REGINA v. PETER TAKU

High Court of Solomon Islands
(Palmer J)

Criminal Case No. 3 of 1995
Hearing: 3rd - 5th September, 1996
Judgment: 19th September, 1996

J. Faga for Prosecution
L. Kwaiga for Defendant

PALMER J: The accused, Peter Taku has been charged with two counts of rape, contrary to section 129 of the Penal Code. The particulars of both counts read as follows:

> "(1) Peter Taku, on the 8th August 1993 on the sea between Kohingo Island and Baeroko Island, Western Province had unlawful sexual intercourse with Tetoka Tuanikai without her consent."
>
> "(2) Peter Taku, on the 9th August 1993 on Baeroko Island, Western Province had unlawful sexual intercourse with Tetoka Tuanikai without her consent."

The brief facts of the allegation by Prosecution was that the accused drove the victim together with other children in a wooden canoe powered by an outboard motor engine, out into the open sea between Kohingo Island and Baeroko Island on the evening of the 8th August 1993, and there raped the victim inside the canoe. He then paddled the canoe with the children inside to Baeroko Island where they spent the night in an old open hut. On the following morning he got the victim to accompany him under the pretext of looking for pawpaw in the bush, and there raped her again. The victim and children finally managed to get away from the accused and found their own way to a neighbouring village within the vicinity of that island, where they were fed (having not eaten since the previous evening) and eventually escorted home by the villagers.

The defence of the accused is actually very simple. He denies that he was at the locus on the alleged dates, when the crimes were committed. Instead, he alleges that he was on another Island, during the said times busy diving for marine products for another man. In other words, his defence is either one of mistaken identity, or a deliberate ploy pulled up by the villagers at Canaan Village and Rawaki Village to get rid of him for his past misdeeds and bad influence on the young people of those two villages, by tying him in with the said offences as the culprit.

THE CASE OF MISTAKEN IDENTITY.

The prosecution has produced two witnesses who have in the course of their evidence identified the accused as the culprit in the rape offences.

The first prosecution witness called was the victim herself, Tetoka Tuanikai (PW1). In her evidence in Court, she had given her age as 16 years, which meant that at the time of the alleged offences, she was around 13 years old. She had gone to Ringi Cove over the week-end with her Grand-mother, and a number of children. According to the evidence of her mother, Bene Teta (PW5), this was on Friday 6th of August, 1993. She stayed there for three days. On the evening of Sunday the 8th of August, 1993, they were picked up at Ringi Cove by canoe and driven to Canaan Village, to drop off her Grand-mother. She puts the time when they were picked up at Ringi Cove at about 6.00 pm in the evening. The person who came to pick them up in the canoe, and this is crucial, was identified by this witness as the accused.

It is important to point out right from the beginning that the issue of **identification** is crucial to the prosecution case. The first question that can be asked at this point, is whether the identification of the accused by PW1 and PW2 (Temoia Tabenaba), as the person who drove the canoe they were travelling in from Ringi Cove to Canaan, **reliable**, bearing in mind that both PW1 and PW2 were present in the canoe, and were the crucial prosecution witnesses who have made the crucial identification. In other words, could both witnesses have been mistaken as to their identification of the

accused? I will deal with the issue of fabrication later. This raises the question in turn as to how the accused had been identified by both witnesses.

The method of identification of the accused by both witnesses was by **recognition**. In the case of PW1, she states that she knew the accused prior to the 8th of August 1993, and therefore when she saw him that day, she recognised him. She stated that she knew his name and that he was also called *Petero*. She also stated that she had known him for about two years and that he lived at Canaan Village; which was not far from Rawaki Village, where she resided. She also gave detailed evidence in chief and under cross-examination (which have not been disputed by the accused), as to the location of the house of the accused at Canaan Village. Thus further supporting her assertion that she knew the accused prior to the events of the 8th of August, 1993 and therefore could easily recognise him clearly that day

