

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 003 of 2011

BETWEEN: **THE STATE** **COMPLAINANT**

A N D: 1. **VILIKESA RAMAQA ACCUSED**
 2. **NIKO QAQARA**
 3. **MORITIKEI NAYAVAGAKI**
 4. **MORITIKEI NAYAVAGAKI NAICOBOCOBO**

Counsel : Mr. M. Vosawale with Mr. R. Kumar for the State
 : Mr. S. Waqainabete with Ms. V. Bano for all 4 Accuseds

Hearing : 25th, 26th, 27th February 2014

Judgment : 14th March 2014

JUDGMENT

1. Mr. Vilikesa Ramaqa, Mr. Niko Qaqara, Mr. Moritikei Nayavagaki and Mr. Moritikei Nayavagaki Naicobocobo are been charged by the Director of Public Prosecutions on the following counts;

First Count

Statement of Offence (a)

RAPE: Contrary to section 207 (1) (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence (b)

VILIKESA RAMAQA, on the 12th day of November 2010 in Nasinu in the Central Division had carnal knowledge of N.R., without her consent.

Second Count

Statement of Offence (a)

RAPE: Contrary to Section 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

NIKO QAQARA on the 12th day of November 2010 in Nasinu in the Central Division had carnal knowledge of N.R., without her consent.

Third Count

Statement of Offence (a)

AIDING AND ABETTING RAPE: Contrary to section 45 (1) (2) (a) and 207 (1) (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence (b)

MORITIKEI NAYAVAGAKI, on the 12th day of December 2010 in Nasinu in the Central Division aided and abetted another person namely Vilikesa Ramaqa to have carnal knowledge of N.R. without her consent.

Fourth Count

Statement of Offence (a)

AIDING AND ABETTING RAPE: Contrary to Section 45 (1) and (2) (a) and 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

MORITIKEI NAYAVAGAKI, on the 12th day of December 2010 in Nasinu in the Central Division aided and abetted another

person namely Niko Qaqara to have carnal knowledge of N.R. without her consent.

Fifth Count

Statement of Offence (a)

AIDING AND ABETTING RAPE: Contrary to section 45 (1) (2) (a) and 207 (1) (2) (a) of the Crimes Decree 44 of 2009.

Particulars of Offence (b)

MORITIKEI NAYAVAGAKI, on the 12th day of December 2010 in Nasinu in the Central Division aided and abetted another person namely Vilikesa Ramaqa to have carnal knowledge of N.R. without her consent.

Sixth Count

Statement of Offence (a)

AIDING AND ABETTING RAPE: Contrary to Section 45 (1) and (2) (a) and 207 (1) (2) (a) of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

MORITIKEI NAYAVAGAKI NAICOBOCOBO, on the 12th day of December 2010 in Nasinu in the Central Division aided and abetted another person namely Niko Qaqara to have carnal knowledge of N.R. without her consent.

2. After a full trial before assessors, the assessors returned with their unanimous opinion of 'GUILTY' of all the accused for all the counts aforementioned. This court thought it fit to re-visit the evidence before pronouncing the Judgment of court in terms of section 237(2) of the Criminal Procedure Decree 2009.
3. Ms. N. R., the complainant told court in her evidence that she met Mr. Moritikei, the 3rd accused on 12th December 2010, when was going home with Laisa, one of her neighbouring friends. Leaving Laisa to proceed, Ms. N. R. had come and sat beside Mr. Moritikei and had a chat for a while. They had gone for a walk along the road and at last decided to have 'sex'. Mr. Moritikei had brought an empty box of a beer carton, laid it on the ground and had 'sex' with her.

