

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF  
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA167/08  
[2008] NZCA 443**

**THE QUEEN**

v

**SAULO TUPUTALA**

Hearing: 15 and 16 October 2008  
Court: Arnold, Randerson and Hugh Williams JJ  
Counsel: S J Lance for the Appellant  
M A Woolford for Crown  
Judgment: 24 October 2008 at 12 pm

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**JUDGMENT OF THE COURT**

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**The appeal against conviction is dismissed.**

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**REASONS OF THE COURT**

(Given by Randerson J)

## **Introduction**

[1] Mr Tuputala appeals against his conviction on one count of sexual violation by rape. He was found guilty by a jury in the District Court on 14 July 2006 and sentenced on 9 August 2006 to a term of nine years imprisonment with a minimum period of imprisonment of four and a half years. An earlier appeal against sentence was withdrawn in 2007: see [2007] NZCA 63.

[2] The sole ground of Mr Tuputala's present appeal is that a miscarriage of justice occurred through the failure of trial counsel (Ms Iuni Sapolu) to act in accordance with Mr Tuputala's instructions. Some ancillary issues of alleged counsel incompetence arose during the hearing before us.

[3] On the central issue of Mr Tuputala's instructions, Mr Tuputala says his instructions to counsel were that he had consensual sexual intercourse with the complainant. Ms Sapolu's evidence was that no such instructions were given and that Mr Tuputala had consistently denied any involvement with the complainant of any kind. Mr Tuputala, a Samoan, speaks very little English but Ms Sapolu is fluent in both English and Samoan.

[4] Counsel are agreed that our resolution of these sharply contrasting accounts will dictate the outcome of the appeal.

## **Factual background**

[5] The complainant's account at trial was that on Saturday 6 March 2005, late in the evening, she was walking through an alleyway towards the Otara Town Centre when she was approached by a man whom she identified to the police very soon afterwards as Mr Tuputala. He approached her from behind, grabbing her and partially removing her clothing. He then threw her to the ground and had intercourse with her despite her protests. When it was over, he gave her \$10 and left the scene. However, the police were involved at an early stage and Mr Tuputala was soon located not far from where the incident happened. When confronted by the police he ran away but stopped when further approached.

[6] Mr Tuputala was taken to a police station where he was interviewed at length with the assistance of a Samoan interpreter. The interview was recorded on videotape. Mr Tuputala's account was that he had been drinking with friends that evening and had then gone looking for a friend. He repeatedly denied any knowledge or contact with the complainant. Items of Mr Tuputala's clothing, including his underpants, were taken for forensic examination. He was asked whether he would undergo a medical examination and provide a sample for DNA purposes. It was explained to him that, depending on the outcome of the forensic examination, it could be demonstrated through DNA that he had had contact with the complainant. After obtaining legal advice from Ms Sapolu, he declined to undergo a medical examination or to provide a blood sample at that stage.

[7] Mr Tuputala was detained in custody until the morning of Monday 7 March 2006 when he appeared in the Manukau District Court. Ms Sapolu successfully obtained bail for Mr Tuputala. He was bailed to the address of the Reverend Fa'a'esea Filoa and his wife.

[8] On 7 June 2006, the police applied for a suspect compulsion order against Mr Tuputala but, after advice, he voluntarily supplied a sample for DNA purposes on 20 June 2006. Shortly before trial, Ms Sapolu received on 5 July 2006 a brief of evidence from an ESR scientist Ms Susan Vintiner. The analyses conducted by the ESR established an overwhelming case against Mr Tuputala. Ms Vintiner's evidence was that semen taken from the complainant's vaginal area was 10 billion times more likely to have originated from Mr Tuputala than any other male chosen at random from the New Zealand population. Further, the examination of a semen stain on Mr Tuputala's underpants revealed a female DNA component which was 1 billion times more likely to have originated from the complainant than any unrelated female chosen at random from the general New Zealand population. Ms Vintiner's evidence was that the forensic examination provided extremely strong scientific support for the proposition that the semen stain found in the complainant's vagina originated from Mr Tuputala and that the female DNA found in the semen stain on Mr Tuputala's underpants originated from the complainant.