It is also significant on the issue of identification, that PW1 stated in her evidence that the accused was a relation of hers. This has been confirmed by the mother of PW1, Bene Teta (PW4), who stated in her evidence that the accused was closely related to her. I note that this assertion has never been disputed by the accused. The significance of this relationship, on the question of identification is that, in normal circumstances, it would be much easier to identify a person related to you than one who may have been a total stranger and was seen for the first time by the witness at that time. No evidence has been produced to show that the circumstances prevailing at that particular time of the evening, when the children were picked up at Ringi Cove, were abnormal or unusual, such that it was more likely than not that PW1 would not have been able even to recognise and identify a "wantok", or someone that she had known previously. It has also never been suggested to this witness that the accused may have been a stranger or unknown to her. The fact that the accused is related to the victim only strengthens and gives support to her clear and unequivocal evidence as to the identification of the accused.

The evidence of PW2 however, as to whether she knew the accused prior to the events of the 8th of August, is somewhat hazy In chief she gave the impression that

she came to know the accused only as a result of what had happened to them on the 8th and 9th of August. Under cross-examination, she stated that she did not know the accused prior to the events of the 8th and 9th. Under re-examination however, she stated that she had known the accused prior to those events in 1993. Despite what might seem to be an apparent inconsistency in her evidence, there was one thing which this witness never conceded; and that was her recognition of the accused as the person who had picked them up by canoe from Ringi Cove, that evening of the 8th.

It had been suggested to this witness under cross-examination that she may not have been able to see clearly the person who was driving the canoe as it was getting dark already. This witness however replied that they were picked up at about 6 00 pm and that she could see clearly that it was the accused who had come to pick them up.

But even assuming, if at all, that both prosecution witnesses may have been mistaken as to their identity of the accused that evening, it must be borne in mind, that according to their undisputed evidence, the accused had remained with them throughout the night of the 8th August, right through to the morning of the 9th. The period or length of time over which the accused was alleged by these two witnesses to have remained with them is also directly relevant to the question of identification, as it naturally gives more time to the witnesses to identify and recognise who the culprit was. So even if the accused may have been a stranger to them, by seeing him at close range for a longer time frame, and living in close proximity with him for that period, it is more likely than not that these two witnesses could possibly be making a mistake in their identification of this accused. They saw him with their own eyes on the evening of the 8th, before it was dark. They heard him talking to them and could even smell him. The victim in fact could not get any closer to the accused than when he raped her on both occasions. On the night of the 8th, it may be argued that she may not have had a clearer view of the accused. But not on the morning of the 9th. when the rape was committed in broad daylight. PW2 was also already awake on the morning of the 9th when the accused pretended to go and look for pawpaw in the bushes with the victim. She saw him clearly in broad day light. She had been given the job by the accused of looking after the other children while he went with the victim and another

boy, called Willie to look for pawpaw. It has never been suggested that both prosecution witnesses eye-sights may have been impaired or that there may have been other extraneous factors which may have affected their visual identification of the accused. It has never been suggested and the victim's evidence on this is unchallenged, that her head may have been covered with any hood or her eyes blind-folded.

When the evidence of PW1 and PW2 as to their identification of the accused are considered in their totality, I am satisfied so that I am sure, that I can rely on their evidence, but, subject to the determination of this court on the other relevant issues raised in defence, including the issue on credibility

The Defence case.

Before the issue of credibility is considered, I will deal first with the evidence of the accused as given on oath in court. I bear in mind that the accused need not plead alibi. However, where he elects to give evidence on oath before this Honourable Court, then it is this Court's duty to consider in the normal way, the question of reliability and credibility of his evidence. The accused states that on the dates of the alleged offences, he was staying at Poro Village at Kolombangara Island. He says he went there sometime in the second week of July 1993 and stayed there until mid-October 1993. His reason for going there was to dive for beche-de-mer and trochus shells. On the 7th of August 1993, he says that he was diving with the land-owners son, but whose name he had forgotten. No other names of any other person had been given by this accused in support of his story, including the name of the land-owner that he claims to have obtained permission from to stay at Poro Village.