4. The problems had erupted after they finished 'sex'. Ms. N.R. said that she was not aware that four more persons were waiting at the other side of the road, to 'share her'. She said that she agreed to have sex only with Mr. Moritikei, the 3rd accused. Once the 3rd accused finished 'sex' with her, he had called 'another one'. When the second person came to her, apparently, it was Mr. Vilikesa Ramaqa, the 1st accused, she had been pulling up her panty. Her efforts to push him away had failed and he had penetrated his penis to her vagina after laying her down on the ground.
5. This cause of action had been followed by the third person, seems to be Mr. Niko Qaqara, the 2nd accused after the 1st accused finished 'sex' with Ms. N.R. When the fourth accused approached Ms. N.R. after Mr. Qaqara, she had told him that she wants to go home. The fourth person, Mr. Moritikei Naicobocobo, (the 4th accused), had done nothing and came with her to the place where others were standing, Ms. N.R. said that the 'gang' of boys were around 10 meters away from the place where these 'sexual activities' took place. Then she had gone home and went to bed after a bath and her dinner. The following morning, she had told Ms. Laisa Koto that she was been raped by four (04) boys and she 'liked it'.
6. Prosecution Exhibit No. 05, the Medical Examination Form prepared by Doctor Tasveer Singh says that Ms. N. R., had told him that she was "raped by five men on 10th and 12th December 2010". When doctor Singh examined Ms. N. R. on 14th December 2010, he had not observed any 'injuries' on her. Doctor Fong, who tendered the Medical Examination Form to court said that "if she consented to the 1st intercourse, there can be lubrication and subsequent acts might result lack of injuries".
7. The basis for the charges laid down with the narration of Ms. N. R. That is why the 3rd accused is been charged only with aiding and abetting to 1st and 2nd accused though he had 'sexual intercourse' with Ms. N. R. That is why the 4th accused is been charged on the same footing like 3rd accused, though he did not have sexual intercourse with Ms. N. R. Therefore, the prosecution needs to prove beyond reasonable doubt that 1st and 2nd accused had sexual intercourse with Ms. N. R. without her consent and 3rd and 4th accused did intend to aid and abet for the other two to commit the offences and in fact aided and abetted.
8. The accused took a different approach to the allegation of Ms. N. R. They said whatever happened with her on 12th December 2010, took place with her full consent. 1st, 2nd and 3rd accused stressed that they asked Ms. N.R. separately to have 'sex' with her and she 'consented' to have so, but 'one by one', or 'on turns'. Mr. Ramaqa, the 1st accused said that Ms. N.R. came to his house with

the 3rd accused while he was with the 4th accused. Then all of them had gone to buy 'sun pops' over the request of Ms. N.R. The 2nd accused joined them when they went to another place to buy cigarettes. After 3rd, 1st and 2nd accused had sexual intercourse with Ms. N.R. respectively, all five of them (including 4th accused and Ms. N.R.) had returned to the place where the 2nd accused joined them. At that point, the accused said that Ms. N.R. wanted to go home and they all said 'good bye' to her and in return she said 'tomorrow again' in I-taukei language.

9. As pointed out in the 'Summing Up', the contested issue in this case was the 'consent' of Ms. N. R. to have sexual intercourse with 1st and 2nd accused. If the court decides that the two accused had sexual intercourse with the 'consent' of Ms. N.R., there is no need of proceeding any further to determine the culpability of 3rd and 4th accused as though they have aided and abetted to the 1st and 2nd in terms of Section 45 of the Crimes Decree, they had not done so to commit any offence.
10. This court has stated many a times that the mechanism operates in the mind of a rape victim at the time of the incident cannot be mathematically enumerated. Victims will react differently to the crisis. That is something natural, as in day to day events, we see different people reacting in drastically different ways even in a small crisis. Therefore, it is not correct for somebody to say that she could have run away or raised alarms or hit the assailants or bit his body. It is acceptable that the way one behaves in a crisis, especially in a situation of a rape, spreads in a very broad spectrum. That is why the law does not treat a victim of sexual offence like an accomplice to the crime anymore and allows her to come forward without any corroborative evidence. That is why the law does not expect a rape victim to show her physical injuries to support her resistance to the act. The fact that the law provides lot of facilities to ease the victims of sexual offences does not mean that the prosecution is relieved proving their case beyond reasonable doubt, against the accused. The final judgment of a court will entirely depend on the available and presented evidence by parties; that includes the accused as well. At the end of the day, we are dealing with human beings, may it be a victim or an accused of an offence.
11. It is in this context, this court wishes to pursue the credibility of Ms. N. R.'s testimony. She admitted in cross examination that there were several houses close by to the place where she was 'raped'. The 1st accused also said in evidence that there are four houses on the right hand side and two on left, just 10 – 15 meters away from the place they were standing. Ms. N.R. agreed with the learned defence counsel that the house occupants should be at home at the time of the alleged incidents as it was the night and had she raised alarm,

those people would have come for her assistance. She further agreed that she could have even run towards those houses. Most importantly, the moment she said to the 4th accused that she wants to go home, he had done nothing and returned back to the others along with Ms. N.R.

