**HIGH COURT OF SOLOMON ISLANDS**
Criminal Case No. 250 of 2003

**REGINA**

**-v-**

**JOHN IROI**

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

Date of Hearing: 17 February 1, 2, 3, and 25 March, 1, 2, and 5, April 2004.
Date of Judgment: 6th April 2004

R.B. Talasasa for the Crown.
R. Ziza for the Accused.

**JUDGMENT**

**Kabui, J**. The accused has been charged with the offence of rape, contrary to section 137 of the Penal Code Act (Cap. 26) "the Code" to which the accused pleaded not guilty on arraignment. The accused had been arrested the evening he allegedly committed the offence and was interviewed by the Police the next day and gave a statement under caution. The onus of proof of guilt is upon the Prosecution to prove beyond reasonable doubt that the accused is guilty of the offence of which he has been charged. At the trial, the Prosecution called a number of witnesses, including the complainant who gave evidence on oath as proof of the case for the Prosecution.

**The Prosecution case**.

The case for the Prosecution is that the accused accosted the complainant at night on the road on her way to a shop in the Kukum Shopping Centre owned by a Gilbertese man. The accused pulled the complainant off the road to the side of the road and threw her down in the drain that runs parallel to the road. The accused then had sexual intercourse with her without her consent in the drain.

**The case for the defence**.

The accused did admit that he met the complainant at about 7 pm on the road. He did admit that he and the complainant went to the drain and sat on the edge of the drain and talked for about half an hour when some boys came and accused the accused of raping the complainant. The accused then left the drain and moved to the middle of the playing field where some boys attacked him and later taken to the Kukum Police Station. He denied having sexual intercourse with the complainant at any time that evening. Counsel for the accused, Mr. Ziza, put the case

for the defence as being complete denial of sexual intercourse taking place between the accused and the complainant. Counsel urged upon me to acquit the accused forthwith if I should believe the accused. If, on the other hand, I did not believe the accused, then it was the accused's case that the Prosecution had failed to prove penetration of the complainant's vagina beyond reasonable doubt.

**Evidence adduced by the Prosecution**

The complainant was PW 4. Her evidence was that she was staying in the household of George Mouli, a Police Officer and a relative, in the Kukum Police Station compound at the relevant time. She was sent to buy sugar at one of the shops in the Kukum Shopping Centre near the Kukum playing field. The time was between 7pm to 8pm in the evening of 19th July 2003. It was already dark in the evening when she left her house. On her way up to the shop, she met the accused along side the old Kukum Cinema building. The accused accosted her and told her that he had seen her in the club. The accused said he wanted to go with her and to give her money. The complainant refused to co-operate whereupon the accused said he knew her. She refuted that claim saying she had just arrived from home. The accused then held her right hand and pulled her to the playing field side of the road and threw her down inside the drain. The accused shut her mouth with one hand and removed her trousers and his clothing and lay on top of her and had sexual intercourse with her without her consent. When her relatives arrived at the scene, she was still in the drain and the accused was pulling up his trousers. Joyce Mouli, PW5, said in evidence that she and others went to look for the complainant after the complainant had been away for too long. She said that when they reached opposite the old Kukum Cinema building and near Muaki's house, someone told them that a man was in the grass in the playing field across the road. PW5 then shouted to whoever was in the grass to release the complainant immediately. A little later she saw a man ran away from where the complainant was in the drain. She said she took the complainant away to her house. Betty Suri, PW6, said she actually stepped on the back of someone and jumped back. On asking who it was, the accused said he was him John Iroi. When told to release the complainant, the accused said the complainant was a different girl. Rose Titi, PW8, was also at the scene, and like PW6, asked who he was and the accused said he was John Iroi. When asked about the complainant, the accused said the complainant was not with him. The accused then ran away. The accused was later seen by the complainant, PW5, PW6 and PW8 at the relevant Police Station. Identification of the accused is not an issue in this case.

**The law**.

Rape is defined in section 136 of the Code. It says that-

'...**Any person who has unlawful sexual intercourse with a woman or girl, without her consent, or with consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape**...."