If I could describe the evidence of this accused, it has been given with the barest minimum of facts. However, I do bear in mind that the onus of proof in this case does not lie with him but with the prosecution.

The question of fabrication.

The question of fabrication is related to the issue of credibility. The defence seeks to argue that the prosecution witnesses had ulterior motives in fabricating the involvement of the accused in the alleged rapes. They seek to put forward the theory that the two prosecution witnesses may have been part of a scheme by the villagers at Canaan and Rawaki to get "rid" of the accused, as he was considered an "undesirable" resident at Canaan Village. The reasons suggested by the defence to both witnesses, (PW1 and PW2) and PW4 and PW5, were that he had previously been sent to prison for a rape committed on a girl from the same village, and, because of his bad influence on the young people in the Village. When PW1 and PW2 however were cross-examined on those two points, it was never denied that this accused was not popular in his community. It was also not denied that on a number of occasions some reports had been put through to the Police, but that because no evidence was forthcoming, that nothing came out of those reports. When it was put to these two witnesses that it was for the above reasons that blame was being placed on this accused, they denied emphatically that this was so. Both PW4 and PW5 also never sought to deny the fact that the accused was unpopular in their villages, and more so when the stories about what had happened to the victim in this case were known.

The credibility question.

The issue of credibility which arises is two-fold. One relates to the question of credibility of the prosecution witnesses, in particular PW1 and PW2, whilst the other relates to the credibility of the accused. These will be dealt with under the respective headings below.

The witnesses - PW1 and PW2

I have carefully observed the personality and demeanour of these two witnesses in the witness box whilst giving evidence and come to the conclusion that they were merely recounting as best as they could what they knew occurred on those dates. They did

not manifest any unusual characteristics which might have pointed to the suggestion that they may have been under pressure to come to Court and give a false story. There was no unusual emotion showed. They did not show any form of uncertainty or doubts as to their identification of this accused, or throughout the rest of their evidence in court. They were very clear, firm and sure of themselves, that it was no one else, and couldn't have been any one else that picked them up at Ringi Cove on the 8th August 1993, but the accused, and of the events that transpired thereafter.

I have already dealt with the issue of motive, and suffices here to point out that it has not been shown to my satisfaction so that there may even be a slight doubt (far from a reasonable doubt), that both prosecution witnesses may have been sufficiently motivated to lie and fabricate the involvement of the accused in the rape offences. The suggestions put forward by the defence fall down in the face of very clear, forthright and convincing answers and explanations provided by the prosecution witnesses.

The evidence

As regarding the evidence of prosecution witnesses, I am satisfied there is much consistency throughout, and little that had been discredited, that would cause me to doubt in any way the credibility of those witnesses.

Corroborating evidence.

The evidence of PW1 and PW2, have to a certain extent been corroborated by the evidence of PW3, Agnes Ladu. She was clearly an independent witness, totally detached and unrelated to PW1 and PW2. She gave her evidence in a very clear and calm manner, and I am satisfied that I can rely on her evidence, as objective and untainted. She described the appearance of the children on arrival at her village as looking very weary, sad, weak and hungry. She also says that the children were crying when she arrived to see them at their Chief's house. This is consistent with the evidence of PW1 and PW2 that they had been with the accused since the evening of the 8th of August, and throughout the night and part of that morning. It also appears

too that they had not eaten since that time. This would explain why they were weak and hungry. From the evidence of PW1 and PW2, the children would naturally have been terrified as to what was happening and this would explain why they would have been crying as well. PW3 also confirmed that there were six children in all who had arrived at her village. This is consistent with the evidence of PW1 and PW2 as to the number of children that was with them in the canoe with the accused. Not only that, but she also described their composition as consisting of three small children, two big girls (this would have been a reference to PW1 and PW2) and one small boy (Willie) This is consistent with the evidence of PW1 and PW2

