IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION

NO. 383/93 & 384/93

BETWEEN : REX

AND : 1. TEVITA VAKA
2. ELEVISI SCHAUMKEL

WARD CJ

Veikoso for the First Accused
P. Tonga for the Second Accused
Elrington for the Prosecution

Hearing : 14, 15, 16 and 17 December 1993
Judgment : 17 December 1993

JUDGMENT

The two accused are each charged with rape, indecent assault on a female and abduction of a girl of less than 14 years on 19th February 1993.

The two girls involved are close friends. Both attend Tonga High School and, at the time, of these incidents Mele was 12 years, 11 months and Salote was 12 years 4 months. The accused are both bus drivers and their work includes carrying the two girls to and from school. The first accused, Vaka, is a single man of 27 years and the second accused Schaumkel, is a married man of 30 years. The charges relate to the same overall incident but Vaka is charged only in relation to Mele and Schaumkel in relation to Salote.

On the day involved, the two girls had arranged with their parents to go to sports training at the school followed by a barbeque and afterwards - some time about 9.00 pm - both were to stay the night at Mele's house in order to study.

Whether that was originally a genuine arrangement was never revealed on the evidence but it was clear the two girls had decided very early on to do otherwise. It is not disputed that after school, they went home and changed into ordinary clothes and boarded Schaumkel's bus. They suggested he went to Sopu but, when they stopped at Lopaukamea, Vaka's bus passed and also stopped. The girls transferred to his bus in order to let Schaumkel drop his other passengers.

It was agreed they would continue driving with Vaka who had finished work and so he took them when he went to fill the bus with fuel. From there they drove to the base from where Schaumkel worked. It was arranged that they would go to Sopu and Schaumkel would join them later. On the way Vaka brought five Royal beers and, once they arrived in Sopu, the girls who had never drunk alcohol before, asked to taste it and then had a bottle each given to them.

Schaumkel arrived shortly after with another man but later left and returned with 20 cans of beer. Because it appears Salote lived in Sopu, it was decided to move to Fanga and much of the beer was consumed there. Whilst there, Vaka bought another 10 cans and a half litre of vodka. Those drinks were shared with a number of others and there is a sharp dispute how much the two girls drank. What is clear is that they did drink some beer and I accept their evidence that they were affected by it. I do not need to resolve the issue beyond that because the prosecution do not suggest they were so drunk they could not consent to sexual intercourse.

At one stage at Fanga, Schaumkel went in his vehicle to town and took Salote and another man, who was left in town whilst the accused and Salote drove back. Salote told the court that, when they arrived back at Fanga, Schaumkel stopped his vehicle behind the bus and they remained in the van. Shortly afterwards they had sexual intercourse. That is denied by Schaumkel.

Later, the other men left to go to the Ambassadors Night Club and the accused and the two girls drove first to Ha'ateiho where Schaumkel left his van. Again it is disputed whether Mele and Vaka went in the bus and Salote in the van or whether Schaumkel was, as he claims, alone in his van . I cannot on the evidence, resolve that dispute but it is a matter of minor importance. In so far as it is of relevance, I take it in Schaumkel's favour that his account is correct.

Once the van had been left, all four drove eventually to Nualei when Vaka has a tax allotment. On their arrival, he and Mele went into the house there and had sexual intercourse leaving Schaumkel and Salote in the bus nearby.

Vaka admits that sexual intercourse and says that Mele took off her clothes when he left for a moment to collect a mat from the bus. Mele says she was told to take her clothes off by him and did except for her underclothes which he removed. She also said they had previously tried to have sexual intercourse at Fanga but were disturbed by Schaumkel's return. It appears she was having her period at that time and she says she told Vaka on that first attempt. She also says that once they had started sexual intercourse, she asked him to stop because of her period. The charge of rape depends on that denial because at no previous or subsequent stage does she describe any attempt to stop the intercourse. I believe she was having a period but I am not satisfied she allowed it to prevent intercourse nor that she asked Vaka to stop at any stage. The prosecution must prove lack of consent and have failed to start to prove it. In fact, the evidence convinces me Mele was a willing and consenting partner throughout the sexual intercourse. Vaka is aquitted of rape. He has pleaded guilty to indecent assault, as he must, because the girl could not consent to the acts he admits occurred.

Before dealing with the abduction count, I shall deal with Schaumkel's case on counts one and two. He denied to the police and denies to the Court that he touched Salote. He admits once asking her whether she had had any previous sexual relationship but denies anything more. He admits they chatted in the van on the return to Fanga but denies there was any familiarity. He denies taking Salote in his van to Ha'ateiho.