[9] Faced with this highly compelling evidence implicating Mr Tuputala, Ms Sapolu said she urged him to consider defending the case on the basis that consensual sexual intercourse had taken place notwithstanding his denial to the police. Ms Sapolu's evidence was that Mr Tuputala's instructions to her continued to be an outright denial of any sexual contact with the complainant.

[10] The trial proceeded before Judge Blackie and a jury from 10 to 14 July 2006. Mr Tuputala was not called to give evidence. There was no suggestion by Ms Sapolu in cross-examination of Crown witnesses that the complainant had consented to sexual intercourse or that there was any basis upon which the perpetrator might reasonably have believed she was consenting. Ms Sapolu obtained confirmation from the doctor who examined the complainant that there were no signs of physical injuries but otherwise the defence was confined to a denial of involvement and reliance on the onus of proof. Ms Sapolu explored issues of identification (somewhat forlornly given the DNA evidence) and raised issues about possible contamination of the DNA samples. Any suggestion of that kind was firmly rejected by the ESR witnesses.

[11] In his summing up, Judge Blackie directed the jury on all the elements of proof the Crown had to prove including the issues of consent. Given the overwhelming case against the appellant, it was not surprising the jury convicted him.

### **The disputed evidence**

[12] Mr Tuputala provided two affidavits to the Court, gave further evidence orally before us with the assistance of an interpreter and was cross-examined. In his first affidavit, Mr Tuputala said he first met Ms Sapolu on the Monday of the bail hearing. Then, on Wednesday of the same week, he met her at her office. He said he told Ms Sapolu that day he had sexual intercourse with the complainant on the evening in question with her consent. His account was that he had met the complainant previously and met up with her again that evening. She asked him to go with her to do some shopping. He agreed to do that and they walked down the alleyway together. The complainant then said to him that he could have sex with her

if he gave her \$100. He agreed to give her the money even though he did not have \$100 in cash at that time. They had sex by consent and afterwards he gave her \$10 being the only money he had available at the time. He told her they could meet the following week and he would pay her some more money then. Thereafter, he went to a friend's house and then left again looking for another friend. As he walked back towards the alleyway and crossed the main road, he saw a police vehicle flashing its lights. He stopped on the other side of the road and was arrested.

[13] In his affidavit, Mr Tuputala accepted that Ms Sapolu had taken brief notes of their meeting on the Wednesday. He said she advised him to stick with what he had originally told the police. Because he trusted her, he took her advice. He also said he was led to believe he was not going to prison.

[14] There were a number of other meetings in 2005 and 2006 with Ms Sapolu but he did not see her take notes at any of the other meetings. Mr Tuputala asserted that he had not been advised of the advantages and disadvantages of giving evidence at his trial and that no brief of evidence was prepared for him. No advice was given about the potential of calling character evidence. He said Ms Sapolu told him that if the police interviewed him again he was to tell the same story (that is to deny any involvement with the complainant).

[15] Mr Tuputala then referred to his appeals post-conviction which are not directly relevant for present purposes. He went on to state that in or about June 2007 he found that his father was very ill. His brother visited him in prison and it was then that he told his brother he had engaged in consensual sex with the complainant.

[16] After receiving Ms Sapolu's first affidavit, Mr Tuputala filed a second affidavit responding to some of the matters she raised. He said he could not recall Ms Sapolu making any notes during their first meeting in the cells on 7 March 2006. That meeting, he said, had focused on bail issues. He did not recall any discussion about DNA evidence at that time. He confirmed he had told Ms Sapolu at the meeting he said took place on Wednesday 9 March 2006 that he had consensual sex with the complainant.

[17] As to the DNA evidence, he maintained that Ms Sapolu did not tell him about the results of the forensic analysis of the DNA and did not explain the significance of the findings.

[18] Ms Sapolu also swore two affidavits and was extensively cross-examined before us. Importantly, she produced notes she said she took of a series of meetings with Mr Tuputala between 7 March 2005 and 5 July 2006. Most of her notes were written in Samoan but some in English. An English translation was provided to us of the notes taken in Samoan. It is quite clear from these notes (and Ms Sapolu confirmed in evidence) that, from the beginning, Mr Tuputala emphatically denied any involvement of a sexual nature with the complainant. According to notes taken at the Manukau District Court on 7 March 2005, Ms Sapolu questioned Mr Tuputala about the possibility of DNA linking him to the complainant. The notes record:

**Question:** What if a DNA of your semen is found on the vaginal area of the girl, in a scientific test by the doctors?

**Answer (ST):** I swear in front of the Living God, I did not have sexual intercourse with this woman, I didn't do anything to her, and I don't know her.

