

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

NO. CR.208/2006

REX

-V-

'ALOISIO SISI FALEMAKA

BEFORE THE HON. CHIEF JUSTICE FORD

Counsel : Mr Sisifa for the Crown and Mr Pouono for the
accused.
Dates of hearing : 8 and 9 November 2006
Date of judgment : 16 November 2006

J U D G M E N T

Introduction

[1] The 74-year-old accused is charged with one count of indecent assault contrary to section 124 of the Criminal Offences Act (Cap 18). The offence is alleged to have occurred on Monday 29 May 2006.

[2] In his opening address, Crown counsel indicated that the prosecution case would rely heavily upon subsection (3) of section 124 of the Act which is the provision dealing with mentally retarded complainants. The unchallenged expert evidence in the present case was that the 18-year-old complainant is moderately mentally retarded as a result of meningitis while still an infant. I will need to return to the evidence touching upon this aspect of the case.

The prosecution evidence

[3] The complainant's 52-year-old mother told the court that her husband had passed away in 2003 but the complainant was the youngest of the couples' five children. On the day in question, the mother and the complainant had attended a neighbour's funeral at 8 a.m. and following the burial, the mother had some food at another neighbour's house before laying down to have a rest. Later in the morning she was woken by another woman who told her that a girl had come across from her home with a message. When the mother arrived home she was told that her daughter-in-law had seen the complainant riding around in a van being driven by the accused. The mother said that she was certain that her daughter was still with the accused and so she ran to his home to confront him.

[4] The witness continued in evidence:

"I ran to Sisi's (the accused's) house and saw his van parked there. When I was going into his allotment, I picked up a stick. When I went around the back I saw the van and looked to see if anyone was there but there was no one there. So I came around the front and I knocked on the door. I knocked the first time and there was no answer. Then I knocked again and after a while the door was opened and I saw Sisi. When Sisi opened the door he came down the steps and he said, "hello". I said, "hello Sisi, but I'm here because I was told that Kalini had seen my daughter in your van." He said, "Yes Vai, it's true. I was on my way when (the complainant) stopped my vehicle. I asked her where she was going and she said that she was coming to the road on her way to get a bus to go to town. When we got to Fanueli's house which is two houses from the main road, she told me to stop the vehicle and she said to stop there so she could catch the bus and she got out of the vehicle. That was the last I have seen of her." But at that time I saw that Sisi was intoxicated and when I seen his face that he was intoxicated I said, "Sisi, I think you're lying, I know for certain that my daughters in your house" and Sisi said: "No Vai, I would not lie to you. We came in the vehicle and she stopped the vehicle at Fanueli's house and got out and I believe that she has gone to town." I told him that I wanted to go to town to look for (the complainant) but I did not have any money for the bus fare and so he said, "here's two pa'anga for the bus fare." So I caught the bus into town (Nuku'alofa) and looked for her. I went to many roads, almost all the roads looking for (the complainant) until the late afternoon towards the evening."

[5] The mother then returned to the period prior to when she caught the bus into town:

"But prior to my coming into town, I had an argument with Sisi at his house. I insisted that I come into the house. So I went into Sisi's house. I knew for certain of my daughter was in the house but I was afraid to go into any of the rooms because there were only the two of us in the house, him and myself, and I thought that he was very drunk.

Q. What happened when you went into the house?

A. When I went into the living room I saw that the rooms were locked.

Q. How would you know the rooms were locked?

A. The doors were closed and I was afraid so I went out of the house."

[6] Returning to her trip into town, the mother told the court that she arrived in Nuku'alofa about 12 noon and after the futile search for her daughter which she described, she caught another bus back to her village sometime after 5 p.m.. After making other enquiries in her area about her missing daughter, she took a bath and then went to report the matter at the Mu'a Police Station. Her evidence continued:

"When I got to the police station, the officer asked me why was I there at the police station and I cried and said that I wanted to lodge a complaint about my daughter who had gone missing. The officer asked me why she was missing, where had she gone and I told him what I have stated here in court and I told the police I wanted them to come and search for my daughter at Sisi's house because I felt that my daughter was hidden by Sisi in his house. The officer apologised and explained that they had no vehicle at the time to go to Sisi's house but he asked if I could wait there and I remained there. I got to the police station at 7 p.m. and it was around 12 midnight and there was still no police vehicle available. The officer said he felt sorry for me and my grandchild. He apologised and said maybe we should go home because the vehicle had been tied up by an investigation regarding a cow. And then the officer told me to go home and get some rest and come back early the following morning. I told the officer I'm sorry, I can't go home until I see my daughter and it doesn't matter how long I have to wait for a vehicle. I insisted that my daughter was still at Sisi's house. I remained at the police station and then the vehicle arrived and in the vehicle came the officer in charge of Mu'a, Soane Naufahu."

[7] The witness was asked:

Q. "What time did the vehicle arrive?"

A. "Probably around midnight."

She then continued:

"Then Soane came and asked me why I was there. I told him about my daughter. He asked me if I was certain she was at Sisi's house. I told him: "Yes, I was certain she is at Sisi's house but that Sisi was lying to me." He told me not to worry because two officers would go to Sisi's house looking for my daughter and the vehicle left and when the vehicle returned I saw my daughter in the vehicle."

[8] The complainant's mother said that she was quite shocked to see her daughter and she asked her whether she had seen her when she had come into Sisi's house and her daughter replied that she had seen her when she came around with the stick but the accused had told her to hide because her mother was coming around with a stick to beat her up. The complainant told her that her bra, pants and underwear were still at Sisi's house.

[9] A formal complaint was then made to the police. They returned to the accused's home and found the complainant's bra between the bed and the window in one of the bedrooms. The accused was also brought back to the police station. The complainant's mother said in evidence that when they arrived home she asked her daughter where she had gone. The complainant

told her that at the function after the funeral a woman (her brother's first wife) told her to go and ask the accused for a cigarette (the accused had also attended the funeral). And that was why she climbed into his van. The complainant had also talked about bottles of alcohol. The accused drove her to the bush and offered her a drink of alcohol. The complainant told her mother how they had then returned to the accused's home and carried on drinking. She described the nature of the indecent assault that occurred and she said that they carried on drinking until she "passed out drunk".

[10] The 18-year-old complainant was called as the second witness for the prosecution. After being sworn in, she told the court her first name but when she was asked by Crown counsel for her surname she simply shrugged her shoulders. When she was then asked her age she replied, "4". After that rather inauspicious start to her evidence, she seemed to settle down in the witness box and I have no doubt that she was a competent witness within the meaning of section 118 of the Evidence Act (Cap 15).

[11] Referring to her initial contact with the accused, the complainant said that he showed her two bottles of alcohol and called her over to get into his van and go for a drink in the bush at his allotment. At the allotment the accused went and collected coconuts and the complainant remained in the van. While they were later driving back to the accused's home the accused told the complainant to hide because her brother was walking along the road. She did so by ducking down in her seat. The complainant then described to the court how, when they arrived at the accused's house, they continued drinking and then the accused kissed her on the mouth, took off her clothes as well as his own and sucked on her breasts and licked her vagina. Those are the events making up the charge of indecent assault. The complainant was asked in examination-in-chief whether she consented and she replied, "No". She was asked why she did not consent and she shrugged her shoulders. When asked again, she replied: "because he was old."

The defence

[12] The complainant was not challenged on her evidence of the events making up the indecent assault charge. The accused did not deny the allegations but his defence was that she had consented to everything that had taken place and he had no idea at the time that she suffered from any form of mental disorder. The accused, as was his right, did not give or call evidence but the prosecution produced an unsworn statement he had made to the police in which he said that he and the complainant were celebrating. The statement continued:

"Q. 8: What do you mean by celebrating?

A: We agreed to lick and play with each other and she organised twice and I

once

Q. 9: And how did you lick each other?

A: She had her head at my feet and I had my head at her feet and she licked me and I her.

Q.10: Who was on top and who was on the bottom?

A: I was on the bottom and she was on top."

[13] Later in the interview the accused was asked by the police officer about his knowledge of the complainant's mental condition:

"Q. 20: When you saw her face and actions, did you think that there was something wrong with her thinking?

A: She was speech impaired and was cunning almost handicapped.

Q. 35: So when you say (the complainant) is speech impaired, cunning and almost handicapped, do you think then that she is feeble-minded?

A: On closer inspection she is feeble-minded.

Q: 29: Did you know that it was an offence that you had committed against (the complainant)?

A: I know today that she is feeble-minded."

The law

[14] Putting to one side for the moment the case of a mentally retarded complainant, in order to establish a charge of indecent assault on a female under section 124 of the Criminal Offences Act, the Crown must prove beyond reasonable doubt the following five elements:

1. That there was an assault, the intentional touching of the body of a female;
2. That the touching was indecent according to the commonly accepted community standards;
3. The accused knew that the touching was indecent in that sense and intended to do it;
4. That the complainant did not consent and the accused did not honestly believe that she consented;
5. The complainant was aged 16 or over at the time.