This witness states that she then took two of the smaller children and PW2, to her house and fed them. She states that she did not ask them about what had happened straight-away, but waited until they had had something to eat. By then, PW1 had also arrived at her house and was sitting with the other children, when she asked them to explain what had happened to them. What the children told her was very brief; that a man had taken PW1 out into the bush, and so they had run away. This, despite its briefness, is consistent with the evidence of PW1 and PW2. She then states that when PW2 mentioned that part which referred to the accused taking PW1 out into the bush, she looked down and cried. Although she did not ask PW1 why she cried, her actions are consistent with what she had described in court happened to her that morning.

PW3 also mentioned in her evidence that when PW1 came towards her house, she noticed that she was not walking normally. She also confirmed in court seeing what she described as blood stains on the front part of the white T-shirt that PW1 was wearing. Under cross-examination it was sought to be put to her that the stains on the front part of her T-shirt were caused by young husks of green coconuts which the children had eaten along the way. Unfortunately, no evidence whatsoever had been given by PW1 and PW2, or put to them under cross-examination that they had eaten any green coconuts along the way, and accordingly, it was simply not open to Counsel to put this question to this witness. This witness nevertheless stated very clearly that it looked more like blood to her than anything else. In the absence of any evidence to the contrary, the description of this witness of the unusual manner in

which the victim was walking that morning, coupled with her observations of what she described as blood stains on the front part of the T-shirt of the victim, are all consistent with the evidence of the victim. Her observation that the victim had not been walking normally is consistent with the victim's evidence that when the accused raped her, her vagina felt very sore, and that blood had come out as a result. Her observation of the blood stains on the front part of the T-shirt of the victim, is consistent with the victim's evidence that she had used her T-shirt to rub or wipe her vagina with. She had also given clear evidence herself, that the front part of her T-shirt had blood stains on it.

Other witnesses called.

The other prosecution witnesses called, included the uncle and mother of the victim, PW4 and PW5, respectively. PW4, (Tony Tokatu) stated that he was present at Canaan Village when the victim told her Grand-mother (also PW4's mother), and Auntie, about having been raped by the accused. As a result of what the victim had told them, he arranged for the victim (who is his niece) to be taken to Noro Police Station that same morning and to lodge a complaint with the Police. This is in line with what the victim had stated in court.

The mother of the victim, Bene Teta, confirmed her daughter's evidence, that she was told about the rape after her daughter had gotten back from Noro Police Station. She stated that the victim cried and looked very sad, when she related to her what had happened. She confirmed the victim's story that she had gone to Ringi Cove on the 6th of August 1993, and was due to arrive back on Sunday the 8th of August, but did not Instead, she had arrived back on Monday.

Both PW4 and PW5 stated that since the incident in August of 1993, they had not seen the accused until his appearance in Court for this trial. I have no cause to doubt this evidence. This can be viewed as being consistent with the actions of a man who had done something wrong and is on the run; hiding for fear of reprisals from the victims family members and relations.

I have observed carefully both witnesses giving evidence in court and have no cause to doubt the correctness and veracity of their testimony in court. I accept their evidence with no hesitation. I am also satisfied, that their evidence did not in any way diverge from that of PW1 and PW2 where applicable.

The final prosecution witness called was, a police officer, Station Sergeant Felix Kalinamae, who had taken some photographs, of the scene where the second offence was alleged to have been committed on Baeroko Island. Those photographs included a photo of the hut (Photo marked No.1 in the Album of photographs), and a photo of the log (photos marked No. 3,4,5,and 6) on which the victim alleged the accused had told her to lie down on and then raped her. Officer Kalinamae stated that those photos were taken on the 18th of August, 1993.