Rape is therefore an offence that involves a male person having had sexual intercourse with a

woman without her consent. Lack of consent and penetration of the woman's vagina are two elements to be proved by the Prosecution. Using force, threats or intimidation to cause fear of bodily harm in the mind of the woman to facilitate penetration is evidence of lack of consent on the part of the woman. Rape can also be committed where no force is applied such as where penetration is effected whilst the woman is asleep or by tricking the woman or pretending that the man is her husband or making false representations to the woman as to the nature of the act.

**Denial of sexual intercourse by the accused**.

The act of sexual intercourse being denied by the accused, the question of a guilty verdict would depend largely on which side was telling the truth. The accused gave evidence on oath but called no witnesses. The accused was interviewed by the Police on 20th July 2003, the day after the incident. Sergeant Balaga, PW9, was the Police officer who received the report of the alleged rape at Kukum playing field at about 10 pm that same night of the alleged rape. He went to the scene of the offence, pointed out to him by the complainant. The spot where the alleged rape took place is the floor of a drain covered with tall grass. There was darkness so the headlights of the Police vehicle were used to light up the scene. The grass was down as though heavy weight had previously been placed on them. There he found one pair of slippers and a cowboy hat. Staff Sergeant Hane, PW3, took photographs of the scene, the pair of slippers and the cowboy hat made possible by the headlights from the Police vehicle. The cowboy hat belongs to the accused. He admitted that in his caution statement interview with the Police the next day. The album of photographs developed by the Police was tendered as Exhibit 2. The pair of slippers is Exhibit 5 and the cowboy hat is Exhibit 6. Photographs D and E clearly show the state of the grass being disturbed. The scene of the alleged rape being the floor of the drain is inconsistent with the accused's version that he and the complainant sat on the edge of the drain. Photographs D and E clearly confirm that the disturbed grass were on the floor of the drain and not at the edge of the drain. I visited the scene of the offence on 1st April 2004. Both the edge and inside of the drain are covered with grass and being in that state would be most unsuitable environment for love story telling. The accused in his evidence admitted that he had been drinking with Mr. Ramo prior to meeting the complainant. He had drunk 6 cans of Solbrew beer of the 12 cans bought by Mr. Ramo. He had seen the complainant before at Fouia near Sulufou but had not spoken to her or known her name. He said his intention of asking the complainant was to have sex with her if she was willing. He said his penis was already erect when they were at the edge of the drain but the chance to have sex with the complainant was denied by the boys who came and accused him of raping the complainant resulting in his running away from the complainant. Photographs D and E do tell a different story. They do suggest weight being placed on the grass previously so as to cause it to be disturbed or lie on the floor of the drain. The complainant's female relatives, PW5, PW6 and PW8 all confirmed in evidence that they found the accused and the complainant inside the drain before the accused ran away. Their evidence and photographs D and E are consistent with the complainant's evidence as regards the exact spot where the alleged rape took place. That spot is not at the edge of the drain but inside the drain. The persons seen by PW6 and PW8 at that spot were the accused and the complainant. The accused actually identified himself as John Iroi but denied being with the complainant. PW 6 and PW8 saw him pulling up his trousers before he ran away. The complainant also got up and looked for her trousers and having found it put it on before she was taken away by Joyce Mouli, PW5. The accused would not have known the identity of PW 5, PW6 and PW8 when he responded to their questions other than

guessing that they were persons looking perhaps for the complainant. The fact was that these women were the relatives of the complainant, searching for her after she failed to return to the house. They had sent her to fetch sugar for a cake mixture and were awaiting her quick return to the house so that the cake could be made. The complainant's failure to return as expected had raised concern and so they went to search for her. PW5, PW6 and PW8 saw the accused at the scene of the alleged rape being the floor of the drain with the complainant. As I have said above, I visited the scene myself. PW5, PW6 and PW8 would have been standing at the edge of the drain looking down on the accused and the complainant. PW6 who stepped on the back of the accused would have tried to cross the floor of the drain. Actually, the accused was caught red-handed by the three women. Why should PW5, PW6 and PW8 be lying in court? After all, they did not know where the complainant might have been until PW7 told them that someone was in the drain on the other side of the road though it was dark then. PW6 and PW8 did not know the accused until he identified himself as John Iroi and then they knew who he was before he ran away. The same man was later identified by them at the Police Station. He was the accused. I do not believe the story told by the accused in his sworn evidence. The accused was caught red-handed and still said PW5, PW6 and PW8 were lying in court. I do not believe him for that reason.

