

REGINA -v- HENRY SUUMANIA

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J.).

Criminal Case No. 313 of 2003

Date of Hearing: 18, 19, 20 and 21 October 2004

Date of Judgment: 26th October 2004

M.J. McColm for the Crown
S. Lawrence for the Accused

JUDGMENT

Kabui, J. Henry Suumania is the accused. The accused was charged with the rape of Valentine Baomaole, the complainant, contrary to section 137 of the Penal Code Act (Cap. 26) "the Code" on 22nd August 2003 at the Botanical Garden in Honiara. On arraignment, the accused pleaded not guilty. I entered a plea of not guilty against the accused. I bear in mind that the burden of proof beyond reasonable doubt of the guilt of the accused rests with the Crown, the Prosecution. The accused does not need to prove anything to vindicate his innocence. The accused however admitted having sexual intercourse with the complainant on the date alleged in the information. However, the accused said in evidence that there was consent on the part of the complainant for they both had agreed to have sexual intercourse on the alleged date. So the issue in this case is consent or the lack of it on the part of the complainant.

The case for the Prosecution.

The Prosecution called seven Crown witnesses. The first witness was the complainant. Her story was that she was a student at Bishop Eppalle School. She was then 18 years old. She did not attend school on 22nd August 2003 being a RAMSI field day programme in Honiara. She and Miss Sirorau went to the King George V1 School Market to buy betel-nut and then returned by bus to town. Fred Siriurao, her boyfriend, boarded the bus with them and they headed back to town. She and her boyfriend, Fred, dropped off at St. John School bus-stop and went to the Botanical Garden behind the Rove Prison compound. The complainant then was living with relatives at Leggakiki. The road through the Botanical Garden is a short cut to Leggakiki where she was living. They stopped at a place along the way and made love. They walked away and then she saw the accused running towards them. She told Fred of that fact and Fred told her to go. The accused reached Fred and appeared to be talking to Fred but she did not hear what was being said between them. She saw the accused holding a newspaper and something that resembled a radio in his hands. The accused was wearing a short and a singlet. She kept walking. Fred then left the accused and walked down from her. The accused then shouted to her saying that she was trespassing. The accused said that he was working for RAMSI. She replied and said she was sorry if she was trespassing. The accused insisted that she must lead him to where she and Fred had been together. The accused asked her whether she and Fred had made love. She led the way to the place where she and Fred had been together. The accused was holding a radio and was talking into it indicating his position as though he was communicating with the Police. She said she was afraid because she thought the accused was a Police officer talking to RAMSI about her trespassing. She pointed out the place the accused wanted to see but the accused called her back to him. She went up to him but the accused kept on talking into the radio he was holding as though to the Police. The accused asked her that they talk. The accused told her

to sit down on a newspaper. She refused to take the newspaper from him. The accused told her that for her safety, they should have sex. She said no and apologized for trespassing. The accused said that if he made a report to the Police, she would be arrested. The accused said the Police were coming to arrest her. The accused said the Police were down there and that she was in School uniform. The accused then removed his clothes and advanced towards her. The accused was already naked. The accused pulled her pants down and separated her legs. The accused pressed her down on the ground and she could not move. The accused had sexual intercourse with her. Later she pushed him off her and stood up. She said that she pushed him off her when she felt he was weak. She said the accused ejaculated outside of her. She said she did not look back at the accused after she stood up having pushed him off her. She said she was upset of what the accused did to her. She followed the road past the E.U. building and arrived at her uncle's house where she met Angela who gave her water. She then walked to her house where she saw Miss Kokopu, (PW5), her cousin sister. She cried and so Miss Kokopu asked what had happened to her. She then told Miss Kokopu what had happened. Miss Kokopu assured her that they would try to locate the man later if she could recognize the man.

Fred, (PW2), confirms that the complainant and himself had had sex in the Botanical Garden. He confirms that the complainant and himself had separated after having sex. The complainant was making her way home and he was heading down to the road to catch the bus. He said he was about ten metres away from the complainant when he met the accused. The accused was holding a mobile phone and accused him of trespassing. The accused told him that the Botanical Garden was being looked after by the army and they had already arrested four persons. The accused told him to leave and that he was going to tell the complainant also of those facts. He said he was afraid and left. He said the complainant stood still and watched him and the accused talking. He said he felt troubled on his way to the bus-stop and decided to go to the complainant's house. He said he followed another road and eventually reached the complainant's house. He said the complainant was not at the house so he followed another road and met the complainant. She was crying and when asked why she was crying she told him to go and look for the accused for the accused was a bad man. He told her to go her house and have a rest.