The significance of the evidence of the photos produced in Court is that they lend support and consistency to the evidence of PW1 and PW2, as to the existence of the hut described by them, and the log described by PW1, on which she alleges the second rape was committed. I do bear in mind however, that whilst the existence of these physical features do not necessarily prove that the victim was raped by the accused, it strengthens enormously the prosecution case, in particular, that those two witnesses most likely, are speaking the truth in court; bearing in mind that a sure way of testing the truth of what a witness has said, is to search for evidence which provides proof of that. I am satisfied there is evidence which provides sufficient proof of the existence of a hut on Baeroko Island and a log on which the victim alleges the second rape was committed, and which are all consistent with the evidence of PW1 and PW2.

On the totality of the evidence before this Court, I am satisfied with the element of ***consistency***, throughout the evidence of the first two prosecution witnesses, and that this has been sufficiently supported by the evidence of other prosecution witnesses.

I am satisfied so that I am sure, that the events described by those two prosecution witnesses which occurred on the 8th and 9th of August 1993, were accurate and true. I am satisfied they were picked up on the evening of the 8th August 1993 from Ringi Cove and taken to Canaan Village in a canoe driven by this accused. There were six children and an adult (the Grand-mother of the victim), inside that canoe, with the accused as their canoe driver. I am satisfied the Grand-mother, Neiketa, was dropped off at Canaan Village, and that the accused was then supposed to drop off the other children at their home village at Rawaki, some distance away. It was at that point of time that this accused must have formulated his mischievous plan, because instead of taking the children to their destinations, he diverted the canoe to his place under the pretext of going to cut his toddy According to the clear and uncontradicted evidence of PW1 the accused did not cut any toddy at all He only pretended to go and cut toddy so that he could ask for the assistance of PW1 to hold the torch for him. When PW1 however went to hold the torch, he appears to have changed his mind about climbing any coconut tree that night and instead, made an attempt to grab the hand of PW1. This obviously came as a shock to PW1 because she screamed and ran back to where the other children were at the canoe. So upset was she about the actions of the accused that she cried.

It had been sought to be suggested to her under cross-examination, and this was also put to PW2, that she may have in fact been frightened of a ghost or a "devil", but this was denied by PW1. I note that there is no basis or ground on which this suggestion could have been supported by the Defence, bearing in mind that the defence of this accused was that he was not present at all during those times.

Having failed it seems to get any where with his mischievous intentions, he then got back into the canoe with all the six children inside, but this time it was to go out into the middle of the sea far away from any nearby village so that he could continue with his mischievous plan.

I do not need to go into the details and repeat what PW1 and PW2 have told this Court about what happened after this accused had stopped the engine and canoe out in

the middle of the sea. I accept the clear and unequivocal evidence of those two witnesses as to what transpired inside that canoe out in the open sea. This raises the crucial question whether prosecution had shown beyond reasonable doubt that sexual intercourse did take place inside that canoe, that night of the 8th of August, 1993 This is the issue which I will address next.

The issue of sexual intercourse.

Did the accused achieve unlawful sexual intercourse?

Defence Counsel has sought to suggest to the victim that she may have been mistaken that when the accused inserted his fingers into her vagina she may have mistaken them for the penis of the Accused. The victim however could not be shaken on this particular point. She stated very clearly, and emphatically, that not only did the accused pushed his fingers into her vagina many times, but that he also pushed his penis into her vagina and raped her. When it was put to her under cross-examination that she may not have known the difference between the two, she could not be shaken, that there was complete penetration and intercourse.

One of the matters which was sought to be stressed under cross-examination was the question of emission of seed. Under cross-examination, the impression was given that there had been no emission of seed despite the claim by the victim that sexual intercourse took place for about five minutes. It had been suggested repeatedly to her that sexual intercourse could not have been achieved without the emission of seed and especially when it was alleged intercourse occurred for five minutes. The victim however remained adamant, that sexual intercourse did take place. Whilst it appears that in normal circumstances, there would have been evidence of emission of seed where sexual intercourse occurs for at least five minutes or so, there are a number of factors in the circumstances of this case to be noted. First, it is that the circumstances in which sexual intercourse occurred were not normal. It would have been possible therefore that no emission of seed occurred. On the other hand, it is possible that emission did occur but that it got mixed up with the blood coming out from the vagina

of the victim, and therefore may not have been easily detected by the victim. Secondly, it must be understood that the victim of the rape was only a child of 13 years, and therefore it is possible that she may have been totally ignorant of such matters relating to the question of emission of seed. The impression given from her answers in court was that she may not have been aware of such matters, at such a tender age.