[19] The notes of this initial meeting also show that Ms Sapolu urged Mr Tuputala to tell the truth but he continued to deny in emphatic terms that he had sex with the complainant although he stated "I know she is a slut".

[20] Mr Lance for Mr Tuputala cross-examined Ms Sapolu at length suggesting that the notes were not made at the 7 March meeting at the Court. He suggested that time would not have allowed for such extensive notes to be obtained and that the focus was on bail matters rather than obtaining a detailed account of what had happened. Having heard Ms Sapolu's evidence, we accept her as a witness of truth and prefer her evidence wherever it is in material conflict with that of Mr Tuputala.

[21] In any event, it is not particularly relevant whether Ms Sapolu's notes were made on 7 March or two days later as Mr Tuputala suggests. The notes show, and Ms Sapolu's evidence confirms, that he continued to maintain his denials of any sexual involvement with the complainant at meetings on 7 July 2005, 5 May 2006 and 5 July 2006. His denials in that respect are entirely consistent with the account

he gave to the police at the outset, with similar denials he gave to the Reverend Fa'a'esea Filoa and his wife (confirmed by their separate affidavits), and with the way the defence was run at Mr Tuputala's trial. We accept Ms Sapolu's evidence refuting the suggestion that she told Mr Tuputala to deny any involvement if anyone asked him about the incident.

[22] Ms Sapolu's meeting with Mr Tuputala on 5 May 2006 is particularly significant. Although Mr Tuputala had not by that stage provided a sample for DNA analysis, Ms Sapolu's evidence was that she was aware from discussions with the police and the fact that various items of clothing and a sample from the complainant had been sent to the ESR for analysis, that the DNA evidence was likely to be a source of considerable difficulty for the appellant in maintaining his defence. She was also aware that an application for a suspect compulsion order was likely. At the meeting on 5 May 2006, Ms Sapolu raised the DNA issue with Mr Tuputala. The notes record:

**ST:** I completely deny, I did not have sexual intercourse with this woman. I know police try to do something bad to me, I think they (police) may put a DNA on my underwear. I didn't pay any money to have sex with her.

**Question:** What about if they found a DNA of you on the vaginal area of the girl?

**ST:** No, Police took my clothes and my underwear too. They can put a DNA of the girl on my clothes. I swear I didn't do anything to her.

[23] The notes of the meeting of 5 July 2006 also indicate that there was a focus on DNA issues. Ms Sapolu questioned Mr Tuputala about what had happened to his clothes at the police station. Ms Sapolu confirmed that she asked these questions with a view to exploring possible issues of contamination. Although she had in mind that she might attempt to obtain some expert evidence on this subject, she did not in fact do so.

[24] Mr Tuputala's trial commenced five days after the meeting on 5 July 2006. Although Ms Sapolu told us that there were a number of other meetings with Mr Tuputala, there are no notes of any such meetings. The only other documentary record produced by Ms Sapolu related to Mr Tuputala's instructions to her during the trial confirming he would not give evidence. It is unfortunate that Ms Sapolu did not

keep a note of the other meetings or obtain written instructions from Mr Tuputala about his defence but this does not cause us to doubt her evidence as to what took place. The existence of the contemporaneous notes she did make and retain has been influential in enabling us to resolve the disputed issues of fact.

### **Conclusions on the issue of Mr Tuputala's instructions**

[25] We accept Ms Sapolu's evidence and find that Mr Tuputala's instructions to her were consistent throughout. He emphatically denied any sexual involvement with the complainant and did not at any stage admit to Ms Sapolu that he had sexual intercourse with the complainant on any basis, consensual or otherwise. The contemporaneous notes made by Ms Sapolu reliably record her discussions with Mr Tuputala on this issue. Ms Sapolu was aware from the outset of the potential for damaging DNA evidence to emerge. She raised this issue with Mr Tuputala from the outset, urging him to tell the truth. Faced with the results of the ESR analyses, Ms Sapolu recognised the folly of a defence based on the denial of any sexual activity occurring. She renewed her attempts to persuade Mr Tuputala to tell the truth about what happened and informed him of the risks he faced. It was obvious to Ms Sapolu that Mr Tuputala's defence was almost certain to fail and she invited him to consider a defence based on consensual sexual intercourse having occurred (despite his initial denials to the police of any sexual activity).