Identification of the accused is not an issue in this case. The accused admitted that it was him who had had sexual intercourse with the complainant. The accused admitted that he carried with him a mobile phone and a Star Newspaper and a pen who the complainant said was a knife. The accused admitted that he had had full sexual intercourse with the complainant with her full agreement.

The accused's evidence on oath.

The accused said he was relieving himself in the Botanical Garden when he heard the sound of a stick breaking. He looked in the direction of that sound and saw a boy being on top of a girl, making love to her. The girl was underneath the boy. He said the boy began to run away but the accused told him not to because what he and the girl had been doing was not the accused's business. The boy said nothing. The accused spoke to the complainant. The complainant asked where the accused was from and enquired whether the accused was from Malaita. The accused began to walk away but the complainant told him not to go but wait. The complainant suggested that they follow the road up the slope, she taking the lead. The complainant then said, "**brother, I am very sorry.**" The accused said that he recognized her as his brother, Coleman Mani, was a teacher at her School. The accused said the complainant suggested that they sit down. She said they should sit down and tell stories. She said, "**brother, I am in trouble.**" She asked him whether he was married to which he answered in the affirmative. He said she did not believe him when he said he was married.

She then told the accused to have sex with her quickly. The accused told her that it was her agreement for that to happen. He said they both agreed to have sexual intercourse. She confirmed it and said she would not tell anyone. She said it was a thing between them and no one else. She suggested they shake hands and they did so and then went their separate ways. He said he used no force against her or anything of that sort. He denied using the mobile phone to frighten her nor did he say he was a police or security officer to the complainant. He said the complainant went to him. In fact, he said that she removed her own clothes and told him to be quick with it. He believed that she wanted to have sex with him.

Some preliminary important points to notice.

The first and foremost, the accused and the complainant were complete strangers to each other. They both admitted this fact in evidence. The second is that the accused was an adult and the complainant was 18 years old school girl. The third is that the purpose of each of them passing through the Botanical Garden was different, thus their meeting was by chance. The fourth was that the complainant breached her promise not to tell anyone of what had happened between her and the accused because according to the accused, she was rather instrumental in inviting the accused to herself to have sex with her and to depart with a happy note by shaking hands. The fifth is that no one saw them having sex so that there was a threat of that person making a report first before she did. The sixth is that they were alone as Fred, (PW2), the boyfriend had gone away from the complainant to catch the bus.

The case for the defence.

Counsel for the accused, Mr. Lawrence, did concede that the complainant, (PW1), was confident and articulate in giving her evidence in Court. However, he warned that those qualities do not necessarily mean that she was telling the truth. He said her appearance in Court was brief so that her demeanor would not be conclusive of being a truthful witness. He said that she was a girl who had had sex that same day with her boyfriend, perhaps suggesting that she could have that same disposition towards the accused if the chance arose. Mr. Lawrence also dwelled on some inconsistencies in the evidence of the complainant. The first is about the meeting of the accused by the complainant, (PW1), and her boyfriend, Fred, (PW2). The evidence in chief by the complainant was that they separated and Fred, (PW2), headed down on his way to catch the bus. That was when he met the accused who spoke to him in full view of the complainant. This version was maintained under cross-examination even when confronted by her statement to the Police. She did explain why there might have been inconsistencies. She said she it was her first time with the Police, she was simply giving answers to questions being asked and she was in an unhappy mood. Her explanation is believable because the Police had taken two subsequent additional statements from her being on the 19th September 2003 and 10th October 2003. This shows that the Police themselves had not been adequate in taking her full story in her first statement on 6th September 2003. In any case, her statements to the Police were not evidence on oath like her evidence on oath in the trial. Mr. Lawrence also mentioned the complainant's evidence being inconsistent with that of her boyfriend, Fred, in that whilst she was adamant that she had not spoken to Fred before she spoke to Miss Kokopu, (PW5), Fred, (PW2), admitted meeting her first on the road before speaking to Miss Kokopu, (PW5), and later told her story to Miss Kokopu. This is indeed an inconsistency because certainly one of them was mistaken of the true fact. Even if the complainant was mistaken about that fact it did not alter the fact that she was upset after her encounter with the accused. She told Miss Kokopu, (PW5), why she was crying and upset. Mr. Lawrence also pointed out that the complainant had identified the wrong man at the Central Market who was taken to the Police Station and later released. How I understood her evidence on this point was that the complainant was not too sure of the man's identity and did not wish to confront the man. It was Miss Kokopu, (PW5), who