What is pertinent though to take note of in this case is that it is not a requirement of law that emission of seed be proven as a separate element by prosecution in order to show that sexual intercourse had taken place (see section 161 of the Penal Code). It is sufficient if penetration is proven by prosecution. On this issue, she was never in doubt or uncertain about what had happened. She repeatedly stated that not only did the accused pushed his fingers into her vagina many times, but that he most definitely pushed his penis into her vagina.

One of the matters related to the question of emission of seed, was the presence of blood which the victim described came out of her vagina. It had been sought to be put to this victim that the blood which came out of her vagina may have been caused by the fingers of the accused when he fingered her. With respect however, there is no evidence or basis on which such suggestion could have been based. The blood may indeed have been caused by the fingers of the accused, but even if that were the case, there is no evidence whatsoever to support the suggestion or view that that meant in turn that no penetration was achieved and therefore no sexual intercourse occurred. The clear and uncontradicted evidence of the victim was that penetration was achieved by the accused and sexual intercourse took place. If anything, the clear presence of blood emanating from her vagina after the alleged incidences of rape can only go to support and strengthen the version of PW1 that penetration was achieved and sexual intercourse took place which caused her vagina to bleed.

It is also important to note that the evidence of the victim on the issue of unlawful sexual intercourse had been very clearly supported by the unchallenged evidence of PW2. Both witnesses had described the length of the wooden canoe in which the rape

was committed as being about 7-9 metres long (that is from the witness dock to the ladder on the left side of the bench). Both described too the place where the rape was committed as in the middle of the canoe. Now PW2 had stated that when this was taking place, she was sitting in the front of the canoe with the other children, but facing backwards. She claimed therefore that she could see what was going on. She also stated that the accused and the victim would not have been far from her, about 1-2 metres away. This witness gave very clear evidence that she saw the victim lying down on her backside, and the accused lying on top of her She also stated that when the accused climbed on top of the victim, she noticed that the canoe started to shake vigorously. This went on for some time. She also stated that the victim cried when the accused climbed on top of her, and she heard the victim saying to the accused not to push his finger into her vagina. She also confirmed hearing the victim say that her vagina was sore, and the accused replying that he was not yet satisfied All these are consistent with the evidence of the victim and unchallenged. I am satisfied I can rely on the accuracy and correctness of her evidence and that there is no reason to doubt the veracity of her testimony. I accept her evidence. I am satisfied so that I am sure, that unlawful sexual intercourse did occur inside that canoe on the night of the 8th of August, 1993.

As to the events relating to the second rape, I am satisfied the children were taken by the accused to a remote part of Baeroko Island, where they spent the night in a hut in the bush. I accept the evidence of both PW1 and PW2 that on the following day, the accused took the victim and another boy, Willie, into the bush under the pretext of looking for pawpaw. I accept the uncontradicted evidence of the victim that after the accused had sent Willie back to the others at the hut, he raped her on top of a log in the bush. I accept her evidence that not only did the accused again fingered her vagina, but that he also achieved complete penetration and sexual intercourse took place.

The element of consent.

Has it been proven beyond reasonable doubt that there was an absence of consent on both occasions? The evidence adduced by prosecution to this effect in my respectful view is more than sufficient. The victim states how she had seen the accused holding a very sharp knife that evening of the 8th of August, 1993, when he had tried to lure her to himself under the pretext of cutting toddy, but failed. She also stated how she had seen that knife with the accused in the canoe when he told her to take off her clothes and how the accused had spoken roughly to her, and threatened to tear off her clothes or to cut them off with his knife if she refused. The victim also states that when he knelt down to rape her, he placed the knife behind him. She stated very clearly that she feared for her safety and was extremely frightened of the accused.

