IN THE SOLOMON ISLANDS — Criminal Appeal No. 2 of 1989.

COURT OF APPEAL

Connolly P.

Kapi J.A.

McPherson J.A.

BETWEEN: CHARLES KWAITA — Appellant

AND:

REGINAM — Respondent

JUDGMENT OF THE COURT

Delivered the 30th day of April, 1990.

CATCHWORDS:

Counsel: Mr. P. Kee for applicant.

Mr. Mwanesalua for respondent.

Hearing dates: 23rd and 24th April, 1990.

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Kwaita was convicted on 6th July, 1989 before the High Court at Auki (Ward C.J.) of the rape of Abiline Nasau on 6th August, 1988. He is strictly an applicant for leave to appeal against his conviction because the substantial grounds which he raises are that the verdict is unreasonable, cannot be supported having regard to the evidence and is unsafe and unsatisfactory having regard to the evidence. These grounds raised what are essentially questions of fact: Ratten v. The Queen (1974) 131 C.L.R. at p. 515. They therefore require leave to appeal. Counsel also sought to call new evidence on an important issue and the court received affidavits from the proposed witnesses.

It will be convenient first to state shortly the circumstances out of which the charge arose. There is no doubt that shortly after 7.00 p.m. on 6th August, 1988 near the church in Tautaumalefo village an act of intercourse occurred between

the complainant and Charles Kwaita. The account which she gave in evidence was as follows. She had visited the house of Nelson Sumani whose wife was a friend of hers and left at about 7.00 p.m. to go to the well nearby. Sumani's house is 75-100 yards from the church. She says that when she approached the church, Charles was standing there and that she did not speak to him when she first saw him. She says that he seized her by the hand and she called out, "Who are you?" She says that he hit her so that her mouth bled which made it impossible for her to shout. According to her she was pulled into the bush, he tried three times to knock her to the ground and eventually had intercourse with her. She claims that she complained of rape to her husband when she got home. Despite what she said in chief about not being able to shout because of the bleeding, in cross-examination she claimed to have shouted loudly. It may be that she meant that she shouted loudly before she was hit. She agreed however that Sumani lives about 100 yards away from where these events occurred.

The case for Kwaita was that there had been a long standing relationship between them going back some 14 years to his early adolescence. He said that Abiline and he regularly had intercourse in the bush about three times a month; and that on the occasion in question they had arranged two days earlier to meet near the church. She however denied there had been any relationship between Charles and herself and denied that he had ever eaten at her house or slept there. She denied that she was afraid of her husband although it is the case for Charles Kwaita

that her husband was a violent and jealous man who had in fact served a term of imprisonment for murder.

It was put to her that she had confessed to a church worker, Margaret Nanau, that she had committed adultery with Charles and she denied it. It was also put to her that the pastor of her church, John Kwaifi, had spoken to her about her relations with her husband and about her relations with Charles Kwaita. She denied such a conversation with the pastor. On the other hand not only did Charles Kwaita give evidence about the long-standing relationship but also about conversations he had had on a number of occasions with the pastor (who as it happens, is also the paramount chief and a relation of Charles Kwaita who is described by the chief as being in the same line). The pastor said that he had spoken to Charles Kwaita about his relationship with Abiline and counselled him against it on a number of occasions reminding him that Abiline's husband was both jealous and violent. It is apparent that if there is anything in the evidence of Kwaita that his relationship with Abiline was an intimate one going back 14 years and involving regular acts of intercourse, the situation could well be the not uncommon one in which rape is cried in order to placate a husband who may have seen something to arouse his suspicion.

The learned Chief Justice found Abiline to be a truthful witness and preferred her evidence to that of Kwaita. He rejected the evidence of Margaret Nanau on the basis that she had said in her evidence that she would not reveal Abiline's confession to others, it having been made to her in church, yet she was called by the defence at the trial. On the other hand

his Lordship found that the pastor, John Kwaifi, may have been truthful. In fact his Lordship accepted that the pastor may have acted on a number of rumours by which I take it he means that he may have heard rumours which led to his having conversations with Kwaita about his relations or alleged relations with Abiline; and he accepted that when charged with adultery by the pastor Kwaita admitted the fact. However his Lordship records that he does not accept the admission, if made by Kwaita, as being true. It is obvious that it is of critical importance whether there was or was not a prior long-standing relationship between the complainant and Kwaita. If there was, the probabilities would favour his version of events rather than hers.

