

SOLICITOR

Judgment file



27/08/09

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

NO. CR. 98 of 2009

R E X

-V-

SULIASI VAHA'I

BEFORE THE HON. CHIEF JUSTICE FORD

Counsel	:	Ms Lavakei'aho and Ms Finau for the Crown and Mr Kengike for the accused
Dates of trial	:	17 and 18 August 2009.
Date of submissions	:	26 August 2009.
Date of Judgment	:	27 August 2009.

JUDGMENT

The charges

[1] Suliasi Vaha'i, the 44-year-old accused, is charged with two counts of indecent assault contrary to section 124(1) of the Criminal Offences Act (Cap 18). The complainant is his 19-year-old daughter.

[2] The particulars in the indictment in relation to the first count allege that on or about 29 April 2009, at Popua, the accused indecently assaulted the complainant by touching her buttocks without her consent. The particulars for the second count allege that on or about 10 May 2009, at Popua, the accused indecently assaulted the complainant by touching her on her buttocks without her consent.

[3] The accused gave evidence and called his son, Sifa, as a witness. He denies the charges and says that neither incident happened. He maintains that the complainant made up the allegations as an excuse for leaving home. The background to the case is rather complicated.

The background

[4] The accused and his wife had three children, two girls and a boy. The complainant was the youngest child. Before the complainant's first birthday, her parents separated. The accused at that stage was a musician with a band. He played the banjo. The separation came about when the accused took a dance group on a tour to Japan. He did not return to Tonga but went to the United States where he remained for approximately 15 years. The children were fostered out. The complainant was fostered by the accused's older sister and her husband.

[5] The accused returned to Tonga in 2005 when the complainant was 15 years of age. The day after his return, he met with the complainant (she had never met him before) and they went to live at Popua. The son and brother, Sifa, also lived with them. The reunion appears to have been a success. The accused told the complainant that he wanted to continue raising her. The complainant told the court that she loved her father and the feeling appears to have been reciprocated.

[6] At that stage the accused had become a fisherman. The complainant told the court that on some occasions after he returned from fishing the accused would consume alcohol and when he was drunk he sometimes assaulted both her and her brother.

[7] There was evidence which indicated that the accused became over-possessive in relation to the complainant and he was unhappy about her associating with boys or using a cell phone. He seems to have imposed a rather strict disciplinary regime and there was other evidence which suggested that the complainant may have reacted a little rebelliously. The accused admitted in cross-examination that when the complainant and her brother were disobedient he would beat them but he said that that did not happen as frequently as the complainant made out.

[8] Approximately 4 months before the alleged first incident, the accused's nephew and his wife, 27-year-old Ane Vaha'i, and their children came to live with the accused at Popua. Ane was called as a witness for the prosecution. She told the court that she had five children but she referred to only three children living in the house at Popua. The house was described as having

only two rooms -- a livingroom and a bedroom. The accused and Sifa slept in the livingroom; the accused on a bed and Sifa on the floor. The complainant slept in the only bed in the bedroom, top and tailing with Ane's 14 month-old son. Ane and the other two children slept on the floor. Ane's husband slept at a neighbour's house.

[9] There are two other background matters which need to be mentioned. First, the accused volunteered in his examination in chief that he was presently in Huatolito Prison. He explained that approximately a month ago he had been convicted in the Magistrate's Court on two counts of assault on his daughter, the complainant in this case, and the magistrate had sentenced him to six months imprisonment on each charge with the sentence imposed being made consecutive resulting in a total sentence of one year's imprisonment. It is not clear when the offending took place but, for reasons which will appear later, the assault incidents would have occurred prior to the alleged indecent assaults.