took the initiative on her behalf which resulted in the matter being reported to the Police. The release of the man from the Police Station must have been due to the complainant telling the Police that the man was not the accused. She then must have given the correct description of the accused to the Police which led to his arrest. She later identified him at an identification parade. Her boyfriend, Fred, did the same at a later date. Mr. Lawrence further suggested that the evidence given by Miss Kokopu, (PW5), was too good to be believable. She obviously remembered everything the complainant had told her about her being raped by the accused. Her story began only with the time the complainant and her boyfriend, Fred, separated and finished at the time she left for her house. Only that part of the story that the complainant told Miss Kokopu, (PW5). It is easy to re-tell that part of the story. The fact that Miss Kokopu, (PW5), re-told it in evidence quite accurately does not surprise me at all. The fact that the complainant did not tell Angela whom she met first according to her evidence of what had happened to her is of no significance in a Melanesian society like Solomon Islands. Hue and cry at the first opportunity in sexual cases is irrelevant in Solomon Islands because of cultural mores about the subject of sex. In *Birch v. The State*, [1979] PNGLR 75 at 82, Prentice, CJ, expressed the same view that "... such a principle of the common law (if it be such) is totally unsuited to the conditions of the present organization of Papua New Guinea society..."

Reports made several years later after the event may however have to be investigated to verify its value in terms of the principle of *hue and cry* in sexual cases.

The use of the mobile phone.

The mobile phone played a crucial role in the rape of the complainant. The accused does not deny that he had a toy mobile phone with him at the time he had sexual intercourse with the complainant. But he said in evidence that he did not use it in the way the complainant suggested he used it to frighten her to give in to his wish for having sex with her. His evidence on oath is consistent with his caution statement to the Police. Under cross-examination by Mr. Lawrence, the complainant said she and Fred had not seen anyone around in the Botanical Garden that time. She said they were alone in a private place and no one would have seen them together having sex. She maintained her story that Fred had left her before the accused met Fred down the road. She maintained that she was in front and the accused was behind her talking into the radio and following her to show the place where she and Fred had been together. She maintained that the accused had said to her that for her own safety and not to sleep in the cell, she must have sex with him. The accused, although was not in uniform, accused the complainant of trespassing and apparently both the complainant and her boyfriend, Fred, (PW2), believed him. Fred, (PW2), said he was in a panic after the accused had told him that they were trespassing and that they had already arrested four persons for trespassing in the Botanical Garden. The accused also told Fred, (PW2), that he was going to tell the complainant the same as well. Fred, (PW2)'s evidence is consistent with what the accused said to the complainant. Almost immediately, the accused shouted to the complainant letting her know that she was also trespassing. The accused was speaking into the mobile phone. He said to the complainant that he was a police officer with RAMSI and worked for the army. He said he was doing security work in the Botanical Garden. He was interested in being led by the complainant to the place where both had been together. But the accused was all along speaking into the mobile phone about the trespass concocted by him and allegedly committed by the complainant to cause her to believe him. The complainant said she was afraid of what the accused was doing. She believed that she was in trouble because the accused was a police officer. She said when they got to the place where the accused wanted to see, the accused told her to sit down. He gave her newspaper to sit on it. She refused to take it from him. The accused then revealed his intention. He said to the complainant that for her own safety, she should have sex with him.

She refused and apologized for her trespass. The accused told her that he would report her to the Police and she would be arrested. The accused insisted and said the Police were coming to arrest her saying that the Police were down there meaning below them at Rove Police Headquarters. At that moment the accused removed his clothes and moved towards her. The accused pushed her on the ground, removed her pants and had sexual intercourse with her. She said the accused separated her legs first. She said the accused was strong and she was only able to push him off when she felt that he was weak. She said she thought the accused ejaculated outside of her. She said she stood up and left without looking at the accused. The accused in his evidence said that he had full intercourse with the complainant with her consent.

Consent or no consent to sexual intercourse.

