

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

**CR 7 of 2018**

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**BETWEEN:                      REX**

**-      Prosecution**

**AND:                              PISONI FILO**

**-      Accused**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel:      Miss L Macomber and Miss Liu for the Prosecution  
                    The Accused in person**

**Date of Hearing:      20, 21 and 28 May 2019 (site visit)**

**Date of Ruling:      31 May 2019**

**VERDICT**

**The charge and the issues**

[1]      Mr Filo is charged with two counts of serious indecent assault contrary to s. 124(1) and (2) of the Criminal Offences Act. The two charges arise out of one incident on 15 July 2017 when it is alleged that Mr Filo assaulted a 12 year old girl, who I shall refer to as UT, by licking her vagina (count one) and biting her right nipple (count two).

- [2] Mr Filo represented himself and denies the charges. He says that he did not indecently assault UT and that the allegations against him are lies.
- [3] The trial was conducted over two days. I heard evidence from UT and her mother, who I shall refer to as MT, and from Constable Palefau for the Prosecution. Mr Filo gave evidence and called his wife as a witness.
- [4] I made a site visit on 28 May 2019. The property in question is now substantially overgrown and the residence has been demolished. The shower and toilet block in which it is alleged that the assaults occurred is still there but partially deconstructed. Nevertheless I was assisted in seeing the property.
- [5] At the start of the trial Miss Macomber sought leave to amend the indictment to change references to s. 124(3) of the Criminal Offences Act to s. 124(2) of the same Act. I allowed that amendment as Mr Filo did not oppose it and there was no prejudice to him.

**Proof and the elements.**

- [6] The onus of proof lies on the Crown at all times and it is to the standard of proof beyond a reasonable doubt in relation to the charge and every constituent element of the charge. I have also reminded myself that I must decide the case only on the evidence which the Prosecution chose to call before me and in so far as there are gaps in the evidence that is a matter I must consider in assessing whether it has satisfied its burden.
- [7] Miss Macomber submitted in closing that this case comes down to whether the Court accepts the word of UT or the word of Mr Filo. She is correct to the extent that the Court is faced with two very different versions of events. In circumstances where the Court finds this conflict insoluble it must fall back on the burden and standard of proof. This is such a case.

[8] Section 124 (1) of the Criminal Offences Act reads:

Any person who shall commit an indecent assault on any person shall be guilty of an offence under this section.

[9] The essential elements that the Prosecution must prove beyond a reasonable doubt in order to establish the charges of indecent assault are:

- (a) That Mr. Filo;
- (b) Assaulted UT by intentionally licking her vagina and/or biting her right breast; and
- (c) That the assault/s was indecent in that right minded persons would consider what was done offensive to contemporary standards of modesty and privacy.

[10] As UT was under the age of 15 years she was unable to give any consent which would prevent an act being an indecent assault for the purposes of the section (s. 124(5)). However Mr Filo does not say that UT gave her consent, rather he says he did not do the acts alleged.

#### **The statement**

[11] Constable Palefau was the investigating officer in this case. I must rule on the admissibility of an entry in her notebook that was signed by Mr Filo and which the Prosecution argues amounts to a confession.

[12] On 17 July 2018, Mr Filo was arrested at his home at Ma'ufanga and taken into custody in a Police vehicle. On route Mr Filo is said to have made a voluntary statement. Constable Palefau said she wrote down what he said in her notebook during the journey and completed it at the station. Mr Filo signed the notebook at the station. Constable Palefau and two other Police Officers also signed the notebook. She said that no one threatened Mr Filo to make a statement. He was not however given any warnings at any time prior to signing the notebook.

- [13] I was provided with a translation of the notebook entry and it reads:

Monday 17<sup>th</sup> July 2017

170717 D/Palefau, D/Pua'a, D/Fihaki. D/Siale we arrived at Ma'ufanga and lawfully arrested Pisoni Filo (M) 32 yr Ma'ufanga on the offence of Indecent Assault CRA 779/2017. When we came back in the vehicle to the work station Pisoni Filo of Ma'ufanga talks freely admits and we all hear it. He said he does not deny what had happened, the complaint against him. And he apologizes for us to go and talk and apologize to the lady who is the mother of the victim. And he was too drunk at the time.

