

Sean + H.L.

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

CR 172 of 2020

REX
-v-
FALEU TAILONI MAFI

REASONS FOR VERDICT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: Mrs 'A. Aholeilei for the Prosecution
The Accused in person
Date of trial: 12 May 2021
Date of verdict: 12 May 2021

1. At the conclusion of the evidence and submissions in this case, I delivered my verdict ex tempore. This is the transcript of my reasons for verdict, edited as to form only, not substance.

The charges

2. The accused stands charged with one count of serious housebreaking contrary to ss 173(1)(b) and (5) of the *Criminal Offences Act* and one count of serious indecent assault contrary to ss 124(1) and (3) of the said Act.
3. The particulars of the alleged offences are that on or about 2 April 2019 at Fonongahina, Tokomololo, the accused entered the residence of Lavinia Faingata'a, as a trespasser, and committed a crime therein. In respect of the second count, serious indecent assault, it is alleged that on the same date and place, the accused indecently assaulted Lavinia when he inserted his finger into her vagina without her consent.
4. The accused was self-represented. He confirmed at the outset that he had received and familiarized himself with the information provided by the Court and served by the Crown being a guide for self-represented defendants in relation to the criminal trial process. He was also relatively fluent in English.
5. In opening, the Prosecutor, Ms 'Aholeilei, indicated that the Crown had proposed to call three witnesses. Apart from the complainant, two other witnesses were in Vava'u, apparently for a funeral. The Prosecution had not been able to contact those witnesses by telephone yesterday. The Prosecutor then indicated that she would consider whether they could be contacted for appearance tomorrow given

25 MAY 2021



that the trial had been set for three days. It transpired after the complainant's evidence, to which I will turn shortly, that the Crown elected not to call those other two witnesses. I will say more about that in due course.

6. Ms 'Aholelei helpfully identified the elements for each of the offences, to be proven by the Crown beyond reasonable doubt. In relation to the housebreaking charge, the elements are that the accused, entered the complainant's house, as a trespasser, within intent to commit a crime therein. In relation to the serious indecent assault, the requisite elements are that the accused, intentionally assaulted, the complainant, when he inserted his finger inside her vagina (being conduct contrary to notions of decency held by right minded persons), without her consent.
7. There were no documentary exhibits tendered during the trial.

Lavinia Faingata'a

8. The complainant, whom I will simply refer to as 'Lavinia', gave the following evidence.
9. She is 22 years of age. She is in a de-facto relationship with a man by the name of 'Alifa Hurrel. She has a four-year old daughter. She first met the accused, who was one of her de-facto husband's friends, when he came around the week before the day in question to give 'Alifa the use of a rental car.
10. On 2 April 2019, the accused came to the house a number of times that day to ask 'Alifa for money. Lavinia had nothing to do with those conversations. 'Alifa then went to get a tutu plant, which he then sold, and from the proceeds of which, he gave the accused \$50.
11. In the early evening, police arrested 'Alifa for stealing the tutu plant. He ended up being remanded in custody for the next two weeks.
12. Later that evening, one of 'Alifa's young friends by the name of 'Pita' was also at the house, 'just helping out', together with Lavinia's young daughter. Around 10 pm, Lavinia was sleeping when she was woken by Pita telling her that the accused was there and that he wanted the keys to the rental vehicle so that he could take it the next day. Lavinia told Pita to give the keys to the accused and she then went back to sleep.
13. Lavinia was then again woken by feeling somebody behind her (in a 'spooning' position) touching her left breast and putting their hand between her legs and eventually inserting their fingers inside her vagina. There were no lights on in the house or from the street. She was wearing long pants and a hoodie at the time. She thought it was her partner 'Alifa. She did not recall how long the touching went on for before she realized it was not her husband. She called his name. The person said "It's me" and the hand withdrew. She recognized the voice as being someone else. She asked the person (still then thinking it might have been her

husband) how it was possible that he was released from the police station. The person replied that he was released a while ago but that he went out to drink alcohol. She could smell alcohol on his breath from behind her.