This is the difficult part in this case being the law. The accused had used no force at all against the Complainant. She sustained no injuries at all. Section 136 of the Code defines what conduct constitutes rape. Force, threats or intimidation of any kind or fear of bodily harm need not be present in all cases of rape. There can be rape by the accused if he makes false representations as to the nature of the act. See *R. v. Selwyn Sisiolo*, Criminal Case No.5 of 1998 (unreported) and *R. v. William Tepounapa*, Criminal Case No. 33 of 1997 (unreported). However, section 136 of the Code uses the term, "if consent is obtained... by means of threats or intimidation of any kind", that is rape. This means that the categories of the kinds of "threats or intimidation" that an accused applies to the victim of rape are not fixed. The threat in this case was a threat of Police arrest and detention in a Police Station if the complainant did not agree to have sex with the accused. Although the threat as a fact was an empty threat, the complainant believed it as being true and it affected her mind. The complainant said in her evidence that the day she was raped was a RAMSI field day in Honiara. So the mention of RAMSI and its army element was a fact at the time. I do take judicial notice of the fact that at that time many special constables who joined the Police were not in uniform although they carried out Police duties. So the mention of the fact that the accused was a police officer and was on security duty at the Botanical Garden was a believable fact by the complainant and her boyfriend, Fred, (PW2). In my view, the accused lied to the complainant and her boyfriend about his status as a police officer and the fact that they were trespassers in the Botanical Garden. In fact, the accused himself was a trespasser himself for that matter. What made him interested in Fred, (PW2), and the complainant was the fact that he saw them making love when he was relieving himself in the bush. He saw them separating and took the opportunity to isolate the complainant from Fred, (PW2), so that he could have sex with her also. The fact that she submitted to having sexual intercourse with him does not necessarily mean that she consented because that submission was a direct result of the events and threat preceding the act of sexual intercourse. She had been placed in a situation where submission was but inevitable on her part but was not consent on her part. (See *R. Olugboja* [1981] 3 All E.R. 443 cited in *R. v. John Iroi*, Criminal Case No. 250 of 2003 and *R. v. Tibon Oge*, Criminal Case No. 396 OF 1999). Whether consent is given grudgingly, tearfully or hesitantly is immaterial in rape cases. (See *The State v. Michael Rave, James Maien & Phillip Baule* [1993] PNGLR 85 and *The State v. Stuart Hamilton Merriam* [1994] PNGLR 104).

The question of credibility of the complainant and the accused.

The complainant gave her evidence in a forthright manner. She was confident and firm under cross-examination. She maintained that she caved in because of the threat of arrest and detention made against her by the accused, believing that the accused was a police officer keeping security in the Botanical Garden. She maintained that she did not consent to having sexual intercourse with the accused. Her evidence is confirmed by her boyfriend, Fred,

PW2, to the extent that the accused claimed to be a police officer keeping security in the Botanical Garden and accusing them of trespassing. The story told by the accused is extraordinary indeed. He invented his story. He was most evasive under cross-examination about the mobile phone. He did not say why the complainant should accuse him of raping her. She could have told no one if she had agreed to have sex with the accused because no one saw them doing it. She could have kept it a secret from Fred, (PW2), and even to Miss Kokopu, (PW5). There was no point in saying anything more after the encounter with the accused because having sex with the accused had been mutual and satisfying. After all, her boyfriend was not her husband and being unfaithful would not have mattered very much. She could have left for another or continued as though nothing had happened. There was no way Fred, (PW2), or Miss Kokopu, (PW5), could have known about the encounter but from the complainant. It is my view that the complainant was telling the truth. I do not believe the accused and I reject his evidence as being the truth of what happened. I find that the complainant did not consent to having sexual intercourse with the accused on 22nd August 2003.

Corroboration of the complainant's evidence.

Fred, (PW2)'s evidence as to the fact that the accused claimed to be a law enforcement officer accusing them of trespassing confirms the complainant's version of facts to that extent. Fred, (PW2)'s evidence also confirms that the accused had a mobile phone with him. The accused admitted this fact in evidence. The accused had told Fred, (PW2), to leave the Botanical Garden and was obliged to tell the complainant the same facts that he had related to Fred, (PW2), to get him out of the way. Fred, (PW2), felt troubled about the meeting with the accused that he returned to find out about the fate of the complainant. Even if these facts do not amount to corroboration, I can still convict the accused of rape if I believe her evidence as being the truth of what happened to her on 22nd August 2003 having warned myself of the need for corroboration of the complainant's evidence. That is, it is unsafe to convict the accused without some evidence corroborating the evidence of the complainant. However, the Court can convict on the evidence of the complainant alone if the Court believes the truthfulness of the complainant's evidence having been aware of the existence of the risk of conviction without corroboration. I find that the complainant is a truthful witness. She did not agree to have sexual intercourse with the accused. The accused raped her and I accordingly convict the accused of rape as set out in the information filed by the Director of Public Prosecution. The prisoner may appeal against conviction.

F.O. Kabui
Puisne Judge