He repeatedly asked us to give him an opportunity to go and apologize to the lady for what had happened. He asked us to do our work as he does not deny what had happened to the girl but for him to go and talk and apologize to her mother.

- [14] Mr Filo said that when he was arrested he was told that he should make the Police's work simple and should speak up about the allegations otherwise he would be locked up. He asked that his young child, who he was caring for at the time, be taken to his wife (there was no evidence about what happened to this child) and to speak to MT. Having been taken to the Magistrate's Court Mr Filo rang his wife on his cellphone and told her to ask MT to come to the Police station to talk about the allegations. The cell phone was taken off him by Constable Palefau and he could not finish the call.
- [15] Miss Macomber argues that the notebook should be admitted into evidence. Her principal submission is that the notebook is admissible under s. 22(e) of the Evidence Act and that Division 3 of the Tonga Police Act does not apply in this case because Mr Filo did not make his statement whilst being questioned, rather what he said was in the nature of a spontaneous and voluntary utterance.
- [16] Sections 147 – 149 which appear in Division 3 of the Tonga Police Act relevantly provide:



#### **147 When this Division applies**

This Division applies to any person who is in the company of a police officer for the purpose of being questioned about his knowledge, involvement or participation in the commission of an alleged offence.

#### **148 Cautioning a person of his right to remain silent**

(1) A police officer shall caution the person about his right to remain silent if —

(a) the police officer has sufficient evidence to charge the person at the time he commences questioning..

#### **149 Right to communicate with relative, friend or law practitioner**

(1) ...before a police officer starts to question a person who has been charged with an offence, the police officer shall inform that person that he may telephone or speak to a relative, friend or law practitioner.

[17] Section 22 of the Evidence Act relevantly provides:

#### **When confessions are admissible**

It shall be no objection to the admissibility in evidence of a confession that it was made....

(e) without any warning having been given to the person making it that he was not bound to make such a confession and that evidence of it might be given against him:

Provided always that where a confession is alleged to have been made to a police officer by the accused person while in custody and in answer to questions put by such police officer, the Court may in its discretion refuse to admit evidence of the confession.

- [18] In *R v Muli* (Unreported, Supreme Court, CR 102 of 2018, 9 January 2019) Cato J noted that the provisions in Division 3 of the Tonga Police Act dealing with the questioning of witnesses:

....are important modern provisions that recognise the vulnerability of suspects in the coercive atmosphere of custodial questioning and are designed to reduce the risk of unreliable confessions those provisions should be taken very seriously by police and breaches of them view [sic] should also be taken very seriously by the courts.

- [19] Cato J went on to consider the relationship between s. 22 of the Evidence Act and the provisions in Division 3 of the Tonga Police Act and said:

I consider a sensible resolution is to be found in an interpretation which would include breaches of section 148-153 of the Police Act within section 22 of the Evidence Act. This would mean that a failure to comply with the protections of those provisions would not affect the admissibility of a confession unless the breach was so serious, egregious, or deliberate that a court considered it could not be in the interests of justice to qualify for admission under that proviso.

- [20] When the person who is being questioned has been arrested for an offence ss. 148 and 149 are not to be read disjunctively. That person is entitled to be cautioned as to his right to remain silent (under s. 148) and to communicate with a relative, friend or law practitioner (under s. 149). To interpret the sections otherwise would be incongruent with the protective intentions of Division 3. It would also offend common sense as the right conferred under s. 149 may be of no real assistance to a person who is not also warned of 'his right to remain silent' (s. 148). It cannot be expected that a relative or friend would know and advise an accused person of his right to remain silent.

- [21] Miss Macomber's argument that Mr Filo was not entitled to the protections in ss. 148 and 149 as he was not being 'questioned' is not correct. Constable Palefau said that Mr Filo was questioned after his arrest in her evidence:

The day where we arrested this person he kept asking us numerous times to talk with the mother of the victim. We asked him why does he want to go there and he answered he wanted to go and apologize to the woman.