[10] The other background matter relates to the so-called house that the accused lived in at Popua. In the course of the evidence there was mention made by all the witnesses to a hole in the wall of the house made, apparently, about the time of the second alleged indecent assault. Although the evidence was vague, the accused appears to have formed the view that the complainant had deliberately made the hole in the wall so that she could communicate in some way with boys. At one point, the court asked the accused to describe the size of the hole he had referred to and he explained that it was not really a hole but rather the whole wall had come away with the nails holding on one side only. The complainant had claimed that the wall had come away when her feet knocked against it while she was asleep. Given this rather puzzling explanation and other evidence about the two rooms in the house, the court decided to carry out a site inspection.

[11] It is recognised that Popua is one of the poor areas of Tongatapu. It is unnecessary in this judgment to speculate on the reasons as to why this should be the case. Suffice it to say that the building, which had been referred to in evidence as a house with a living room and bedroom, fell far short of fitting such description in the conventional sense of those words. At best it could be described as a shack clumsily cobbled together with bits and pieces of plywood. Both rooms were tiny and unkempt. The accused described the size of the place in his statement to the police as being approximately 14 feet by 12 feet. It has no electricity, no water supply and no sanitation facilities. From the road it looks something like a car parking case. The "wall", which the complainant apparently knocked out while she was sleeping, was in fact a piece of plywood. Even to reach the building from the roadway was something of an ordeal. The property is adjacent to the lagoon with the rear of the shack being only a metre or two away from

the water's edge. The surrounding land is flat and low-lying and, on the day of the court inspection, which was a fine day, it was difficult to walk from the road to the building without stepping into water puddles over one's shoes.

The Crown case

[12] In relation to the first incident, the complainant said that on the night in question the accused had returned from the sea where he had been gathering fish bait and after that they had a hot drink before all going to sleep. She said that while she was asleep she was surprised to feel someone touching the top of her buttocks and as she stirred she saw this person move hurriedly out of her room and "he grunted as if he was not satisfied". The complainant said that she could not go back to sleep and the following morning she told Ane what had happened. The complainant said that there was no light in the room but when she stirred and looked up the man switched off a torch he was carrying, turned around and walked out. She did not see his face but she said that she could tell from his walk that it was her father and she heard his bed creak. The complainant told the court that there was a blanket on her bed but she did not have it over her at the time. She said that she was wearing a skirt with bike shorts underneath. When asked how she felt she replied that she "felt goosebumps all over." In answer to a further question from the prosecutor the complainant said, "when he came and touched me it was not just a brush, it was as if he was trying to fondle my buttocks."

[13] When asked to describe the second incident, the complainant said that on the evening of 10 May 2009 the accused again went to the sea to get some fish bait and when he returned he had a hot drink. The complainant said that she went to sleep and Ane was asleep on the floor with her head at the foot of the complainant's bed. She continued:

"On this night he touched me on the buttocks again. I stirred in the torchlight and turned around. He turned the torch off. Then he was bending down over Ane's head. He touched me on the buttocks and he was trying to touch me between my legs. I was lying on my stomach. When I saw him bending over Ane's head the torch was on and I saw his face -- it was the accused. When I sat up he turned off the torch and walked into the living room."

[14] The witness was asked how long did the person attempt to touch her between the legs and she answered, "sometime. He did not remove his hand until I stirred." she said that she was able to confirm that the person was the accused because she saw his face in the torchlight when he was bending over Ane's face.

[15] The complainant said that after this incident she sat up in bed and cried and she did not go back to sleep. The following morning Ane asked her what was wrong because she was crying and she replied, "because of my father's behaviour towards me." She said that she told Ane that she was going to leave home because of his behaviour towards her and she never consented to what he did to her. She said that Ane told her she should remain at home because she was the reason why she had moved into their place at Popua. The complainant went to work that day but the following Saturday morning she left home and Ane and the children left that same night.