14. At that point, Lavinia said she 'felt weird'. She stood up, took her phone from under the pillow and shone the phone flashlight on the face of the person touching her and saw that it was the accused. The accused, who was wearing black shorts and a blue t-shirt was sitting at the back of the bed. He became angry. He told Lavinia to turn off the torch and that if she didn't, he would shoot her. She asked him how he entered the house. The accused told her that he came in while the police were conducting a search. Lavinia said that there had not been any search of the premises by police that night. She called out to Pita, only to find that he had 'fled' the house.
15. The accused then produced a handgun from the chair behind him and pointed it at Lavinia. She stopped calling for Pita. The accused told her not to move or do anything so that he could 'do what he wanted to do'. Lavinia said she tried not to be scared. She asked the accused not to shoot her. She then ran outside. The accused remained inside the house.
16. Lavinia called the police. A female officer answered. However, before she could say anything, the accused came out and took the phone off Lavinia. She then noticed a vehicle approaching belonging to one of her husband's friends by the name of Viliami. He was one of the other witnesses the Crown proposed to call but was not able to contact. Lavinia tried to let Viliami know that she needed his help. The accused went over to Viliami's vehicle. Lavinia tried to run after him towards the vehicle when another person, by the name of Owen, appeared and pushed her back toward the house. Both Lavinia, who knew Owen because he 'always hung around town', and the accused, described Owen as being 'insane'. Owen told Lavinia that the accused had told him that if she did anything to let Viliami know she needed his help, the accused would shoot her.
17. When he went to speak with Viliami, the accused left Lavinia's phone on the chair from behind which he earlier produced the gun. She grabbed her phone and tried to call her husband's brother by the name of Sione. She rang his number, but because she had no credit, the call could not go through, so she pretended to be talking to him. Meanwhile, Owen, who was inside the house waiting for the accused, now had the gun.
18. While she was still outside, Lavinia asked the accused to leave the premises. She said that, in response, he apologized to her and asked her not to tell 'Alifa what had happened because he, the accused, was 'too drunk' and he thought Lavinia was 'his wife'. She did not accept his apology because 'what he did was wrong'. The accused did not reply further. He then called Owen and they left in the silver rental car.

19. Lavinia said that, all up, the accused had been at her house that day for about two hours.
20. Lavinia then messaged 'everyone' asking them to call her because she had no call credit. Eventually, Viliami and his wife, Kalo (the other witness proposed to be called by the Prosecution), contacted her. She asked them to come over and talk because she was 'in a difficult position', which she explained as meaning that she was in trouble and felt helpless. They agreed to come over. Lavinia then called the police and eventually went to the police station and submitted a complaint.
21. The accused cross-examined Lavinia. He put to her that the reason he came to the house that evening was because he wanted her to pay for the rental car. She denied that because, as she said in her evidence in chief, she did not have any dealings with the accused or her husband about money for the car. She also denied that she or her husband had been renting the car for about the last week prior to that day. The accused also put to Lavinia that she told him to wait until her husband got back before taking the rental car. She denied that and reiterated that she was not involved in any discussions about money in relation to the rental car.

The accused

22. The accused gave the following evidence. The week before the day in question, 'Alifa had asked the accused for a vehicle. The accused rented a vehicle and lent it to 'Alifa. The following Saturday, the day in question, he went to their house to get \$250 from 'Alifa because the accused 'had a problem'. He did not elaborate on that problem. 'Alifa said he would get some tutu plant to sell in order to give the accused the money.
23. 'Alifa, Lavinia and Pita went and took some tutu from a neighboring allotment. The accused said that he took them and the tutu to a place where they were to sell it. He was then told to come back in the afternoon for the money.
24. The accused returned around 8:00 p.m and asked Lavinia if 'Alifa was there. She told him that 'Alifa was at the police station because of the stolen tutu. He then asked Lavinia for the keys to the rental vehicle. She told him to wait for her husband to come back from the police station. The accused said he had to take the vehicle now because they had not paid anything for it. She then gave him the keys. He said that Owen drove the rental car and that he drove away in his car that they had come in. There was also a third person present in the accused's vehicle, a man by the name of Simone, who remained in the accused's vehicle. The accused informed the court that he did not intend to call either Owen or Simone to give evidence at the trial.
25. And so, according to the accused, that was the end of his involvement with Lavinia that evening.

26. In cross-examination, the accused said, in summary, that:
- (a) Lavinia had lied about all the salient aspects of her evidence making up the elements of the two alleged offences because she was angry that he took the rental car that night;
 - (b) in response to puttage by the Prosecutor, he was frustrated about not having received any money for the rental car from 'Alifa, but that did not cause him to take advantage of Lavinia when he saw her sleeping;
 - (c) he had not consumed any alcohol that day;
 - (d) when he came to the house the second time that day, it was raining and the gate to Lavinia's residence was locked. He told Pita, who was outside, that he was there to get the money. Pita unlocked the gate and let him in. The accused thought that 'Alifa was inside the house. He parked outside the house. He got out and asked Pita where 'Alifa was. Pita told him that Lavinia was inside the house;
 - (e) Lavinia told him that 'Alifa was at the police station, that she asked him to wait until 'Alifa got out of the police station but that he asked her for the keys because he needed to take the car because they had broken part of it and had not paid any rent for it;
 - (f) Pita was outside the house while he was talking to Lavinia;
 - (g) when he left the house, he did not see Pita;
 - (h) he did not have any gun with him at the house that night; and
 - (i) he was at the house for less than 15 minutes.
27. He also explained in answer to a question from the Bench that even though the alleged incident occurred more than two years ago, he had not once asked 'Alifa since for the money owed. When asked how his contention that Lavinia had fabricated her evidence because she was angry that the accused took the vehicle away that evening could alter the fact that, according to the accused, her husband still owed the accused money, he did not answer.
28. The accused said that, since the night in question, his only contact with 'Alifa was when he was passing a friend's house one day and he saw 'Alifa there. He spoke to him about Lavinia's complaint to the police. The accused was due to appear in the Magistrates Court that day in relation to this matter. He said that 'Alifa told him that the case has been dismissed because Lavinia had withdrawn her complaint. For that reason, the accused said he did not appear in court. He did not check with the police or the Magistrates Court about that. Subsequently, he was arrested for drunkenness. When released the next morning, he said the police told him about an outstanding warrant for his failure to appear at the Magistrates Court for this matter. He said he told the police all the evidence that

he had given in court this day. There was, of course, no independent evidence from the police on behalf of the Prosecution, one way or the other about that.

