to her. She said she told them that he had forced her inside the yacht and that he had stuck his fingers in her vagina and had told her to suck him and that when she said no he forced her to masturbate him and then he himself proceeded to masturbate and ejaculated and told her to clean it up and lock up the boat and come and join them in the other yacht. She said that they were both surprised and said that they were frightened.
- [19] She said that the police rang her and asked her for the pillow case. She said she then rang Sipola and Mele but they had left. She said she and Soni went with the police to the yacht Kepa and that she led them to where the pillow case was, by the sink in the bathroom as she had left it. She said that photographs were taken and she identified the photographs taken, which were produced by consent as **Exhibit 1**. She marked on photo 16 where on the floor by the bed she was standing when she was pushed onto the bed. She also pointed in photo 14 to the step on which the accused stood and pulled his pants down and confirmed that that was her in photo 22 pointing at that second step from the bottom.
- [20] She said that she had struggled to get the accused off him and his fingers were inside her vagina for may be 3 to 5 seconds.
- [21] She said that she was afraid to shout or scream because she was afraid that he might do something to her.
- [22] She said that she did not consent to what the accused did to her. She said she did not consent to any of the things he did to her.
- [23] She said that in the past, the accused had joked about her to the other male and female workers. She said that at one time, they were preparing raw fish to eat and that the accused said, "If Fine's lower

under garment is taken off and is used to wring out the coconut, the coconut will be much more oilier!" She said that she responded to it and said, "Do not kick against the sharp edge, because that is sacred".

- [24] She said that at another time, the accused said to the others, "May be Soni had had enough after one sex act but that Fine still wanted another and another". She said that she responded that it was a matter personal to themselves because they were already licenced.
- [25] She said that on the Friday before that day, 20 February 2020, she and Sipola and Mele were at the yacht "Talasa" in the yacht yard and that the accused told Sipola and Mele to go to the petrol station and get some cakes for them to eat. She said that after they left, the accused went into the cabin and called her to come and lie down with him and that she told him no, and that it was cooler where she was. She said that he called 2 or 3 times but she did not go. She said that after may be 10 minutes, he came out and told her to tidy up the yacht and he left. She said that she then went down to go to the toilet of the yacht and slipped on his semen which she did not notice was on the floor. She said she was sure it was semen. She said it was a disgusting behavior of the accused.
- [26] **In cross-examination**, she said that she had started working for the company on 8 March 2017 as housemaid and yacht cleaner. She said that she had had 1 month leave at one time.
- [27] She said that on 20 February 2020 there were other workers working at the yacht yard but none was working on any of the yachts there.
- [28] She said she and the accused talked about her having been on leave for 2 weeks previously. She agreed that she had been late to work often. She said she was not penalised but was warned about being late.
- [29] It was put to her, and she denied, that she had laid down with the accused on the bed or that they had kissed or that they fondled each other's private parts.

- [30] She agreed that the accused did not threaten her or punch her or used any weapon on her, but that he did force her by pushing her and lifting her legs and that she had to push him off.
- [31] She denied that they had kissed and fondled or that they agreed to go to the company's boarding house.
- [32] She said she did not shout or call out because she knew that there was no one nearby for about 100 meters.
- [33] She agreed she had no bruise or mark on her body as a result of the incident.
- [34] She denied that she had sucked the accused's penis at any time let alone 50 times before then as was put to her.
- [35] When asked why she did not shout out, she said that she was afraid to, and that when the telephone rang, the accused held his finger up to his lips for her to be quiet and that she remained quiet because she was afraid that he might punch or beat her up.
- [36] She said that she did not voluntarily grab for him or that she sucked his penis. She said that he was holding her hand so that she would hold his penis.
- [37] She said that after the phone call, the accused was in a hurry and that he masturbated himself and ejaculated and left.
- [38] She denied that she had made up her evidence and she denied that she had sucked the accused's penis or until he ejaculated or that she had asked him: "What about my warning?" She denied that he said to her, "Your warning is still in force."
- [39] It was put to her that what she had described did not happen because she did not tell Soni about it on the telephone when she rang him and because she did not tell Sipola or Mele about it either, and she said that she was afraid that if she told Soni, Soni might be so angry that he might drive and have an accident and that she did not want to tell Sipola and Mele because she wanted to tell her husband, Soni, first.

- [40] She said that at the time she was afraid and that she cried after the accused left. She said she did not cry when the accused was there because she did not want to let him know that she was afraid. She said that she wanted to talk with Soni and then decide to go to the police.
- [41] She said that she was not dismissed from her work and that she herself resigned on the 20 February 2020 and that she was now working for Digicel. She said that the pillow case is still with the police.
- [42] She said that she did feel pain when the accused pushed his fingers into her vagina.
- [43] **In re-examination**, she said that she cleaned up the semen on the floor after the accused left because she was afraid that he might come back and find out she had not cleaned it.
- [44] She said that she was so afraid that she cried and that she was still crying when she called Soni on the phone. She said that she had not said anything earlier in her evidence about her crying because she had forgotten and that it was only when she was questioned by Mr. Latu that she remembered. She said that she wiped her tears so that Sipola and Mele would not know what had happened.
- [45] She said that the talk that she had had with accused about her lateness to work was on a prior occasion, and that their talk on this present occasion was only in respect of whether she wanted to continue working for the company when the busy season would commence again.
- [46] **Mr. Latu asked her** whether it was true that she was sacked from work on that same day, 20 February 2020, and she said – no. She said Pisila never told her she was sacked.
- [47] **Sione Tonga, also known as Soni**, said that he was the complainant's husband and that they have 7 children. He said that he took the children to school and the complainant to work that day at about 8 am. Then he went and got Mosa'ati and they went and did the shopping for preparing the food for the Conference. He said they finished shopping just when the complainant rang him at 9:31 am. His phone recorded the time of the call. He said she told him to come and

pick her up from work, and he asked her why, and that she said, "Hurry Come". He said that her voice was shaky like she was crying.

[48] He said that at that time, they were on the main airport road in Neiafu at about the Maamamo'onia hall of the Wesleyan Church, heading north to go home to Masilamea. He said they continued up that road and turned west on the Vaipua road where Masilamea is situated and travelled towards Masilamea, and that at Masilamea, he saw the accused driving towards them and going past them on his way from Vaipua. He said they continued to the yacht yard at Vaipua and stopped at the gate and the complainant walked up and got into their vehicle.

[49] He said they did not talk until they got home and just the two of them went for a walk because there were other people at home. He said that the complainant told him that when she was at work, the accused told Mele to go and get her water to drink and that when she returned, the accused told her to go to another boat while he and her talk about work. He said that she told him that the accused showed her what he wanted done in the boat and he went into the cabin below and called her to come down there and that she went down to the cabin. He said that she told him that the accused told her what he wanted done there and then pushed her onto the bed and lifted her legs up on his shoulders and touched her vagina. He said she told him that she struggled and she pushed him off and told him that she had not had a bath, and that she told him that he could ring her at any time and that she would come to him. He said that she said that the accused asked her if she was telling the truth and that she told him yes. He said that she told him that the accused then backed off behind the door and took his trousers off and told her to suck him and that she told him no and pushed the door to close but that he pushed it open and pulled her hand to his penis and told her to make him climax. He said that she told him that Pisila rang the accused up just then and that after he talked with her, the accused then shook her hand off his penis and told her that that would not cause any one to ejaculate and that he then masturbated himself and ejaculated on the floor and told her to get a pillow case and wipe it up and then he left.

[50] He said he noticed that she looked like she had been crying and that this was about 10 am and he told her to ring Pisila and she did. He said he heard her say: "I have come back from work and I will not work anymore because of what Leimoni has done to me. He tried to force me in the boat. He pushed me onto the bed and lifted my legs and he touched my vagina and I struggled and pushed him off and told him I had not bathed. I told him he could ring me any time and I would go with him. He then backed off to the door and took off his trousers and told her to suck him but she said no and went to close the door but he pushed the door and pulled her hand to his penis and told her to make him climax but that she, Pisila, telephoned him and that when the call finished, he shook off her hand and masturbated himself and ejaculated".

He said that she told him that Pisila told her to go to the police.

[51] He said that they then went to the police and that the time was then about 11 am.