[16] The evidence relating to what happened subsequently was again rather disjointed but it seems that the complainant went to live with Ane and the children in a house that they had moved into at Ha'amoko and a week or two later the accused went to the house and inquired as to the complainant's whereabouts. The complainant was inside the house at the time but Ane said that she lied to the accused and told him that the complainant was not there but that she would call him and give him a contact phone number. The accused asked Ane if she knew the reason why the complainant had left home and Ane then proceeded to tell him about the two alleged incidents. The accused responded that, in relation to the incident on 10 May, he had only gone into the room to turn the complainant on her side. Ane told the court that she then asked the accused what he had been doing bending over her (Ane's) head and he had replied that he was bending down to remove the mosquito coil so that there would be no fire.

[17] After this development, the complainant decided to go to the police. She was asked by the prosecutor why she had gone to the police station instead of going and talking to her father about the matter. She replied, "because I was afraid." The complainant said that the police officer told her that she had "suffered too much and what her father had done was bad."

[18] In her evidence for the Crown, Ane Vaha'i told the court that in relation to the alleged first incident in April, she could recall that when she woke up the morning after, the complainant was sitting on her bed "looking as if she had lost something". She asked the complainant why she was sitting like that and the complainant told her that the accused had come and touched her on the buttocks and when he went back into the living room she sat up and she had remained sitting up for the rest of the night.

[19] In relation to the alleged second incident on 10 May, Ane said that she was sleeping on the floor with her head at the foot of the complainant's bed and she could recall being woken when the accused stood on her hair which was plaited. She said that she saw it was the accused and so she went back to sleep. The following morning the complainant asked her what the

accused was doing by her (Ane's) head. Ane told her that she did not know and then the complainant (who was crying) told her that the accused had "again come and touched her between her legs." She told Ane that she wanted to leave home. Ane confirmed that there had been a mosquito coil close to her head. Earlier the witness said that the accused would often come into the bedroom before they went to sleep and bid them goodnight and kiss his daughter goodnight but the incident on 10 May was the only occasion he had entered the room after they had gone to sleep.

The police statement

[20] The accused was arrested on 25 May 2009. The police documentation was produced by consent. The accused strongly denied the allegations that had been made by the complainant. Although the police officer who took the accused's record of interview did not give evidence, one criticism which is apparent from the question-and-answer exchange is that the police officer did not make it clear at the start of the interview that he was investigating two separate complaints. Instead, he asked:

"Q.20. We have here a complaint from Sesilia Vaha'i about you entering her room while she was sleeping with your daughter-in-law Ane Vaha'i. She was woken by you touching her buttocks and you were carrying a torch, what you say?"

The accused answered:

"That is untrue, what I was doing was checking on their blanket, she was asleep with the child, I always check on her when I return from fishing."

The accused in this answer was clearly referring to the second incident on 10 May.

[21] Nine questions further on in the record of interview, the police officer asked:

"Q.29. Sesilia alleges that the second time you touched her on the buttocks, she felt you touching her between her thighs between her tights and skin and she felt that your hand was very close to her genitalia and when she stirred you then walked into the living room, what do you say?"

The accused responded:

"That is untrue".

[22] The record of interview form records that a short time after the police officer put question 20 (see [20] above), the accused complained of an upset

stomach and the interview was adjourned until the next day.

The defence case

[23] In his evidence, the accused could recall nothing whatever about the alleged incident on 29th April. He did, however, have a clear recollection of the incident on 10 May. He said that he recalled returning home from the sea after midnight and as usual he looked into the bedroom and saw the complainant asleep facing the wall. When he went into the room he noticed that her feet were lying on top of the child's chest and so he moved her legs and picked up the blanket to put over them. He said that he then moved the mosquito coil which he thought was too close to Ane's head. He could recall that night because it was the same night that the wall had come away. He arranged for his son to nail up the wall the following day. The accused was surprised to find out the following Saturday that the complainant had left home and he told the court of efforts he made at the time to try and locate her whereabouts.

[24] The accused was asked why he thought the complainant would make up such a story, to which he replied: "all I can think of is that the complainant did these things as a reason for her to leave home."