Submissions

Accused

29. In closing submissions, the accused repeated his evidence and reiterated that he was only there that evening to collect money for the rental car. He denied doing anything to Lavinia as alleged. He emphasized that he had simply been trying to help her and her husband through provision of the car.

Prosecution

30. The Prosecutor submitted, in short, that it was highly unlikely that Lavinia, who had only then recently met the accused, would fabricate such a story and that the court should accept her evidence as being more reliable than that of the accused.

Consideration

31. In considering the competing, and relevantly diametrically opposed, accounts between the complainant and the accused, I have kept keenly in mind that the Crown, at all times, bears the onus of proof in relation to the elements of each of the offences. I have also had regard to the demeanour of each of the complainant and the accused during the course of their evidence at trial. I have also considered the accused's evidence about the reasons he considers Lavinia has fabricated her complaints in this case.
32. After considering those matters, and all the evidence before the court, I have no hesitation in accepting the evidence of Lavinia. For a person who had only just recently met the accused, she gave a highly detailed account. Her evidence was clear and consistent, and she was unshaken in cross-examination. The detail in her evidence was not of the sort which, in the court's experience, can be easily defended when subjected to scrutiny.
33. I do not draw any adverse inferences from the fact that the Prosecution did not call Viliami or his wife Kalo or Pita or 'Alifa for that matter for the very simple reason that the core of Lavinia's evidence was what occurred in the bedroom when she was sleeping that night; something which the accused said simply did not happen at all. Similarly, I do not draw any adverse inferences from the accused's unexplained failure to call Owen or Simone. Their evidence may well have been relevant to issues such as the gun referred to by Lavinia.
34. The fact that I accept the complainant's evidence is sufficient alone to support a finding of guilt. That corroboration for a conviction in relation to sexual offences is no longer necessary has been confirmed by s 11(2) of the *Evidence Act*.

35. However, for completeness, I will add why I did not accept the accused's evidence. The logic or plausibility of his simple account that he was at the house that evening only to recover monies he considered were owing to him for the use of the rental car was belied by subsequent events. His asserted belief that Lavinia made up the charges because she was angry that the accused took the rental car could not have affected the fact that her husband still owed the accused money and he was still entitled to recover the vehicle. It is possible perhaps, that if, as a result of the complainant making up the charges, the accused was imprisoned, her and her husband may be practically free of the debt to the accused. But in my view, that is highly fanciful. Further, it was something which was never put to Lavinia by the accused during the trial.
36. The other weakness in the accused's defence was the fact that over the past two years or more, he had not asked 'Alifa for the money he said was the reason he was there that night.
37. From my assessment of the evidence I do accept, I find that the accused went to the house that night to collect the car. However, once he became aware that 'Alifa was not in the house and he found Lavinia sleeping, he decided to take advantage of her in the way that she described.
38. No issue has been raised about whether the elements of the two offences have been established upon acceptance of the complainant's evidence. For completeness, the elements of the serious indecent assault, which in my view, is the more serious conduct here, despite the statutory differences in maximum penalty, are as discussed by Chief Justice Ford in *R v Taufau* [2007] Tonga LR 90¹ where his Honour described the elements the Crown must prove in order to establish a charge of indecent assault as:
- (a) firstly, an assault being the intentional application of any degree of force;
 - (b) secondly, that the assault was indecent, applying standards commonly accepted in the community; and
 - (c) thirdly, the accused knew what he did would be indecent in that sense and he deliberately carried on with the assault in that knowledge.
39. In my view, Lavinia's evidence establishes each of the elements of serious indecent assault.
40. Prior to that offending, that the accused committed serious housebreaking in accordance with the elements outlined by the Prosecution in opening is again established by Lavinia's evidence. The accused entered her house, as a trespasser, meaning that given that Lavinia was asleep at the time, he did not have her permission to enter and he did not leave when she demanded he do so,

¹ Even though His Honour was concerned with a charge under s 125 of the *Criminal Offences Act*, the elements stated above apply here to a charge under s 124.

and he was there with the intention to commit a crime, namely, serious indecent assault.

Result

41. For those reasons, I am satisfied the Crown has proven its case beyond reasonable doubt and I find the accused guilty on both counts.

NUKU'ALOFA
12 May 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE