

Crown. / Sisiifa
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Puloka

29/09/11

IN THE SUPREME COURT OF TONGA
Criminal Jurisdiction
NUKU'ALOFA REGISTRY

CR Case 02 of 2010

THE CROWN

V

RAY HU'AHULU

BEFORE THE HON MR. JUSTICE SHUSTER
SENTENCING DATE 09th SEPTEMBER 2011 @ 14.00
MR. M KAUFUSIS REPESENTED THE DEFENDANT

SENTENCING REMARKS

The defendant was charged on an amended indictment filed in the Supreme Court on 24th August 2011 alleging a single count of rape. The defendant pleaded not guilty to the charge and maintained his election for trial by judge and jury as of course is his legal right.

Amended Count One

RAPE contrary to section 118 (1) (c) of the Criminal Offences Act (Cap 18) particulars: -
RAY HU'AHULU on or about 30th August 2009 at **LONGOTEME** you did have carnal knowledge of **SENETI MO'UNGA** against her will by inserting your penis inside her vagina, and being aware that she was feeble minded.

The substantive trial of this matter took place on 23rd, 24th and 25th August 2011 before a jury, and the defendant was represented by Mr. M Kaufusi. On 25th August 2011 the defendant was convicted by the jury - for the crime of rape. After conviction the defendant was remanded in custody for the preparation of Pre Sentence Report. It should be noted that the defendant is not a first time offender and he does admit that he has a drinking problem.

THE BRIEF FACTS

The prosecution claimed that on the night of Saturday 30th August 2009 there was a funeral at LONGOTEME which was attended by the complainant and her mother. The funeral was held at the Catholic Church and a commemorative, tea was to commence at around about 17.00 the sane date

The defendant was at his home which overlooks the Catholic Church. According to the Crown the defendant had been drinking alcohol, after he had attended a rugby match.

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The Crown say at a point in time the defendant saw the complainant, who had travelled to Longoteme with her mother to attend the funeral, they were both sitting outside the church hall waiting for tea

The prosecution claims the defendant signalled to the complainant, and they met and they both talked outside the Longoteme church hall for a period of time. The defendant claimed he did not know the victim's name and he also agreed that they had never met before.

The prosecution claim that after a short period of time, the defendant led the complainant [by her hand] - to a "little house" - where the defendant said they had sexual intercourse - he claimed with the complainant's consent.

The prosecution claims however, that the defendant had been told by the complainant's mother, that her daughter was in fact - feeble minded - prior to the commission of the offence: though this was strongly denied by the defendant and that complete denial was maintained during the course of the trial.

The prosecution claimed - that it would be obvious to anyone even after even a short period of time spent in the company of the complainant; that it would be obvious to anyone that the complainant was in fact feeble minded. The Crown claim the jury must have also formed that opinion - as a FACT - and having seen the complainant in person - I have to agree with that submission

The prosecution claimed when the complainant's mother - went looking for her daughter after the complainant had failed to return from using the bathroom - her mother found the complainant at that, "little house" along - with the defendant.

According to the prosecution the defendant admitted to having sexual intercourse with the complainant [1] to the complainant's mother and [2] in his ROI with the police, but he claims - that at the time of the commission of the offence, he did not know the complainant was feeble minded and he believed she consented to the act.

According to the Crown when she found her daughter together with the complainant, in those circumstances; the complainant's mother told the defendant that she would sue the defendant and according to the prosecution - at that point in time - they say the defendant apologized to the complainant's mother.

However according to the defendant [via his ROI and also via his testimony to the court] - he maintained it was only when the complainant's mother found the two parties, "together at the little house," that the complainant's mother - told the defendant that her daughter was feeble minded. It is obvious the jury chose the complainant's mother's evidence over the evidence of the defendant

Bearing all these facts in mind, the prosecution say the defendant is guilty of Rape and the jury has agreed with them.

The Crown's case is that the complainant could not consent to having sexual intercourse - because according to her attendant psychiatrist, the complainant has a mental age of around - **five years** - and, she had maintained that status - from her early childhood - up to the present day and unfortunately the complainant's status - will not improve.

DEFENCE VERSION

On the other hand, the defence claimed the complainant was a willing party to sexual intercourse and that she consented to the act - described in the indictment. As part of the evidence the defence claimed the complainant willingly undressed herself, whereas the complainant stated the defendant undressed her.

The defendant gave evidence that he did not know that the complainant was feeble minded, and as such she consented and he was not guilty of - rape - unfortunately the all male jury found against him. Further he admitted he did not know or enquire of her name.