PW2 confirmed the evidence of PW1, that in the earlier part of that evening when PW1 ran back to the canoe, from where she had gone after being called by the accused, she was crying. PW2 also confirmed that when the accused asked the victim to go and sit with him at the back, when they were floating out at sea, the victim refused. She stated that the victim had refused to comply with the demands of the accused but that he had held her hand and then told her to take off her clothes. If she refused, that he would tear them off. I am satisfied the evidence of PW2 is consistent with that of the victim and confirms in a very clear and obvious manner, that there couldn't have been any consent on the part of the victim to the act of sexual intercourse committed in such unusual and abnormal circumstances. I do note in addition that the question of consent was never an issue in this case.

As to the allegation relating to the second rape, I am also satisfied that the element of lack of consent had been proven by prosecution beyond reasonable doubt. I accept the evidence of the victim that she had initially refused to accompany the accused to go and look for pawpaw, but that on the insistence of the accused and on taking one of the other children (Willie) with them, she reluctantly went. It has been sought to be suggested to her under cross-examination that she willingly went, but this has been denied by the victim. The victim gave clear evidence that all the while they were walking along in the bush, the accused was walking behind them, and thereby making it difficult it seems for any form of escape even to be contemplated. Not long after,

the accused told the small boy to go back, but prevented the victim to go back with him.. The accused obviously by then, had other plans than to look for pawpaw. I accept the evidence of the victim that she had been apprehensive as to what the accused was planning to do, but that she felt helpless in his presence. I accept her evidence too that she was frightened of the accused as he still had in his possession at that time, the same knife he had earlier. I also accept her evidence that he again threatened her with the knife that he was holding when she refused to take off her clothes when asked, at the log where the second offence was committed.

She states in her evidence that she cried and then shouted when he raped her and tried to push him off but he was too heavy. Under cross-examination it was sought to be suggested that she may have cried and shouted because she was enjoying what was happening, but she denied this. Under cross-examination too, the victim did say that she was happy to leave the accused when he told her to go, but qualified this by saying that she was happy to leave safely, because she had feared that he may have harmed her.

I accept the clear, unequivocal and unchallenged evidence of the victim as to the element of lack of consent. Despite strenuous cross-examination from learned Defence Counsel, she remained firm in her evidence that she never was a willing partner in the act of sexual intercourse which the accused committed on her. I am satisfied the evidence of the victim, which I accept as true, bears this out clearly. Her subsequent demeanour as observed by PW3, Agnes Ladu, is also consistent with her evidence. PW3 described her appearance as sorrowful and weak. She also observed that PW1 cried when the story was related to her, that a man had taken her out into the bushes to look for pawpaw whilst the rest of the children sought to run away from the accused.

Also, it is of significance that she made a complaint to her Grand-mother and Auntie as soon as she had arrived at her Granny's place, at Canaan Village, and that the complaint was lodged with the Police the same day This is inconsistent with the actions of someone who may have consented to such intercourse. I am satisfied so

that I am sure, that no consent whatsoever, in the true sense of that word, was given, offered or granted to the accused on both occasions.

The absence of a medical report.

First, it must be noted that there has been no suggestion whatsoever put forward that the medical report (if any), had been with-held deliberately by prosecution. There is clear evidence given that the victim did attend at a hospital, on the following Wednesday of the same week, to see a doctor. No report however has been filed, and prosecution explains that as it was not part of the prosecution case that the victim may have been subjected to any physical violence to her body from the accused, that it was not necessary for prosecution to produce such a report, if any. I note too that there is no evidence to say that defence may have sought to obtain a copy but were refused. No application has also been made to this court for disclosure of such a report.