[52] He said that when the complainant first told him what the accused had done to her, he got her telephone and rang the accused up, and that after the accused said "Malo Lelei", he said to him: "What did you do to my wife for her to come back from work?" He said the accused did not say anything and turned off the phone instead. He said he called him again 2 or 3 times but he did not answer.

[53] He said that he telephoned Pisila and told her to do something about the accused and that she said she would and she said that the accused was coming over to see them at their home but he never showed up. Instead, he said, the accused rang up on the complainant's phone and asked him: "What is this I have been told". He said that he said to the accused, "It is what you did to my wife to cause her to leave work". He said the accused said: "Tell your wife to stop lying" and that he replied: "My wife will not come and lie to me". He said the accused said to him: "Have your wife checked because she is not mentally well. In any event, there was no witness".

[54] He said that it was after that that they had gone to the police station.

- [55] **In cross-examination**, he said that he heard from the complainant's voice on the phone that she was crying. He agreed that he saw nothing odd about her appearance when he saw her. He said that she did not tell him about any warning she was given at work and that she had not told him about any disgusting behavior of the accused except his joking about her at work.
- [56] It was put to him that he and the complainant had fabricated the story that they have told the police and the Court and he denied it.
- [57] It was put to him that the complainant was unreasonable that she did not tell Sipola and Mele immediately when she saw them what had happened to her, if what she said was true, and he said that it was reasonable because she knew she had to talk with him first before they would tell others about it.
- [58] **Sipola 'Ealelei**, 19 years of age of Tefisi, said that she works as cleaner for Sunsail and that she worked with the complainant. She said that on 20 February 2020, she and Mele Mahe spoke by telephone to her and that the complainant said to them: "If you go to the boat you will find there something that is evidence". She said that they went and climbed into the yacht, whilst they were videoing where they were going, and they found a pillow case lying on the floor by the sink. She said she looked at it but saw nothing in it.
- [59] She said that she then noticed some liquid on the floor of the hallway by the door of the bathroom. She said it was not water or sweat and that it was whitish and she touched it and looked at her finger and she said that it was semen. She said she washed her hands and they left.
- [60] She said that when the complainant had given her the key she noticed that her eyes were red like she had been crying, and that even when she was speaking to her she was clutching her hands as if something had happened to her. She said that she looked across and saw Soni and that she told the complainant. She said she came down and went with her to the gate and she then returned to work.
- [61] **In cross-examination**, she said she was 20 years old and she was not married. She said that she knew what semen was because she had

studied it in the science class at the Vava'u High School and had seen video of it, but had not seen a male person ejaculate. She said that she and Mele went to the yacht at about 10:30 am, after they had rung and talked with the complainant. She said that she saw nothing on the pillow case but that she saw the semen on the floor by the door of the bathroom.

[62] She said that she had no boyfriend. She said that she felt the liquid with her finger and thought it was semen because the complainant had said that she had been forced.

[63] **There was no re-examination and I asked** and she marked on photograph 15 the spot where she said the liquid was on the floor. She made a small longish mark on the floor by the bathroom entrance. She also identified the pillow case shown in photos 3 and 4. She marked on the floor of the hallway just by the entrance to the bathroom in photo 3 a small longish mark where the semen was.

[64] **Mr. Latu asked** her and she said that the photographs were taken on that same day they had gone and seen the pillow case and semen because the complainant rang and told them that they were going to go and take photographs of the yacht.

[65] **I then asked** and she said that photos 19 and 20 showed the complainant and that the clothes she was wearing as shown in the photographs were the ones she was wearing that day.

Submissions and consideration

[66] Both counsel made detailed oral submissions which were all on issues of fact and one of law I will deal with the issue of law first.

Difference of evidence from particular in indictment

[67] Mr. Latu submitted that the Crown has failed to prove the charge against the accused. He said that the charge in the indictment is that the accused "fondled" ("ngaahi") the vagina of the complainant, but that the evidence which the complainant has repeatedly given was that the accused had stuck his fingers ("nanao") into her vagina and that that is not "ngaahi" or fondled. He said that is a big difference, and

that there was no evidence of "fondling" ("ngaahi") with which the accused is charged at all.