**Had penetration taken place**?

Sexual intercourse for any offence punishable under the Code is defined by section 168 of the Code. It states-

"...**Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove sexual intercourse, it shall not be necessary to prove the completion of sexual intercourse by the actual emission of seed but the intercourse shall be deemed complete upon proof of penetration only**.."

So, there must be penetration of the vagina by the penis of the accused. The complainant had said that when she was thrown into the drain by the accused, the accused pressed his hand over her mouth and with the other hand removed her trousers and his clothing and had sexual intercourse with her. She said she did not wear any under-pant that time. This meant that she was naked. The accused was also naked. Both were therefore naked. She said the accused did wrong to her. She said the accused had sexual intercourse with her. When pressed by Counsel for the Prosecution, Mr. Talasasa, to say what she meant by sexual intercourse, she hesitated. She said the accused did not put his penis into his body. Then she said he did not feel his penis. Then she said the accused lay on top of her and she knew what the accused did to her. Then she said the accused did nothing to her. In answer to leading questions from Counsel for the Prosecution, she changed her story. Defence Counsel, Mr. Ziza, did not object to the leading questions nor did he raise it in his final submission. She answered that she felt the accused's penis enter her body. She said the accused put his penis between her thighs and entered between her legs. She said she felt it. She said the accused moved up and down on top of her. In cross-examination, she repeated that the accused did wrong to her thus repeating her evidence in chief. In re-examination, she said she felt the accused ejaculated. This apparent contradiction is significant in that in North Malaita where the complainant comes from a woman is not expected to tell in public the details

of sexual intercourse. Saying that a man did wrong to her tells the whole story. That is, sexual intercourse has taken place nothing more and nothing less. Telling the details of sexual intercourse and naming the genitalia and so on is not expected. It is repulsive in its essence. How do I know this? Well, the accused, the complainant and I all come from North Malaita where the culture is basically the same. The apparent inconsistency in her evidence on this point was a demonstration of her reluctance to tell men and the public of something repulsive for a woman from North Malaita to tell. She was rather withdrawn and hesitant to tell the details of penetration of her vagina and rather unhappy to the point of being angry when she was pressed to tell the details of penetration of her vagina. She was in tears when she was being asked repeatedly about whether or not the accused ejaculated inside her vagina. She said yes rather unhappily. The point here is that the apparent inconsistency in her evidence was not a deliberate lie on her part and her responses were a result of ambiguous and confusing questions by Counsel for the Prosecution developing into leading questions not objected to by Counsel for the Defence which she found easier to answer with simple yes answers. The medical evidence, though does not confirm physical injuries to her body or her genitalia or the presence of sperm due to lack of testing facilities in the hospital, does not exclude penetration because the complainant not being a virgin, her vagina was capable of receiving a penis without causing any physical injury to her vagina. In cases where physical injuries did occur, such could be the result of fierce resistance by the victim of rape, necessitating the use of more force to subdue resistance. In this case, the complainant did say she tried to struggle to get up but the accused was too strong and bigger than her suggesting that fierce resistance was out of question for her. She also said in evidence that she felt painful when the accused pushed his penis into her vagina. She attributed that pain to the bigger size of the accused's penis and the relative small size of her vagina. Whilst that might be so, the more likely reason was the lack of lubrication of her vagina before entry of the accused's penis thus being consistent with rape being a forced sexual intercourse. The complainant is a young person, probably only a teenager. She is a village girl and has little formal education. She said she was 12 years but PW5 said she was 15 years old. The doctor, PW10, who examined her, said she could be 19 or 20 years. No evidence was given as to her correct age. She said she had not had sexual intercourse with anyone else since the birth of her child some years ago until the accused raped her. The act of sexual intercourse with a man is something she had experienced and knows what the act involves. Should I not believe her if she said the accused had sex with her? Of course I would believe her. She would have had no motive for accusing the accused of rape. There was enough time though short it might have been for sexual intercourse to be completed before the arrival of PW5, PW6 and PW8 at the scene. In fact, the search had gone to the Kukum Market first before PW5, PW6 and PW8 followed the road to the Kukum shops and came upon the accused and the complainant in the drain. Accepting the accused's motive for stopping the complainant on the road was to have sex with the complainant and was ready for it with his penis already erect, accepting both of them being naked in the drain with their respective genitalia exposed to each other, the accused lying on top of the complainant moving up and down and the complainant lying on the ground face up unable to offer any fierce resistance because of the size and strength of the accused, no one would dare say that penetration of the complainant's vagina was impossible. Iam satisfied beyond reasonable doubt that penetration did take place even in the absence of any injury to the vagina or elsewhere on the body of the complainant.

