

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

**CR 66 of 2007**

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**REX**

**-V-**

**RICKY TU'IVAILALA a.k.a HIKIFO'OU TU'IVAILALA**

**BEFORE THE HON. JUSTICE ANDREW**

**Counsel** : **Ms Moa for the Crown and  
Mr Fakahua for the Accused.**

**Dates of hearing** : **25<sup>th</sup>, 26<sup>th</sup> October 2007.**

**Date of judgment** : **29<sup>th</sup> October 2007.**

**J U D G M E N T**

The accused pleaded not guilty to one count of rape, one count of sodomy and 4 counts of indecent assault.

The only issue in the trial upon these charges is that of consent.

The events which constitute these charges were said to have occurred at Ma'ufanga on or about the 30<sup>th</sup> January 2007.

It is not in dispute that on this night the accused was with his friends at a Karaoke bar. The complainant came to the bar with her husband and another where she stayed and sang karaoke. She told her husband that she wished to sing karaoke and that she intended to stay at the bar. She refused to go home with him and she then joined the accused and his friends and they both sang karaoke together. The accused offered to drive the complainant home and on the way home it is alleged that he drove to a

secluded area in the bush where he had vaginal, oral and anal sex with her inside the parked car.

These events constitute the 6 charges against the accused.

The complainant in her evidence said that she had not known the accused before this night. She said the accused took off her clothes. She was sitting in the front seat. She said "he took off my clothes and had sex with me". Later she said he told her to suck his penis, which she did. She said he later "turned me around and was going to put his penis in my anus and I said to him to stop and as my husband hadn't done that and I cried and told him to stop and he turned me around and had sex with me again. She said she suffered great pain. Later on the way home she remembered that a friend lived nearby and she told the accused to drop her at her friend's home. He did so and she spoke to her friend and took down the accused's number. She complained to her friend. They had apparently left the bar at around 2am and she says she got to her friend's place at about 5:30am. Later that morning she made a statement to the police and she was taken to the hospital where she was medically examined by Dr. Makameone.

In Cross examination she said that when she was at the bar she didn't want to go home with her husband as she loved Karaoke and wanted to continue singing. She said "I was drunk enough to sing"

She had said that she had cried and shouted at him to stop but "he turned me around and had sex again" and "I cried and begged him to stop but he said he would do these things as I would not forget him" – she said the car doors were locked.

The accused gave evidence. He confirmed very frankly that they had had sexual relations in the manner described but he said it was by consent. His story is that she approached him and made sexual advances to him after her husband had left. He said they had gone to the TON FON office first after leaving the bar with his friends and that from there they had sexual relations in the car and at another place and had come back to where his friends were before going to the bush, which she described. He says she had been drinking and continued to drink after the bar closed as they had taken beer with them to the TON FON office as that was where they worked as security. He said she initiated the sexual encounters and was calling to him to give her a child. In a record of interview conducted on that morning he freely admitted to all of these sexual events. He did agree that she told him stop at a time when she felt pain but the tenor of that evidence is that she had gone with him freely and that she initiated the

encounter and that they had had consensual sex.

The complainant was medically examined but the Crown has chosen not to produce that evidence, as I understand it, on the basis that it was not helpful. I believe that all relevant evidence should have been produced.

I make the following findings.

Given the amount of time the complainant had been at the bar and in her own admission that she was drunk enough to sing and the evidence that she continued to drink, I think it is a reasonable assumption that she must have been affected to a considerable extent by alcohol.

I think that there is an inherent improbability in all of these sexual encounters having occurred in the manner described in a motor-vehicle had there been some resistance offered over this prolonged period. Of course that might be very different had the complainant given in to fear. But that doesn't seem to be quite the picture which emerges. I am satisfied that she made advances to the accused and at the least had in the circumstances, encouraged him by refusing to go home with her husband and then going with the accused in an encounter involving familiarity and no doubt a sexually charged atmosphere. I can only assume that the medical evidence did not give support to evidence of injury or of force. Again the improbability of these events all having occurred in the car unless there was some consent must raise some doubt. The complainant having refused to go home with her husband and then joining the accused in these circumstances must have left her with some explaining to do in the morning. Again she was affected by alcohol which may have lowered her inhibitions and this I think could have led him to believe that there was consent.

There is no onus on the accused. All of this evidence raises some doubt in my mind on the issue of consent and on all of that evidence I am not satisfied beyond reasonable doubt that the accused committed all of these acts without consent.

Accordingly I return a verdict of not guilty and the accused is discharged.

Nuku'alofa: 29 October 2007

  
JUDGE