Is the absence of a medical report fatal? In the circumstances of this case, the answer must be no. It has never been the defence case that sexual intercourse did not take place, and that the only thing which did happen was an indecent assault on the victim. I note though that that was the line of approach taken eventually by learned Counsel for the Defence. Unfortunately, that would not have been open to his client to advance, as his client's defence had not been a denial that any such offence had been committed, but rather, that he was never at the locus where the crimes were committed. The two main crucial issues in this trial from the beginning therefore were that of identification and the question of truthfulness or untruthfulness of the prosecution witnesses. With respect therefore, it was never open to him to assert that he only fingered the vagina of the victim, sucked her breasts, kissed her, and only played with her. That was never his defence right from the beginning, and therefore what he was doing in actual fact by making the above assertions without any supporting evidence whatsoever is to invent a defence, over and above his main defence. With respect, he simply cannot have it both ways. Either, he was the driver, et cetera, et cetera, or he was never there. In other words, he has made his bed, and

so must lie on it. The very fact that Defence had seen it fit to take such an approach in cross-examination has not assisted the question of credibility of the accused. If anything, it showed very plainly that the accused was giving diverging instructions to his solicitor.

I am satisfied, the element of sexual intercourse, that is, that complete penetration had been achieved, has been proven by prosecution beyond reasonable doubt, despite the absence of a medical report, and therefore it is not fatal to these proceedings that a medical report had not been produced.

As a matter of practice however, in rape cases, where a medical report has been obtained and is available, it should be produced as a Court exhibit and not with-held

Finally, let me make it quite clear, if it has not been obvious throughout this judgment, that the evidence of this accused as to his where-abouts on the 8th and 9th of August, 1993 must be rejected, as false. Though he did not need to plead an alibi, he did mention in his evidence in chief, that around the 7th of August 1993, he was diving at Poro Village with the land-owner's son. He did not know or remember it seems, conveniently, the name of that son or even the name of the land-owner, from whom permission had been obtained for his diving at the village. There is no evidence to show that the Police may have been informed of his line of defence prior to trial so that normal investigations could be carried out to check out his story in the interest of justice. Whilst I do bear in mind the fact that the burden of proof vests with the prosecution, and that therefore he need not have said anything to the police as to his whereabouts, on those dates, it could be argued in the alternative, that police investigations would not have been complete without being given the opportunity to check out his story as well; bearing in mind that the police are obliged to investigate all possible avenues and to collect all such relevant evidence as would best serve the interests of justice.

I also make the observation that in his evidence on oath before this court, there was no specific mention or reference as to what he did or where he was on the 8th and 9th

of August, 1993. The only specific reference made as to what he was doing related to the 7th of August, 1993. That would have been a Saturday (and judicial notice of that fact can be taken). The 8th therefore was on a Sunday. I do note that the general assertion of this accused was that he was at Poro Village during that time. But the pertinent questions which could be asked is, where he was on the Sunday and Monday of the 8th and 9th of August 1993; in particular on the evening or afternoon of the 8th and the morning of the 9th. Was he in church on Sunday afternoon or Sunday evening, (normally villagers go to church at that time), or where was he staying at Poro Village, if he did not go to church that day? On Monday morning where was he? Was he at Poro Village, and if so, at whose house? There has been very little or no evidence adduced whatsoever relating to his whereabouts on the 8th and 9th of August, 1993. As has been alluded to earlier, the explanations and evidence of the accused has been plagued with generalizations, vagueness, and ambiguities, and this has not assisted his case much. The over-all conclusion that this court has arrived at is that this witness (the accused) cannot be trusted, his evidence unreliable, and so must be rejected.

On the other hand, I am satisfied so that I am sure, that the evidence of the prosecution witnesses can be trusted, the reasons have already been canvassed through-out this judgment, and I do not need to repeat them. I accept their evidence, and I am also satisfied beyond reasonable doubt that the elements of the offence of rape on both occasions have been proved. The accused is **convicted** of both offences.

ALBERT R. PALMER

A. R. PALMER

JUDGE