12. This court is ready to accept all what Ms. N.R. said about her responses during the alleged 'sexual acts'. As stated earlier, nobody can predict or opine the way how she should have or could have reacted in that particular moment. But, in such a situation the subsequent conduct of the alleged 'victim' plays a vital role. That subsequent conduct starts from the very first moment she got out of the control and danger of the perpetrator. Therefore, it is worth to note the conduct of Ms. N. R. after she got 'escaped' from the four 'offenders'.
13. She had gone home, had her shower and dinner and then gone to bed. There is no evidence before this court to say that she informed about this 'gang rape' to any of her family members. But the following morning she had told Ms. Laisa that she was 'raped' by four men and she 'liked it'. On the face of it, the figure 'four' is factually wrong. Even with the 3rd accused, it should be three men. Then what can one assume when Ms. N. R. told to Laisa that she 'liked it'? Is that the reason for Ms. N.R. to remain silent without raising alarm to seek assistance from her neighbourhood? Is that the reason for her to remain there without running away from the accused? This 'doubt' was created within the prosecution as soon as their 2nd witness, Ms. Laisa finished her evidence.
14. Then came the medical evidence. Ms. N.R. had told Doctor Tasveer Singh that she was raped by five men on 10th and 12th December 2010. That means she was 'raped' on 10th of December as well. When she says that it was 'five men', had she been 'raped' by the same 'five men' on both days or someone else on 10th and these four on 12th? Had she been raped by somebody else on 10th, how could she freely moved with the 3rd accused and consented to have sex with him without even reporting the 10th incident to police? But her evidence in this court relates only to having 'sex' with three accused on 12th December 2010. The number had gone up to four with Ms. Laisa and to five with Doctor Singh. Further to that another additional date (10th December 2010) had also come into light.
15. This background warrants the prosecution to show court more descriptively about Ms. N. R.'s subsequent conduct. The court was kept at dark as to how and when this incident was reported to police. Had the complainant volunteered to report this matter to police or somebody else initiated the report? If it was Ms. N.R., when did she report it? Is there any unjustifiable

delay in doing so? If it is not Ms. N.R., who reported the matter to police and why not Ms. N.R.? Four police officers testified regarding the caution interviews of the four accused. The investigating officer was not called to testify. Therefore, no evidence was presented to court to clarify the above issues.

16. This court takes a serious note about the three inconsistent statements made by Ms. N.R. in three different occasions; two persons raped her after she had consensual sex with the 3rd accused, four men raped her to Ms. Laisa and five men raped her on two days to Doctor Singh. This is not a 'peripheral issue' like whether somebody was sitting or standing on the steps when the complainant saw him on the day of the offence, whether somebody dragged the complainant or carried her into the bed room, whether the kitchen knife was left in the kitchen or carried into the bed room as discussed in **Rajesh Rajeshwar Prasad v. State** [2002] AAU 13U/02 (30th August 2002).
17. The contradictions in Ms. N.R.'s statements go to the root of the prosecution case. Things get worse when taken her subsequent conduct into consideration. She had gone home after all these forceful sexual encounters, had a bath, dinner and then to the bed. According to Ms. Laisa, Ms. N.R. did like for what took place on the previous night. It is in this context, one has to assess her behaviour during the alleged 'forceful sexual activities'; not raising alarms and no efforts to run. On top of everything, she herself admitted that when the fourth person came to her to have 'sex', she told him that she wants to go home and he took her to the place where others were standing. She was referring to the 4th accused. Had there been any force or threat, could this be possible?
18. It is after analyzing all these aspects, this court concludes that the prosecution did not prove beyond reasonable doubt that the sexual intercourse of the 1st accused and the 2nd accused with Ms. N.R. took place without her consent. The prosecution evidence itself creates a reasonable doubt over the issue of 'consent' of Ms. N.R. to have sexual intercourse with the 1st and 2nd accused. This court declines to accept the narration of Ms. N.R. that she did not consent to have sexual intercourse with the two accused as it seriously questions her credibility.
19. Therefore, this court does not agree with the unanimous opinion of the assessors.

20. All four accused are acquitted accordingly.

Janaka Bandara
Judge

At Suva

Office of the Director of Prosecution for State

Office of the Legal Aid Commission for the Accused