- [68] Ms. Kafa in reply submitted that there was no difference because the term "ngaahi" (fondle) includes "nanao", that is the insertion of a finger or fingers.
- [69] I have to say that the word "ngaahi" as it is used in the charge in the present case means more than "fondled" which is used in the English version. "Ngaahi" means, as it relates to a vagina, "to use the fingers to stimulate or excite" the vagina. It is a general term which covers any act carried out with the fingers and may include the insertion of the finger or fingers into the vagina.
- [70] So that in one sense, Ms. Kafa is correct that the term "ngaahi" includes the term "nanao" (the insertion of finger or fingers), but the term "ngaahi" means and is only used to describe a "process", a foreplay usually for sex. A single insertion of a finger or fingers into the vagina for 3 to 5 seconds (without more) is not a "ngaahi" because it is not a process or foreplay. So that in the present case, I do not agree that the insertion of the accused's fingers into the complainant's vagina for 3 – 5 seconds only was "ngaahi".
- [71] So I agree with Mr. Latu that the evidence of the complainant did not prove that the accused carried out a process or foreplay of "ngaahi" of the complainant's vagina. So I agree that there is a difference in the evidence from the particular described or stated in the charge.
- [72] However, that does not mean that the Crown has not proved the charge which it has brought against the accused, because that is a question of law. The question of law is whether or not the Crown has proved **the offence** with which the accused is charged.
- [73] The law which provides for this offence is S.124 (1) (2) and (3) (a) of the Criminal Offences Act and it provides as follows:

"124. Indecent assault

- (1) Any person who shall commit an indecent assault on any person shall be guilty of an offence under this section.
- (2) An offence under this section may be the offence of serious indecent assault or the offence of simple indecent assault.
- (3) The offence of serious indecent assault –
 - (a) Is punishable with imprisonment for any period not exceeding 5 years ...”

[74] The offence is therefore serious indecent assault, not “ngaahi”. The question is whether or not the accused committed, by putting his fingers inside the complainant’s vagina, but with the fabric of her under garment and tight pants, between his fingers and the inner wall of the complainant’s vagina, a serious indecent assault. It is not whether or not he committed the process of “ngaahi” which is stated in the charge, because it is only a description or a particular of the offence of committing a serious indecent assault, which offence was complete when the accused touched the complainant’s vagina with his hand.

[75] I therefore do not accept Mr. Latu’s submission that the Crown has not proved the charge against the accused because the Crown has not proved the particular in the charge of “ngaahi”. However, the Crown still had to prove that the complainant did not consent to the act of “nanao” which would, without consent, constitute serious indecent assault.

Consent

[76] Mr. Latu submitted that it was the burden of the Crown to prove that the complainant did not consent to the act she alleged the accused did to her. He submitted that the evidence produced by the Crown did not prove, let alone prove beyond reasonable doubt, which is the required standard of proof, that the complainant did not consent at the time of the act. In support of that submission, he referred to the following:

- (a) He said the complainant said that the accused had **forced (fakamalohi'i)** her but there was no evidence of any force used such as a bruise or injury or evidence of any force applied.

In response to that, Ms. Kafa said that there was evidence of force because the complainant said that the accused pushed her backyards onto the bed and lifted both her legs up and stuck her fingers into her vagina, and the complainant said that she struggled and pushed and she got him off her, and his fingers out of her vagina after they were there for may be 3 - 5 seconds.

- (b) He said that the complainant had not screamed or called out for help to other workers who were there at the yacht yard, especially when there was no allegation or evidence that the accused had used or had with him any weapon or had used any threat, for her to be quiet. He said that is consistent with consent on her part.

In response, Ms. Kafa said that the complainant gave evidence that there was no one nearby or within earshot to hear any call she would make so that any call she would have made would have brought no one to help her. She said that the complainant gave evidence that she was afraid that the accused would punch and beat her up if she called for help and that that was why she did not call for help.

- (c) He said that the complainant did not tell her husband on the phone what had happened when she called him up because she had consented to what the accused did to her. That is supported, he said, by the fact he did not tell Sipola of it either when she gave her key to the yacht. He also referred to the fact that the complainant did not go straight from the boat yard to the police and lodge her complaint, but took almost two hours to finally do so. He said that that was consistent with a collusion by the complainant and her husband to fabricate the story which the complainant then conveyed to the police and which she and her husband have given in this Court.