[26] We are satisfied that Mr Tuputala declined to accept Ms Sapolu's advice and his instructions to her continued to be to defend the case on the basis of an outright denial of the events alleged. Indeed, even after his conviction, he continued to deny any involvement in the matter as recorded in the report of the probation officer prepared for sentencing purposes.

[27] According to his own account, it was not until around June 2007 when he was visited by his brother in prison that he told his brother that he had consensual sex with the complainant.

[28] We are satisfied on the basis of Ms Sapolu's evidence that if Mr Tuputala had admitted having consensual sex with the complainant she would have viewed this as



providing a far more realistic basis for a defence at his trial. She would then have run the defence on the basis of the complainant's consent to the sexual activity or a reasonable belief in her consent. Alternatively, the option of a guilty plea would have been explored along with advice as to the likely discount on sentence which would result. However, Mr Tuputala's instructions to her precluded those more realistic options being pursued. It is inconceivable that Ms Sapolu would have defended the case in the way she did if Mr Tuputala had instructed her in the way he asserts.

### **The earlier appeals**

[29] Ms Sapolu visited Mr Tuputala in prison after he was sentenced and initially filed an appeal both against conviction and sentence on 29 August 2006. There was a difficulty over the form of the appeal and a second notice of appeal (CA393/06) was received by this Court on or about 26 October 2006. This appeal was only against sentence. There were difficulties over the grant of legal aid and, ultimately, Mr Tuputala appeared for himself in support of his appeal on 12 March 2007. On that date, he withdrew his appeal stating in writing that he agreed to carry out his custodial sentence. Formal notice dismissing the sentence appeal was issued by this Court on 30 March 2007. There is nothing before us to suggest the sentence appeal had any likelihood of success.

### **Other issues raised on appeal**

[30] Mr Lance submitted that there was general incompetence by Ms Sapolu which had deprived Mr Tuputala of an effective defence. The grounds raised were:

- (a) Running his defence despite the DNA evidence;
- (b) Failing to make inquiries about an alibi;
- (c) Failing to obtain evidence to challenge the DNA evidence on the grounds of contamination; and

- (d) Failing to advise him to plead guilty and to obtain a discount on sentence.

[31] Mr Lance responsibly accepted that these additional grounds for appeal would largely fall away depending on our finding with regard to Mr Tuputala's instructions to counsel. Plainly, the first of these grounds could not succeed in relation to the way the defence was conducted at trial. We find that Ms Sapolu conducted the defence in accordance with her instructions to counsel despite her advice to Mr Tuputala. As to the other matters, there is no evidence that an alibi was available and, in any event, such a defence could not have succeeded in the face of the overwhelming DNA evidence. Nor is there any evidence that material was available to Ms Sapolu to challenge the DNA evidence. And, we accept Ms Sapolu's evidence that she did inform him of the advantages of pleading guilty and the discount which could follow from that.

[32] Finally, we mention that Ms Sapolu stated in her affidavit that, in retrospect, she believed there may have been social or cultural reasons why Mr Tuputala was not willing to admit having consensual sex with the complainant given that Ms Sapolu was a female lawyer. She suggested that he may possibly have been willing to tell the truth to a male Samoan lawyer. It was very fair of Ms Sapolu to make this point but the evidence simply does not support any suggestion of reticence on the part of Mr Tuputala. Indeed, the entire thrust of his evidence was to the contrary. His evidence, which we have rejected, is that he told Ms Sapolu he had consensual sex with the complainant.

[33] Mr Lance raised various issues of counsel incompetence in relation to Ms Sapolu's advice in connection with the appeals. However, we are satisfied that the sentence appeal could not have succeeded and any failure to persist with an appeal against conviction has now been remedied by the further appeal dealt with in this decision.

## **Conclusion**

[34] For the reasons given we are satisfied that trial counsel followed Mr Tuputala's instructions and that there is no evidence of counsel incompetence affecting the fairness of his trial. It has not been demonstrated there is any risk of a miscarriage of justice having occurred. The appeal against conviction is dismissed accordingly.

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