- [22] In the particular context there was always the possibility that such a question could invoke a response that would inculcate Mr Filo.
- [23] Such efficacy as the notebook might have if admitted into evidence rests to a large extent upon the fact that Mr Filo signed it. Constable Palefau said in her evidence that she gave it to him, and explained it to him and then he signed it. Clearly that involved Mr Filo being questioned as to whether the notebook was an accurate record of what he had said in the vehicle and if he would sign it.
- [24] It follows that there was a failure in this case to comply with both ss. 148 and 149 of the Police Act. Consistent with the approach in *Muli* I must decide whether to admit the notebook under the proviso to s. 22 of the Evidence Act.
- [25] These were not technical breaches of the provisions of the Tonga Police Act. They were, to adopt the epithets applied by Cato J in *Muli*, 'serious' and 'egregious'. Mr Filo was questioned in a coercive environment and asked to sign an obviously inculpatory statement without any warnings as to his right to be silent or to seek assistance. He was clearly worried about his child and also was insistent that he be able to speak to MT. He said in evidence that he was told to speak up or he would be locked up. Whether that is correct or not, I have no doubt that he would have perceived some compulsion to comply and sign the notebook.
- [26] Two other factors weigh against the admission of the notebook into evidence. First, the notebook is largely unhelpful as it contains no particulars of exactly what Mr Filo was admitting to except in general terms. That is significant because Constable Palefau's evidence was that she did not recall Mr Filo being told anything other than that he was being arrested and charged with indecent assault in this exchange:

Court: Before you recorded the statement did you give him a warning?

Witness: The only thing we told him at this time was that he was arrested or being charged with indecent assault.

Court: You didn't tell him anything else?

Witness: I don't think so.

[27] Secondly, Constable Palefau said that Mr Filo was later interviewed by the Police but the Prosecution did not produce his statement or rely upon it. I can infer that in the context of a formal interview Mr Filo did not admit any offending.

[28] For these reasons I find that the notebook is inadmissible.

### **A summary of the evidence**

*UT*

[29] UT is now almost 14 years old (12 years old at the relevant time). She said that on 15 July 2017 her parents had gone to wait for some fish from Ha'apai. In fact her father was at Ha'apai and it was her mother and a brother who went to the wharf. She was at home with her second eldest brother and one year old sister. Her brother then went to work. In cross examination she said her brother had gone to the shops and it was her eldest brother who had gone to work.

[30] At around 4-5 pm she went to the neighbouring property to have a shower. They had no water at her house and she had used the next door shower before. She said that the shower and toilet were part of the main house but later said that the shower and a toilet were located outside the main house. The door to the shower could be kept closed with a nail.

[31] When in the shower she heard a man calling for her eldest brother whose name is Taniela. The man used the toilet and when he came out he continued to call for Taniela. In cross examination she said that she knew it was Mr Filo



who was in the toilet as she had seen him through a big hole near the door walking on the road.

[32] Mr Filo then pushed open the door to the shower. She had finished showering and was wearing only a towel. Later she said that she was standing in her towel under the shower head while the water was running 'a little'. She said the water pressure could be adjusted.

[33] Mr Filo told her to lift her towel. She tried to escape but he held her by the hand. He bent down and licked her vagina. The towel did not come off and was 'tight at the top'. He then bit and sucked her left breast. She could smell alcohol on Mr Filo and he was drunk. She cried and called out to her brother Taniela.

[34] Mr Filo told her that what he had done was not bad. She shouted at Mr Filo to move and pushed past him. He offered her \$20 to buy food but she said she was already full at home. Mr Filo followed her out of the shower and told her to remember her promise but she did not understand what he meant by that.

[35] Mr Filo had not spoken to her from outside the shower nor had he been the first to leave the shower. Mr Filo had followed her out of the shower. Her clothes were hanging outside the shower on a nail but she had left them and walked back to her house in her towel. She had not told anyone she had left her clothes and had collected them two days later.