RAPE

Section 118 (1) (c) COA

A person commits **RAPE** – if he carnally knows any female

[c] Being aware that she is feeble minded, insane, or, is an idiot or imbecile as to be incapable of giving or refusing consent

THE CROWN SAYS –

- The defendant is 27yrs old single the alleged victim is 23, with a mental age of 5 years.
- The complainant is of feeble mind – and under our law deserves our protection.
- The defendant took the victim to a little house used by "the boy's "
- The defendant was the instigator of the act - when he took his victim to that secluded house
- The defendant removed the victim's clothing and
- The defendant admitted having sexual intercourse and
- The defendant admitted ejaculating inside the complainant's vagina.
- The defendant used no protection - no condom or withdrawal
- All factors considered - the Crown say the defendant is guilty of rape.

For the purposes of a charge of **RAPE - THE LAW IS VERY SPECIFIC** - about the meaning of consent.

The complainant consents - **IF AND ONLY IF**

(i) She had the **FREEDOM** and also the **CAPACITY** to make a choice and

(ii) She exercised that choice - to **AGREE** to intercourse.

- That agreement need not be given in words - provided the woman was agreeing with her mind.
- A woman clearly does not have the freedom and the capacity to make a choice –
- If she is forced, or, she is unconscious, through the effects of drink - or
- She is suffering from lack of sleep or,
- She is feeble minded or, an idiot or, an imbecile and she is incapable of consenting or refusing consent

CONSENT HAS A PARTICULAR LEGAL MEANING.

- A woman, consents only if she agrees by choice and at the relevant time,
- She has both the **FREEDOM AND THE CAPACITY** to make that choice.
- To prove the complainant did not consent, the prosecution must make the jury sure on all the evidence the complainant did not give her agreement, by an exercise of her free choice.

- A jury will decide whether, in the context of that particular encounter, if **consent** was **freely** given by the complainant - as alleged by the defendant. They did and they did not believe the defendant they convicted him. And this was an all male jury.

ANALYSIS

I told the defendant that he had been convicted by a jury of his peers – by an all male jury. I told the defendant that he had the right under the Constitution to elect and to have - a jury trial: but, that said, if a defendant runs a contested trial then a Court- can give him little or no credit, when it comes to considering sentencing submissions – ostensibly because the effect of conducting the full trial process will have put this victim and also her elderly mother, through a certain amount of trauma – by attending court and by having to give intimate evidence at trial before strangers and that is well established sentencing tradition involving sexual abuse cases

I told the defendant however, that I do give him credit - for accepting the jury's verdict to the Probation Officer and the Court today - and for him co-operating in the preparation of a Pre Sentence Report. I told the defendant that my starting point for anyone charged with the rape of a feeble minded person on a Not Guilty plea, was a sentence of between 13-14 years imprisonment at the higher end of the scale with 8 years on a guilty plea. I told the defendant this is because people in that class - of "feeble minded persons" deserve protection as members of our society as - vulnerable persons.

The facts of this case as presented by the consultant psychiatrist reveal the complainant has a mental age /of five years and that she is incapable of giving her implied consent. The defendant admitted that he ejaculated inside his victim's vagina without using any precautions and that is in my view an aggravating feature, because the victim would experience great difficulty in being able to properly look after a child if she had been impregnated by the defendant and she had to give birth.

I told the defendant because he has apologized and has accepted the jury's verdict then I was prepared to reduce the 13 year sentence down to ten years, by way of suspending the last three years of that sentence. This case deserves a high tariff sentence, because the victim deserves society's protection, and I am satisfied the defendant knew that the victim was feeble minded - before he committed this act. The jury must have also fully accepted the evidence of the victim's mother, and the consultant psychiatrist in order to convict the defendant.

Accordingly, I am satisfied the defendant committed this crime knowing full well that his victim was feeble minded and had been so all her life. In my respectful view the defendant befriended the victim, as she described, that he led her to a secluded house where he undressed her and he held her as she described to the jury - she said SHE SAID SHE SAID NO TO HIM - yet the defendant pressed on and he raped his victim.

In my view respectful view the defendant was reckless - he just did not, or could not care less about the complainant – He had intercourse with her and she is and was at the time incapable of giving proper informed consent.

The defendant was found guilty by the jury and he is convicted as charged.

ORDER

Having heard all the facts during the trial, the court concludes there is a need to protect vulnerable people in society and this crime requires the imposition of a deterrent sentence on the defendant near to or at the top end of the sentencing scale.

Accordingly, in this case on the facts heard the defendant is sentenced to serve **THIRTEEN** years in prison - with the last **THREE** years to be suspended - conditional upon the defendant being of good behaviour and keeping the peace and committing no further offences.

The sentence is to run from the date of his first remand into custody which was 25th August 2011



Shuster J

SHUSTER J