[25] In examination-in-chief, the accused told about an incident when he was going out to get some fish bait and he asked Ane and the complainant to prepare a hot drink for him for his return. He told the court that as he was about to depart, Ane asked him to give them a ring when he was about to come out of the sea so that she knew he was coming home. He said that at the time he was a bit suspicious about what he was told and so he only walked a short distance from his home and then returned standing in the dark. He said that he saw a man come over the fence from his sister's house to the kitchen (an outside kitchen) and five minutes later he noticed Ane and the complainant going from his house over to the kitchen. The prosecutor noted, quite correctly, that Mr Kengike had not put this evidence to the complainant or to Ane.

[26] Mr Kengike also called evidence from the accused's son, 23-year-old Sifa. He told the court that when his father returned from the sea on the 10th, he was awake and he said that he saw his father enter the bedroom, remove his sister's feet from on top of the child and place the blanket over them. He said that his father then removed the mosquito coil and went to bed.

The law

[27] In order to establish a charge of indecent assault on a female under section 124 of the Criminal Offences Act, the Crown must be able to prove beyond reasonable doubt the following five elements:

1. That there was an assault, the intentional touching of the body of a female;
2. That the touching was indecent according to the commonly accepted community standards;
3. The accused knew that the touching was indecent in that sense and intended to do it;
4. That the complainant did not consent and the accused did not honestly believed that she consented;
5. The complainant was aged 16 or over at the time - **Rex v Falemaka** (to be reported in [2006] Tonga LR).

[28] There is no requirement in the law of Tonga for corroboration of a complainant's evidence in criminal proceedings for sexual offences but the common law applies and it is the practice to warn the jury against the danger of acting on a complainant's uncorroborated evidence, particularly where the issue is consent or no consent. A judge sitting alone should also heed such warning. Although corroboration may not be an essential element of the offence, when there is no independent corroboration it is always wise to be less than certain.

[29] As noted in paragraph [25], Crown counsel was critical of Mr Kengike's failure to put to the Crown witnesses the evidence the accused would be giving in relation to the outside kitchen incident. Crown counsel made a similar criticism of defence counsel's failure to put to the complainant the evidence the accused would be giving about removing the complainant's feet from the young child's chest. These are valid criticisms. If the evidence of a witness is to be challenged on any important issue, either by contradictory evidence or in submissions, then the challenge should be put to the witness in cross-examination so that he or she has a fair opportunity to answer it. In a jury trial, a failure to put an issue to a witness may be commented on by the judge. This, of course, is not a jury trial. Crown counsel, however, could have taken objection to the evidence when it was given by the accused or made application to recall the complainant so that the failure could be remedied. Neither of these steps was taken.

Discussion

[30] There are certain aspects of the Crown's case which, upon closer analysis, give cause for some disquiet. In relation to the first alleged incident, right from the outset it was said to have occurred on 28 April 2009. That was the date set out in the summons issued in the magistrate's court and it was the date stated in the charge form completed by the police on 26 May 2009. The indictment issued in this court also recorded the date as 28 April 2009. In her evidence, however, the complainant said that the alleged incident occurred on 29 April 2009 and at the conclusion of her evidence the Crown applied to amend the date shown in the indictment to 29 April. No explanation was given for the variation in date but the application was not opposed.

[31] As noted above, the complainant told the court that on the first occasion the person who entered the room touched her buttocks. She was asked in examination in chief, "Please explain the touch, did his hand just brush you on the buttocks or did he actually touch you?" The complainant replied, "when he came, he touched me -- not just a brush. It was as if he was trying to fondle my buttocks." The complainant also told the court, however, that he only used one hand and he only touched the top of her buttocks.

[32] When it came to the second incident on 10 May 2009, the original indictment alleged that the accused indecently assaulted the complainant, "by touching her vagina without her consent." A day or two before the trial commenced, the Crown filed an amended indictment alleging that in the incident on 10 May 2009 the accused indecently assaulted the complainant, "by touching her between her legs without her consent." After the complainant had completely finished her evidence and cross-examination the Crown applied for leave to amend the indictment again this time alleging that on 10 May 2009 the accused indecently assaulted the complainant, "by touching her on her buttocks without her consent." Although Mr Kengike was critical of this further amendment he did not oppose the application. What this evidence strongly suggests is that, unless Crown counsel got it terribly wrong -- a proposition I would be loath to accept, the complainant had given three different descriptions of the nature of the alleged indecent assault.