Salote described how, once Mele and Vaka went into the house at Nualei, Schaumkel took off her clothes and told her to go to the front of the bus where they had sexual intercourse. She used the word 'rape' but, when asked ~~but~~ what it meant, said it simply meant sexual intercourse. There was absolutely no evidence of lack of consent on her behalf and, again, I am convinced Salote was also a willing and eager participant in the sexual intercourse. Schaumkel is aquitted of rape. He denies the sexual intercourse or any intimate behaviour. Mele and Vaka describe how, after they had sexual intercourse, they heard Schaumkel calling to them to leave before it was daylight . Mele said that, when she returned to the bus, she could see Schaumkel and Salote had no clothes on the upper half of their bodies at least. That is denied by Schaumkel who is supported in that by Vaka.

I am satisfied beyond any doubt that Schaumkel did have sexual intercourse as described by Salote. I believed Salote's and Mele's evidence. They were clear and credible witnesses. I allow for their age is making that assessment but, by any measure, they were good witnesses. Schaumkel I did not believe. He said he joined the others in Sopu to drink beer and when the rest went to Ambassadors, he preferred to stay with the beer. Once he had left his van at Ha'ateiho, he joined them in the bus because the beer was there. At Nualei he simply sat and drank beer. I do not believe him.

Indecent assault is an assault accompanied by an element of indecency. In this case the act of sexual intercourse is an infliction of unlawful force accompanied by indecency. I am satisfied and it is not disputed Salote is under 16 and cannot therefore consent. The second accused Schaumkel is convicted of indecent assault on Salote.

Each of the accused is also charged with abduction of a girl under 14 years old. Under section 129 of the Criminal Offences Act, the prosecution must prove beyond reasonable doubt against each accused that the girl was under 14 years and that he took her out of the possession and against the will of the parent. I must consider the evidence on this charge against each accused separately but much of it is common to both. I am satisfied beyond any doubt that the prosecution have proved in each case that the girl was under 14 years old. They

have called both parents of Mele and of Salote and I am satisfied to the same standard that, if there was a taking, it was against their will.

The defence in each case is that it was the girls who suggested the meeting and who suggested going to Sopu and that, by the time they joined the accused, they had themselves left the possession of their parents. That the girl consented to the taking is, of course, no defence but the Court must be satisfied there was a taking out of the possession of the parents.

I cannot accept the interpretation of law suggested by the defence. Possession in the sense of this section means and must mean far more than the immediate physical custody of the girl. A child when she is at school or visiting the the town, is still in the possession of her parent. Leaving the house for a temporary purpose intending to return does not mean the child has left the possession of her parents. Taking a girl out of the parents' possession means some conduct amounting to a substantial interference with the possessory relationship of parent and child.

Whilst it is not necessary for the prosecution to prove there had been a taking by force, it is necessary to prove there was some inducement or blandishment held out to her by the defendants. On the evidence in this case, both accused admit they had frequently carried the girls in their buses whilst they were in school uniform. They both knew the girls were attending school. Both claim they thought the girls were older. They talked of 17, 18 and 19 years old but neither ever asked them their age or anything to ascertain which form they were in. Having seen both girls in court in everyday clothes, I accept the accused may have believed they were older than 12 but I am satisfied they knew they were school girls and therefore likely to be young and were reckless about their age. That fact gives them no defence to a charge under section 129 but it is a relevant factor in considering whether the accused knew they were in their parents' possession and whether or not they were taking them against the parents' will. A girl of 18 who is allowed to stay out all night and is taken out all night is not removed against the will of her parents. However, I am satisfied beyond any doubt each of these men knew these girls were young. I do not believe they thought them as old as they claimed in court. They knew that these girls were attending school and would not be allowed to stay out drinking with

virtual strangers until 5 in the morning. They induced them to go with them by offering drinks and sexual advances and that is a taking.

Vaka, whose evidence I felt was generally honest, said that Mele asked him in the morning if he would like to go out with them. That I accept was more the conduct of a older girl. However, when they were refueling the bus Salote wanted to leave and he heard Mele persuade her to stay on the basis that, if they did not return home together, their parents would find out.

At Fanga he asked when they wanted to be dropped home and was told it was all right because their families thought they were at a barbeque. They had moved from Sopu because Salote said she lived there and someone might recognised her. All these matters, I am perfectly sure, showed Vaka that Mele and her friend were young and clearly not meant to be out. He is guilty of abduction contrary to sect 129 and I convict him accordingly.

In the case of Schaumkel, he joined the others later and there was no evidence any of the comments just described were made in his presence. However I have already found I do not believe him when he said he thought the girls were much older. I am satisfied beyond any doubt he knew they were at school, were likely to be young and took no steps to ascertain their age. As the evening progressed, I am satisfied beyond any reasonable doubt that he knew Salote should have been at home. He certainly should have enquired and did not. He must have known, and I am satisfied did know, that young school girls are not allowed out in this way in Tonga by their parents. He also induced Salote to stay by offering sexual advances and by taking her off in his van. I am satisfied beyond reasonable doubt that he abducted her contrary to sect 129 and he is convicted on count three.

Gordon Ward

NUKU ALOFA, 17 December 1993.