In response to that, Ms. Kafa said that the complainant gave reasonable explanations for all those. She did not tell her husband anything over the phone because she did not want her husband to have an accident while driving over to pick her up. As to not telling Sipola anything, Ms. Kafa said that the complainant and her husband were quite attached to each other because they have been married for over 10 years and have had 7 children and it was understandable that what had happened to the complainant was a matter that was personal to both of them only and the complainant wanted no one else to know about it then. As to taking nearly 2 hours to complain to the police she said that that was a very short period for the two of them to make up such a fool proof story, such as the accused has alleged. She stated that the complainant's and her husband's stories have been detailed and complete without any gap unfilled or unexplained. She said that despite the strong cross-examinations of defence counsel neither the complainant nor her husband waived in the evidence they have given.

I will deal with each of those 3 submissions.

Forced (Fakamalohi'i)

- [77] Mr. Latu says that there was no evidence of any force (fakamalohi) having been applied or used by the accused because there was no bruise or mark or evidence which have indicated that force had been used by the accused upon the complainant.
- [78] In considering this case, I have no other evidence but the evidence of the complainant and of her husband and their witness Sipola. The complainant's evidence is that the accused pushed her backwards while she was standing with her back to the bed. She showed me the bed. It was raised up from the floor and it had a mattress on it. That is shown in photograph 15. She marked in the photograph where she was standing beside the bed before she was pushed. She would have fallen on the mattress on the bed and would not likely to have suffered any bruise from the fall.
- [79] She said that the accused lifted her leg up, obviously with his hands, but her leg were both covered by her tight pants which came down to

her calves. That is shown in the photograph 22. Those were the clothes she wore at the time of this incident. So that there would not likely to be any bruise or mark made on her legs by the accused's hands when he lifted her legs up.

[80] She said that the accused stuck his fingers into her vagina by pushing his fingers, with the fabric of the under garment pants she said she had underneath and of the outer tight pants she had on the outside, being pushed into her vagina as well. That meant that his fingers would not likely to have caused any scratch or bruise to her vagina. She said that she had no bruise and I accept that as fact.

[81] She said that she did not consent that the accused could do that to her and that she acted and showed that she did not consent to it by struggling and pushing and succeeding in pushing him off her and having his fingers out from her vagina.

[82] By then the serious indecent assault had been committed and completed without and against her consent. It had been committed by force against her will.

No scream or shout for help

[83] This submission of Mr. Latu is that the complainant had all the time and the energy to call, shout and scream for help but that she did not do so, because she had consented to the insertion of the accused's fingers into her vagina.

[84] I do not agree. I agree with Ms. Kafa. It was not because the complainant had consented that the accused could do that to her but because she was afraid of what the accused might do to her if she did. She said so herself. She said she was afraid that if she did shout or scream or call out, the accused might punch her and beat her up.

[85] But that is after the offence had already been committed and completed as I have stated above. Thereafter, she was standing up and the accused was not on top of her and her legs were not lifted up and she was not lying on the bed on her back inside the cabin of the yacht, as she had been before and during the time of the offence. At the time of the offence, I do not think that she could have called out if

she had wanted to. Nobody in such a position could have been able to call for help if she, or he, wanted to.

- [86] So I do not think that it is a reasonable indication of consent, in the case of the complainant in the present case, that she did not call out for help, when the accused pushed her backwards on the bed and then immediately lift her legs up, to indicate to the accused that she did not consent that he put his fingers into her vagina. I consider that in the circumstances, or rather the predicament she was in, she could not call out at all. She had no time to as well.

Fabrication

- [87] Mr. Latu said that the complainant and her husband have fabricated the story and evidence which they have given because the complainant did not tell her husband that story immediately when she spoke to him on the telephone to come and get her, and because she did not tell Sipola whom she saw immediately after speaking to her husband.

- [88] The most that I can make of that submission of Mr. Latu is that there is no evidence to support or to corroborate the evidence of the complainant.

- [89] The law in Tonga is that there is no need for corroboration of the evidence of a complainant in a sexual offence. That is provided for in S.11 (2) of the Evidence Act (as amended on 26 March 2020) which provides as follows:

“11. (1) ...