Discussion

[15] Defence counsel accepted that the Crown had established all the

above requirements apart from the fourth element. Mr Pouono stressed that the complainant had had ample opportunity to escape from the accused's van, had she so desired, while he was collecting coconuts in the bush. She could also have very easily called out to her mother when she knew that her mother was in the living room of the accused's house. I accept the force of those submissions. The evidence highlighted by defence counsel certainly raises serious doubts about the issue of consent and the accused is entitled to the benefit of those doubts. My finding is that the accused honestly believed on reasonable grounds that the complainant did consent.

[16] That is not the end of the matter, however. My finding on the issue of consent then brings into play the provisions of subsection (3) of section 124 which, in essence, provide that a woman who is, "feeble-minded, insane or an idiot or imbecile" cannot in law give any consent to an act which would otherwise be an indecent assault, but an accused will only be guilty if he "knew or had reason to suspect her to be feeble-minded, insane or an idiot or imbecile."

[17] The Crown called expert evidence from Dr Mapa Puloka, a very experienced psychiatrist, who carried out an assessment of the complainant after the incident in question. Dr Puloka made the observation in his evidence that the terminology used in subsection (3), such as "feeble-minded", "insane", "idiot" and "imbecile" is now "very much out of date" but his conclusion, which I accept, was that the complainant's condition could properly be described as "moderate mental retardation" which best equated with the terms "idiot or imbecile". Based on Dr Puloka's evidence, therefore, I am satisfied that the Crown has established that the complainant was unable to give any consent to the indecent assault because of the state of her mind. The sole remaining issue, therefore, is whether the Crown has been able to prove beyond reasonable doubt that the accused knew or had reason to suspect that the complainant was mentally retarded in the way described by Dr Puloka.

Submissions

[18] When the complainant's mother gave evidence, she was asked whether she thought that the accused would have known about her daughter's mental condition. The mother said that he would have known because she would often take her daughter to a Chinese shop which is situated on part of his allotment and the accused would sometimes be standing by the shop and he would greet them. The mother said that the accused lives in the same village and everyone in the village knew about her daughter's condition. She said that when she walks in the street with her daughter, young children will call out, "goodbye (daughter's name) you imbecile."

[19] Mr Pouono, in his submissions, highlighted the fact that the village in question is a large village and the accused lives on the opposite side of the village from the complainant. He said that the families do not socialise or go to the same church so the accused would have no way of knowing about the complainant's condition. In reference to the answers the accused had given in his statement to the police in relation to the girl's condition, Mr Pouono submitted that his answers were given after he had been told by the police officer that the girl was mentally retarded. Mr Pouono also highlighted one of the answers given by Dr Puloka. The doctor had been asked if a someone was to meet the complainant for the first time, how long would it take that person to recognise that the complainant was mentally retarded? The doctor answered that it was something that he (Dr Puloka) as a psychiatrist, could pick up within 10 to 20 minutes but for any untrained person, it could take two to three hours.

[20] Mr Sisifa submitted quite forcefully, however, that the accused was well aware all along that the complainant was mentally retarded. He asked rhetorically, if the accused had believed that the complainant was a normal 18-year-old, would he as a mature 74 year-old married man, have tried to tempt her to get into his van by showing her two bottles of alcohol and would he have told her to hide in the van when he saw her brother walking along the road. In a similar vein he highlighted the complainant's unchallenged evidence that the accused had told her to hide under the bed because her mother was coming with a stick to beat her up. Crown counsel submitted that all of these actions showed that the accused was treating the complainant, not as a mature 18-year-old young woman, but as a child and the only conclusion one can draw from that evidence is that he knew all along that the complainant was mentally retarded.

[21] Mr Sisifa also drew the court's attention to question and answer number 20 in the accused's statement to the police:

"Q.20: When you saw her face and actions, did you think there was something wrong with her thinking?

A: She was speech impaired and was cunning, almost handicapped."

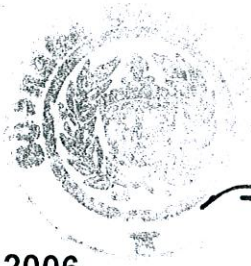
The prosecutor submitted that the accused was being asked in that question about his perception of the girl when he first saw her and his admission is significant.

Conclusions

[22] I found the prosecutor's submissions compelling and they were consistent with my own conclusions from the evidence. The fact that the accused told the complainant to get down and hide while they were travelling

in the van when he saw her brother walking along the road is clear evidence that he was familiar, not only with the complainant, but also with her family.

[23] I am satisfied beyond reasonable doubt that the accused knew all along that the complainant was mentally retarded within the sense of one or more of the terms used in section 124(3) of the Act. The Crown has, therefore, succeeded in establishing all the necessary elements of the offence and the accused is convicted accordingly.



A handwritten signature in black ink, appearing to read "R. J. C. J.", is written over the right side of the seal.

NUKU'ALOFA: 16 NOVEMBER 2006

CHIEF JUSTICE