At this stage it is convenient to consider the alleged fresh evidence. This comes from two witnesses, the first of whom would say that in 1985 he observed an act of intercourse in the bush between Abiline and Charles Kwaita and that afterwards Abiline, who had learnt that she had been seen used to give him money. He says however that he later told Charles about what he had seen and that he said not to tell anyone. The second witness, on an occasion which does not appear to be dated, would say that she saw Charles Kwaita and Abiline together naked inside the pig fence of Abiline's husband. She says that Charles ran away and that Abiline was then on her back on the ground; and that when asked what she was doing she asked the witness not to tell anyone about it or her husband would kill her. She also says that Abiline offered her five dollars which she refused to accept. She says however that after Charles was charged with the rape she

mentioned to him that she could be a witness but he told her not worry.

It is apparent that the existence and availability of both of these witnesses were known to Charles Kwaita at the time of his trial and no effort was made to produce them. The evidence thus fails at the outset to meet one of the requirements if fresh evidence is to be received after a conviction of a criminal offence and this is, of course, that the evidence could not have been produced by the exercise of due diligence at the trial. The court accordingly intimated that this evidence could not be acted upon. Mr. Kee contended that there must be an exception in a situation in which a relationship is said to be long-standing and well known in a community. It is difficult to see why this should be so. All that is required is that reasonable efforts be made to obtain evidence of this character and in a case in which at least two witnesses are known to be able to give such evidence it is difficult indeed, if not impossible, to treat it as being fresh evidence in any relevant sense.

This however is by no means the end of the matter. Plainly enough Abiline was a persuasive witness. She was accepted without reservation by the learned Chief Justice although he accepted that she could not having been telling the truth when she swore that she had shouted loudly in the vicinity of the church. This conclusion was one to which his Lordship was obviously constrained by the fact that he had inspected the scene and was satisfied that a shout must have been heard by people in the Sumani house. No shout was in fact heard. This fact alone would, one would think, have raised some doubt about the veracity

of the complainant. However, it should be considered in conjunction with the finding by the learned Chief Justice that the evidence of the pastor may have been truthful. This is concededly a guarded acceptance of the evidence of John Kwaifi but on analysis it is apparent that it implies at least the following conclusions.

Pursuant to this finding it may be the truth that the pastor discussed with Abiline her alleged relationship with Kwaita. Now she denies any such discussion. She could scarcely have forgotten it and one must ask oneself why she would deny it. Again it may be the truth that, as the pastor said, Kwaita had moved into Abiline's house. This again she denies and one would have to consider why she would make the denial. It may then be seen that the learned Chief Justice's finding that the pastor may have been truthful involves there being two areas of doubt, to put it at the least, about the veracity of the complainant in relation to matters which go to the heart of the case. Coupled then with her proven untruthfulness about the shouting one would think that a reasonable doubt is inevitable.

Finally, there is the matter of his Lordship's rejection of Margaret Nanau. Mr. Kee pointed out that the basis on which she was rejected was really quite unsatisfactory. There appears indeed to be a force in this submission. Margaret Nanau said that she had been told, in a form of confession, within the church, of Abiline's adulterous relationship with Charles. It is obviously quite consistent for her to have said, on the one hand, that she would not reveal the facts of this confession to people generally, who had no right to know of it and at the same

time give evidence in a court of law when called upon to do so and obliged by her oath to tell the truth.

Finally, for what it is worth Abiline's husband, despite his reputation for violence, appears to have been content to accept $200.00 and one piece of red money as compensation for the act of intercourse and does not appear to have reacted as a man would react to the forcible rape of his wife.

Now there was absolutely no corroboration of the evidence of the complainant. The learned Chief Justice directed himself correctly as to the danger inherent in such a situation but the simple fact is that corroboration, which might tip the scales against the doubtful matters to which reference has been made, was not available.

In all of these circumstances it seemed to the court that this is a case in which, despite the findings as to credibility made by the learned Chief Justice, the conviction was indeed unsafe and unsatisfactory having regard to the evidence. Accordingly on 24th April, 1990 the court granted leave to appeal, allowed the appeal and set aside the conviction and sentence, engaging to publish its reasons when they had been reduced to writing.

BY THE COURT

P. D. CONNOLLY P.