**Lack of consent in this case.**

The complainant had been sent by her relatives to buy sugar and to return to the house. She did not go out on her own for a date. However, she met the accused on the road, a public place in the dark in the evening. Her errand was disturbed by the accused who was a stranger to her. She was alone. The accused accosted her and quickly introduced himself, and saying he wanted to go with her. The complainant being unfamiliar with the accused held back in responding and refuted the accused's claim that he knew her. The accused then held her right hand and pulled her off the road to the western end of the Kukum playing field and threw her down in the drain. The accused shut her mouth with one hand and removed her trousers and his clothing with the other hand. The accused lay on top of her and had sexual intercourse with her. She said in evidence in chief that she did not like what the accused did to her and did not agree to have sex with the accused. She said she was afraid of the accused. In cross-examination, she said that she believed that if her relatives did not come to her rescue the accused could have killed her. She said the accused was bigger than her and so she was not able to fight him or struggle to get up. She repeated the same answer in re-examination. She sustained no physical injuries to her body. She is not a virgin as she is already a single mother of one child.

**The amount of force used in rape cases**.

In **R .v. Olugboja** [1981] 3 All E.R. 443, the appellant and his friend Mr. Lawal had been dancing with two girls at a discotheque. Mr. Lawal offered to take the girls home but the appellant instead, drove them to the bungalow occupied by the two men, a place unfamiliar to the girls. On arrival at the bungalow, the two girls refused to go in and started to walk away. Mr. Lawal followed them in the car and after some argument, the girls got into the car. Karen got out and was trying to get Jayne out as well. Mr. Lawal drove off, stopped in the lane and raped Jayne. Mr. Lawal then drove back to the bungalow with the two girls. The three of them went into the bungalow but the appellant was already lying on the sofa and saw them arrive. Jayne was the last to enter but was crying. There was music but Jayne refused to dance. Mr. Lawal dragged Karen into the bedroom. The appellant put off the light and told Jayne that he was going to have sexual intercourse with her. The appellant told Jayne to remove her trousers and she did saying that she was frightened. The appellant pushed her on the settee and had intercourse with her. She did not struggle or cry or call for help. She did struggle when she thought the appellant was going to ejaculate inside her and the appellant withdrew. She put on her clothes and Mr. Lawal and Karen then emerged from the bedroom. Jayne did not report to the Police until Mr. Lawal told the Police that the appellant too did have sexual intercourse with Jayne. Having rejected a submission of no case to answer, the trial judge referred the case to the jury and the jury found the appellant guilty of rape. There had been no consent although no physical force, threat or intimidation had been used against the complainant but the events leading up to the rape and the events taking place inside the bungalow culminating in the appellant wanting to have sex with the complainant and telling her to remove her clothing for that purpose, creating fear in the complainant, were sufficient to make the act of sexual intercourse an act of rape. That case is an example of lack of consent being caused by conduct that could not be descried as using violence, threat, or intimidation to cause fear in the mind of the complainant so as to cause lack of consent. The fact that the complainant did not consent was sufficient to constitute rape. An appeal to the Court of Appeal was dismissed. At page 448 of the judgment, Dunn, L.J. said-

"...**Accordingly in so far as the actus reus is concerned, the question now is simply: at the time of the sexual intercourse did the woman consent to it? It is not necessary for the prosecution to prove that what might otherwise appear to have been consent was in reality merely submission induced by force, fear or fraud, although one or more of these factors will no doubt be present in the majority of cases of rape..."**

**"**...**Although 'consent' is an equally common word, it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other...there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent...In the majority of cases...evidence relevant to absence of real consent will clearly suffice..."**

At pages 448 to 449, His Lordship continued-

"...**In the less common type of case where intercourse takes place after threats not involving violence or the fear of it...we think that an appropriate direction to the jury will have to be fuller. They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case..."**