[33] In examination in chief in relation to this second alleged incident the complainant said that the accused touched her on the buttocks and "he was trying to touch me between my legs." She was asked, "how long was the attempt to touch you between your legs?" The complainant answered, "sometime. He did not remove his hand until I stirred." At the end of her evidence, the Court sought clarification in relation to the touching on this second occasion. The following passage is taken from the transcript:

"Ct. The second time you said that he was trying to touch you between your legs, so he was trying to touch you between your legs, did he touch you or not?

Wit. No.

Ct. So what made you think he was trying to touch you between your legs if he hadn't touched you?

Wit. Because I felt his hands going down between my legs.

Ct. So he did actually touch you on the inside of your legs did he?

Wit. No, he hadn't touched me between the legs but as his hand was coming down my buttocks, it was as if he was trying to touch me between my legs.

Ct. How do you know his hand was coming down, did you see it?

Wit. No.

Ct. I'm just trying to understand, you're saying that he didn't touch you between the legs but you say that his hand went down as if he was trying to touch you between the legs, how did you know that he was trying to touch you between the legs?

Wit. I felt it because he touched me on the buttocks."

[34] In themselves, the apparent inconsistencies in the extracts from the evidence which I have referred to in the previous four paragraphs and earlier or in this judgment may not be sufficient to raise a reasonable doubt but collectively, as I have observed, they cause me some disquiet, particularly in a case where direct corroboration is lacking.

[35] There is another factor. The evidence was that the complainant slept in the bedroom on her own for approximately 4 years until Ane arrived on the scene and yet there was no evidence whatever to suggest that the accused had made any indecent overtures to the complainant during that four-year period. That then gives rise to the obvious rhetorical question, why would the accused suddenly decide to make indecent approaches to his daughter when his nephew's wife and her children had come to stay with them and were sleeping in the same little bedroom?

Conclusions

[36] With the exception of his behaviour after consuming alcohol, the accused impressed me as a person who was trying his best, as he saw it, to carry out the role of a responsible parent. I have no doubt that he was overprotective of the complainant and he did not like the idea of her associating with boys. In this regard, he probably saw Ane as a bad influence. I suspect that he was perhaps trying to make up for his failure to act in a parental role during the 15 years he was in the States. It was apparent also from the accused's demeanour in the witness box that he considered the notion that he had indecently assaulted his own daughter as quite repugnant. In this regard, it was not surprising to see from the police

record of interview that the accused had felt sick in the stomach and the interview had to be adjourned after the officer had put that allegation to him.

[37] On the other hand, the complainant had a clear motive for making up the allegations and involving Ane as a witness. To her, it was a way of leaving home and escaping from her father's overprotective regime knowing that, with indecent assault allegations floating around, the law would be supportive. Crown counsel submitted "that for someone to make up such a serious allegations against one's own father just for the sake of not having to be in his custody is beyond reason and is a preposterous proposition made by the defence." Of course, the notion of a father indecently assaulting his own daughter is equally as preposterous. The reality, sadly, is that in this world of ours preposterous things do happen.

[38] In relation to the evidence given by the son, Sosifa Vaha'i, Crown counsel submitted that he was an unreliable witness and I agree with that assessment. I did not find his evidence convincing or credible and I put it all to one side. I suspect that he, misguidedly, was trying to support his father.

[39] In summary, however, at the end of the day I have been left with very real doubts about the veracity of the complainant's allegations and the accused is entitled to the benefit of those doubts. He is acquitted accordingly on both counts.

NUKU'ALOFA: 27 AUGUST 2009.




CHIEF JUSTICE