

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

NO.CR.216/00

REX

- No guilty knowledge

-v-

TAUFA PULI'UVEA PETELO

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel : Mr S. Sisifa for the Crown
Mr Veikoso for the Accused.

Date of Hearing : 5th June, 2001.

Date of Ruling: 5th June, 2001.

Ruling

The accused is charged with indecent assault contrary to section 124 of the Criminal Offences Act. The accused knew the complainant well and the Crown case is that, in the early hours of the morning, he entered the bedroom where the complainant was sleeping with her two small children, lay down beside her, lifted her dress, removed her bra and licked her breasts. Whilst doing that, he put his hand inside her clothing and touched her vagina.

It is an unusual case. The complainant gave evidence in which she did not deny a series of suggestions by defence counsel. She agreed she had made joking but suggestive comments to the accused earlier in the day including a reference to looking for a man with whom to have sexual intercourse and that the accused would do for that purpose. She also admitted to meeting him later.

She agreed that, when he lay beside her and touched her in the way she described, she had neither tried to stop him nor asked him to desist although his advances continued over a period of some minutes. She did kick the doorframe at one point and, when that woke her baby, the accused immediately left.

It also came out in cross-examination that she had not reported it to the police until ten days later and then only because the accused had boasted to his friends of what he had done and so it had become a matter of comment around the village. Inevitably someone had told her husband and he had beaten her.

She agreed she only reported it to the police because of her fear of her husband.

However, she steadfastly denied that she consented and said she had not tried to stop the accused because she was afraid both that his wife, who was sleeping in the next room, would beat her up and that the accused himself might do so if she resisted although she agreed that he showed no sign of intending to use any force.

At the conclusion of the complainant's evidence, counsel for the prosecution advised the court he would offer no evidence because he considered the evidence of lack of consent was insufficient and could get no better with his remaining witnesses. It was not done as a result of a failure in the evidence and indeed could not have been because there clearly was prima facie evidence both of indecency and of lack of consent.

That is an unusual step for counsel to take involving as it does a subjective evaluation of the evidence before the court. In a case such as this where there is clearly prima facie evidence, the assessment of the reliability of that evidence is a matter for the court and should be left to the court to decide. Thus, unlike a case where the prosecution offers no evidence at the outset, the court cannot simply acquit the accused for lack of evidence when, as here, there is already evidence.

Counsel has instead, therefore, closed the prosecution case after adducing only the evidence of the complainant.

Counsel for the defence has submitted no case to answer on the basis that the complainant clearly consented. That is not a proper basis for a submission at this stage. She has told the court she did not consent and the question of whether or not that was so is a matter for the conclusion of the trial. The question here is whether there is a prima facie case on the evidence of the complainant.

The weight I attach to her denials of consent are properly a matter for the end of the case but, in view of the step I am about to take, it is right that I should say that I formed the impression throughout, that the complainant was a truthful witness even in her denial of consent.

The difficulty is that, if no further evidence was called, I could never find that, in the circumstances as admitted by the complainant, the prosecution could prove the accused knew the complainant was not consenting. Taken at its highest, as the tribunal of fact, I could possibly find he had guilty knowledge.

He is acquitted.

NUKU'ALOFA: 5th June, 2000.



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CHIEF JUSTICE