[36] Her parents did not arrive home for a long time. Later that night she told MT what had happened and MT called the Police. The Police came that same night and interviewed her.

*MT*

[37] MT took her youngest son and went to the wharf. Her husband was in Ha'apai. She returned home at around 9-9.30pm. She was in the toilet when UT told her what had happened. UT was distressed. MT questioned her about what had happened and UT did not change her story.

- [38] UT told her that she heard someone in the toilet when she was in the shower and she had been singing. Mr Filo had come into the shower and had given UT \$20 and told her to get something to eat which UT declined saying she was full at home. Mr Filo then pulled her towel and bit her breast and knelt down and licked her vagina. UT told her she kept shouting for her brother and when she was walking home Mr Filo told her not to forget her promise.
- [39] UT took off her t-shirt to show MT her breast and the right nipple was blackish in colour and showed signs of having been bitten. When Miss Macomber told MT that UT had said that it was her left breast that was bitten MT said UT was correct.
- [40] MT called a taxi and they went directly to the Police and filed a complaint. A few days later Mr Filo's wife had come to the house and told her that Mr Filo had contacted her and apologized but Mr Filo's wife did not know what he had done and asked what had happened. MT did not accept the apology.
- [41] MT had used the shower and said there was a nail used to close the door and the water could be adjusted by a tap. She also said that there was only a small window at the top of the bathroom.
- [42] Her eldest son, Taniela, had been friends with Mr Filo and they drunk together.

*Constable Palefau*

- [43] When the Police had gone to arrest Mr Filo he lied and said that the person they wanted was working at Fasi. They had gone to Fasi before returning and arresting him. When Mr Filo was taken to Court he made a cell phone call to his wife that Constable Palefau overheard. He told his wife to go to MT and apologise to her because he had been arrested. That was all she heard him say and she took the cell phone off him.

*Mr Filo*

- [44] Mr Filo said that he had been drinking with UT's brother, Taniela, the previous night and into the early morning (between 11pm and 2am). Taniela left because he had to work but said he would return after work and go with Mr Filo to drink kava.
- [45] When Mr Filo awoke he drank some beer. He did not hear the shower and did not know anyone was in the shower. At around 3-4 pm he went to the toilet and then went to take a shower. UT was in the shower wearing only a towel. He asked UT where Taniela was and she was silent. He went back to his house and UT went back to her home.
- [46] He did not see any clothes hanging outside the shower and the water pressure of the shower could not be adjusted except at the metre.
- [47] Taniela did not come to see him that night.
- [48] When the Police came to arrest him they did not come in a Police vehicle. He had lied to them because he did not know they were from the Police and he was looking after his child and did not want to leave. Whilst in the Police vehicle he was told to speak or he would be locked up. He was also told to make the Police's work simple and that was when he asked to speak to MT.
- [49] In relation to the cell phone call that he made to his wife from the Court he asked his wife to ask MT to come to the Police station to talk and that while he was talking the cell phone was taken from him.

*Vileti Filo*

- [50] She is Mr Filo's wife and confirmed that he called her. He asked her to go to MT and ask her to go to the Police station and talk to him. She went to MT's house and asked for her forgiveness and that she go to the Police station. MT said she would not go.