- (2) Where any person is tried for any sexual offence under sections 118 to 137 of the Criminal Offences Act or for any other offence of a sexual nature, no corroboration of a complainant’s evidence shall be necessary for the accused to be convicted, and in any such case the Judge shall not be required to give any warning to the jury relating to the absence of corroboration.”

- [90] I note that that amendment came into force after the date of the offence which is now before me in this trial, namely the 20th February

2020. Can that amendment be applied in this case? Or would its application be retrospective and be in breach of clause 20 of the Constitution which provides:

“20. It shall not be lawful to enact any retrospective laws so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.”

[91] The answer is that it can be applied in the present case, not because it is not retrospective but because it is only a clarification of the law before the amendment was made. It did not change the law in so far as corroboration is concerned. That is because subsection (1) of S.11 of the Evidence was and is still part of the law of evidence. It provides as follows:

“(1) In all criminal proceedings for rape or other sexual offences in order to corroborate the testimony of the person injured by the commission of the crime which forms the subject of the charge evidence that such person at or shortly after the crime was committed voluntarily made a statement relating to its commission may be given. Such statement shall not in anywise be considered as constituting additional or independent evidence of the crime but only as showing that the person’s conduct is consistent with his evidence at the time.”

That provision does not provide or require that there be corroboration of the testimony of the complainant. It simply provided that an early or fresh complaint is to be accepted as corroboration although it constituted no additional or independent evidence.

That is all that subsection 2 has now provided expressly.

[92] So that the point that Mr. Latu has submitted, that the evidence of the complainant is not corroborated because no early or fresh complainant to either the husband or to Sipola or to the police was made, has no relevance because –

(a) corroboration is not required by the law, and

- (b) it is not the law that the complaint must be made to the first person who shows up, and
- (c) in any event, the complaint was made to the first person who showed up, her husband, the one she rang up immediately when she had the opportunity.

[93] I agree with Ms. Kafa and I believe the evidence of the complainant. Her evidence is consistent and it is supported by the evidence of her husband and by the co-worker Sipola. I believe her evidence, that she acted and she spoke as she did in the presence of the accused in order to show him that she was not afraid and that she could look after herself in his company, and she did have the accused believe that she could, because she could push him off her and talk as if she did not mind to have sex with him, but that he should appreciate that she was dirty, and that she would not like him to think that she was like that all the time, and that she wanted to be nice and clean for him. He believed her because he did not force or ask her to have sex with him anymore. He was willing and he proceeded to masturbate himself instead when she refused to even suck him off.

[94] But when he finally left, she cried. One would have thought she would have jumped for joy but she didn't because she was afraid in all the time that he was there and she showed it then. Her husband heard her voice and thought she was crying. That is corroboration of her evidence. Sipola said she saw that her eyes were red as if she had been crying. That is corroboration of her evidence as well.

Admission

[95] Finally, I consider that there is evidence that the accused admitted that he did what the complainant has said that he did to her. That evidence was given by the complainant's husband when he related his telephone conversation with the accused as I have stated in paragraph 53 above which I set out for ease of reading:

“Accused : What is this I have been told?

Husband : It is what you did to my wife to cause her to leave work.

Accused : Tell your wife to stop lying.

Husband : My wife will not come and lie to me.

Accused : Have your wife checked because she is not mentally well. **In any event, there was no witness.**"

[96] I have underlined the words the accused said: "In any event, there was no witness" because he thereby admitted that what the wife (the complainant) had said he had done to her could not be proved because there was no one else present to support what she has said. He thereby confirmed that he was alone with the complainant and had done what she said he had done to her but that no one, other than himself, would support her story because no one else was there.

Conclusion

[97] Taking that into consideration, together with all the evidence I have heard in this trial, and the exhibits which have been produced, and agreeing with Ms. Kafa as counsel for the Crown with the submissions which she has made, I am satisfied beyond reasonable doubt that the accused committed serious indecent assault upon the complainant on 20 February 2020 at Vaipua such as he is charged in this trial, and I convict him accordingly.



A handwritten signature in black ink, appearing to be "Niu J", is written over the seal and extends to the right.

Niu J

J U D G E

NEIAFU: 9 March 2021.