A petition by the appellant for leave to appeal to the House of Lords was refused. So my understanding of all these is that each case will have to be decided on the evidence before the court in so far as the absence of consent is concerned either by reason of violence or fear of it or other threats not involving violence or fear of it. In this case, the complainant was not part of the accused's intention. She was on an errand for a different purpose. She had not met the accused before prior to the rape. She was suddenly accosted by the accused from nowhere in the dark and being alone she was afraid. She tried to brush aside claims by the accused that he knew her and had seen her in the club but to no avail. The accused held her right hand and pulled her and threw her into the drain, removed her trousers and his clothing and had intercourse with her without her consent. She tried to struggle but it was pointless as she was small in stature and the accused is bigger than her. I saw both the accused and the complainant in court. The accused is tall and bigger in size than the complainant. In fact, the accused could carry the complainant without any difficulty. Pulling her along or even dragging her without her consent would not be a problem for the accused. She did not choose to have sexual intercourse in the drain with the accused; that was not what she was sent to do that evening by her relatives. The meeting of the accused was not her

making. In fact, the accused was a stranger to her. How could she have been willing to have sexual intercourse with a stranger for no reason at all on meeting him only by chance in the night on a deserted public road? I believe the complainant's story in evidence. I prefer her evidence than that of the accused. The complainant did not consent to sexual intercourse to take place.

**Corroboration of her evidence.**

The accused did admit that his caution statement was taken down by the Police on a voluntary basis without force or anything of that sort. But the accused denied giving the answers to questions 28, 30 and 31 in the record of interview. I do not believe that he did not give the answers that he said he did not give in the record of interview. The record of the interview with the Police on 20th July 2003 has the effect of giving the accused away. His answer to question 26 was that he did not know the name of the complainant, confirming that he was a stranger to her as confirmed by the complainant. His answer to question 28 was that he pulled the complainant's hand, confirming the complainant's evidence. His answer to question 29 was that he pulled the complainant's left hand though the complainant said it her right hand. This contradiction does not matter because the fact is that the accused pulled her hand. His answer to question 30 was that the complainant struggled when the accused pulled her hand. His answer to question 31 was that the complainant ran away. This answer is contradictory to his evidence on oath that when he asked the complainant on meeting her on the road, she suggested that they move away from the road and so they moved to the edge of the drain, sat there and talked until they were disturbed by some boys. His answer to question 37 was that he had a cowboy hat. His answer to question 42 was that he dropped the hat in the drain when he was being chased by some boys. This answer is inconsistent with the fact that PW9 collected the hat in the drain where PW5, PW6 and PW8 found him with the complainant. Photographs D and E are unassailable as to the exact spot the rape took place. When found in the drain, both the accused and the complainant were naked. The accused was pulling up his trousers and the complainant searched, found her trousers and wore it. PW6 and PW8 saw grass in the hair of the complainant as she was standing up from the drain and searched for her trousers on the edge of the drain. She was then crying. The accused was caught immediately and taken to the Police Station and the rape reported immediately.

**Conclusion**

The accused has not told the truth. The truth is what the complainant said supported by PW5, PW6 and PW8. Any inconsistencies in the evidence of PW5 PW6 and PW8 are of no significance. The accused was lying when he said that some boys chased him and he ran into the middle of the field where he was attacked. What I believe to be the case is that the boys having heard shouting coming from PW5, PW6 and PW8, ran up and caught up with the accused in the field and took him to the Police Station. The accused showed no marks of injury, if any, sustained by him when he said he was attacked by the boys. I find him guilty of the offence of rape and convict him accordingly. The accused is course entitled to appeal against his conviction.

As I said above, the accused gave evidence on oath but called no witnesses. Should the Prosecution be allowed to sum up its case? The answer is yes but summing up is not a must but if summing up is thought necessary, it need not be long. This is where section 143 of the CPC comes into play in that the fact that the accused gives evidence on oath and calls no witnesses

does not automatically entitle the Prosecution to make a reply. If, there is one, it should be brief otherwise there need not be one. The ultimate decision to make a reply or not is one of exercising, I might say, a sense of some wisdom on the part of the Prosecution. I do raise this point because Counsel for the Prosecution appeared to have prepared a lengthy analysis of the Prosecution evidence and therefore had to await the written submissions he had prepared but had not been typed up and thus necessitating an adjournment which I reluctantly granted on Friday 26th March 2003. A brief concise reply could have been sufficient to save time and cost.

**F.O. Kabui**
**Puisne Judge**