### **My assessment of the evidence**

- [51] The issue is whether it has been proven beyond reasonable doubt that Mr Filo assaulted UT by intentionally licking her vagina and/or biting her right breast. There can be no doubt that if that is proven the assault was indecent.
- [52] I note that the evidence of UT was that Mr Filo bit her left breast but despite this no application to amend the indictment was made. In the event this is not determinative.
- [53] The only witness who gave direct evidence of the alleged assault is UT. Much depends upon whether I accept her evidence as credible. There are three features of her evidence that cause me concern.
- [54] First, I am satisfied that in some respects UT's evidence was incorrect and UT contradicted herself on some matters. Examples include her evidence that both her parents had gone to the wharf when her father was in Ha'apai, that her second brother had gone to work and her evidence about phoning the Police with her complaint. I have been cautious not to place too much weight on this feature as some time has passed since the events that UT described occurred.
- [55] Secondly, in certain respects UT's evidence was not plausible and was given to counter propositions put to her by Mr Filo in cross-examination that she did not accept. Mr Filo put it to UT that he did not know she was in the shower. She responded that Mr Filo knew she was in the shower because the water was running. This was even though she had finished her shower and was wearing a towel. I note that MT said that UT had told her that she was singing in the shower but UT said nothing about that. UT also said that Mr Filo did not ask her where Taniela was yet said he had been calling to Taniela. She also said she called out for Taniela but earlier said he was at work. She also said in answer to questions from Mr Filo that she knew he was in the toilet as she had seen him walking on the road through a big hole near the door. When I inspected the toilet it is of block construction and there is no hole.



- [56] Most significantly, UT struck me as highly suggestible and I do not accept Miss Macomber's submission that her evidence was given in detail. Much of her evidence was given in response to leading questions. I will give just three examples to illustrate the point. UT gave evidence that when she was in the shower a man was in toilet. She was then asked '*And then what happened? Before he opened the door did you say anything to him?*' UT had said nothing about the man opening the door. UT gave evidence that Mr Filo bit her left breast. She was then asked '*When you say bit on your breast did he just suck on it or did he just bite it directly?*' UT relied for the first time that Mr Filo had sucked on her breast. She was then asked '*At this time did you call for help?*' and not surprisingly she answered '*I called for help*'. There are many other examples of leading questions which affects the weight of the evidence given in response to them.
- [57] I turn then to consider what other evidence there is to support UT's account. I accept that she complained to MT that Mr Filo had assaulted her. That is not independent evidence that she was assaulted: it is evidence that UT's conduct on the day was consistent with her evidence at trial (s. 11 Evidence Act).
- [58] However the evidence of MT as to what she was told by UT was not always consistent with UT's evidence and highlighted also a gap in the evidence. MT said that UT's nipple was blackish in colour and that they went straight to the Police. There were no photographs nor a medical report to support MT's evidence suggesting bruising of UT's nipple. The absence of such physical evidence is an important omission.
- [59] Miss Macomber's submissions that I should accept that UT was indecently assaulted because she has no reason to lie and because MT believes her and 'a mother knows best' do not assist and infer that Mr Filo carries an onus to provide a reason why UT might lie. He does not bear any such onus.
- [60] The fact that Mr Filo had been drinking the night before and also earlier on the day in question is not helpful as the evidence did not establish that he was affected by alcohol.

[61] Mr Filo's evidence was straightforward and in the main was plausible. I accept that there was evidence that he lied to the Police and asked his wife to go to MT and seek forgiveness. I do not consider that this is evidence directly probative of guilt of the offences with which he is charged. In respect of his lie to the Police there was no evidence from which it can be inferred that Mr Filo knew that they were there to arrest him for indecent assault upon UT and he gave evidence that he was concerned about being taken away because he had the care of his young child. His request of MT might be interpreted as consciousness of guilt but it could equally be regarded as an attempt to avoid an unjust allegation.

[62] I am left in doubt as to whether Mr Filo indecently assaulted UT. That does not mean that I believe UT is lying. It does not mean either that she was not assaulted. It simply means that on the state of the evidence as it was presented to me I am left with a reasonable doubt about the matter and Mr Filo is entitled to the benefit of that doubt.

### **Result**

[63] I find that the charges in the indictment have not been proven to the required standard. Mr Filo is acquitted on those charges.

[64] There shall be an order under s. 119 Criminal Offences that the identity of UT (or any details that may identify her) and her evidence taken in this proceeding shall not be published in the Kingdom in a written publication available to the public or be broadcast in the Kingdom.



NUKU'ALOFA: 31 May 2019

A blue ink signature, likely of the Lord Chief Justice, O.G. Paulsen.

O.G. Paulsen  
LORD CHIEF JUSTICE