000119

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SUPREME COURT REGISTRY

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA
Appellate Jurisdiction
Criminal Appeal No. 74 of 1982

BETWEEN: ISOA UCAUCA, MATAIASI CAKAU, TEVITA GUSUDRADRA, ULAIASI SAUVOCIA, JONE KULANAYASEYASE, KEIEVI MALIMOCE & SEREMAIA BATIALIVA — Appellants

AND: REGINAM — Respondent

Mr. J. Reddy — Counsel for the Appellants
Mr. S. C. Maharaj — Counsel for the Respondent

JUDGMENT

The six appellants together with one other were charged with the offence of raping Paulina Naqio. They pleaded not guilty but after hearing evidence including the testimony of the appellants and the evidence of an elder of their village the magistrate convicted them and sentenced them to terms of imprisonment as follows -

Accused 1 - 5 years
Accused 2 - 5 years
Accused 3 - 3½ years
Accused 4 - 4 years
Accused 5 - 1½ years
Accused 6 - 1½ years

They now appeal against their convictions and sentence.

The complainant is a woman of about 24 years and had not been a virgin for some time before the alleged offence. Her story was that she and another woman Eva Marie had gone to sell roti and curry outside a dance place. After selling the roti at some time which must have been near midnight they went with some men into the bush to drink beer. After drinking beer Eva went off with one of the men and had sex, whilst the complainant went with the other men. In or near a cassava patch they met accused 1 and others. Accused 1 seemed to take charge of matters and took her to a mango tree where, after threatening her and

000120

making her take her underwear and clothes off had intercourse with her. The story became rather involved and complicated involving movements from one place to another having intercourse with various appellants at each place. According to Paulina there were six different places and within a period of about 4 hours - from 1.00 a.m. to 5.00 a.m., accused 1 and accused 2 had intercourse with her at all six places, accused 3 at five places, accused 4 at five places and accused 5 and accused 6, and the other accused person at one place. That is a total of 25 incidents of rape within four hours, some of it on rough ground. I have stressed this because it is not without significance in view of what happened later and in view of the doctor's evidence. The doctor did not examine her till about 2½ days later. Not surprisingly he found no signs of sperm then but perhaps more surprisingly he found no signs of violence on Paulina's body, although he found redness and abrasions present on the entrance into the vagina. The vaginal walls and cervix were normal.

There is significance in this because it would be rather surprising to find so little evidence of violence if the girl had been raped 25 times on rough ground as she stated in evidence. But perhaps it would not be so surprising if the defence case was true, namely that there was some intercourse - but not 25 times by any means - with her consent.

In their evidence four of the accused admitted having intercourse with Paulina, but each said that it was her consent. (The first two denied having intercourse, though accused 2 said he tried but could not get an erection.) So an important issue for the magistrate was whether there was consent or not, or whether the accused thought she consented.

There must be some doubt about that. The doctor's evidence must raise some doubt. The fact that these two girls go off into the bush at night with men to drink beer must raise a question of whether something more than drink was in their minds. The fact that one of them - Eva - admitted going off with one of the men and having intercource with him is some indication that this was so. Although Paulina said she cried out no one seems to have heard her, not even Eva, who was fairly close by. There were no signs of a struggle, except for a tear in her dress, though it is true that Paulina said she was more frightened by threats of what accused 1 would do to her, than by violence used on her.

000121

There was the evidence of Semi Nacula who said he went to find beer to drink. When he heard voices under a mango tree he went there and saw people sitting down talking and smoking. Paulina was there amongst them and said only "Semi don't you feel sorry for me?" He said "Paulina, come with me, let's go." She got up and led him to Imeri's house, followed by accused 1. That is all, apprently, he saw. Paulina made no complaint. His evidence was inconsistent with that of Paulina on this incident. Imri gave evidence saying that about 4.00 a.m. Semi, accused 1 and Paulina came to her house.

Imeri was treated as hostile which means that the Crown no longer relied on her evidence but that does not necessarily mean that the defence could not rely on it. What the magistrate appears to have done, but should not have, is to accept those parts favourable to the Crown and reject those parts not favourable. In fact he seems to have done this with any prosecution witness he considered to be hostile or "unfavourable". There was no evidence of Paulina complaining to anyone although later when Aporosa questioned her she said she told him what had happened. In fact it was not she who brought the police into it. The police were brought in by Aporosa a school teacher. There was also the evidence of a ceremony of some sort before Aporosa where a village elder named Epeli Rokolewa, in the presence of accused 1, accused 2, accused 3 and accused 4, presented yaqona and a tabua. Apparently the tabua was because accused 3 wished Paulina to be his wife. According to Aporosa the yaqona was so the boys could be excused for what had happened. This was disputed by the defence and there was some dispute as to the exact words used and their meaning, but I don't think that it could be put higher than "for their misdeeds". It would appear to have been some sort of conciliation gesture, but whether it was an admission or could be taken an admission by accused 1, accused 2, accused 3 and accused 4 to having raped Paulina is very much open to question. Four of the appellants had admitted having sex with Paulina with her consent, but even with her consent, or with her implied consent they might have been ashamed of what they had done because she had drank too much beer perhaps and particularly if accused 3 wished to take her as his wife, they might wish to make some gesture of conciliation.

That there was such a ceremony, that there was a tabua handed over and that it was presented becaused accused 3 wished to take Paulina as a wife is not in dispute, and it is rather hard to understand why the magistrate should have treated it rather as something out of Alice in Wonderland.

128

The case depended very much on Paulina's evidence and so it was necessary to consider it very carefully indeed. I have already indicated some matters which must raise some doubts. There is no doubt that there were many inconsistencies and contradictions in her evidence, there were inconsistencies and contradictions between her evidence and the evidence of other prosecution witnesses. I have already referred to those witnesses the magistrate considered hostile or unfavourable and how he seems wrongly to have accepted those parts of their evidence which support Paulina's evidence and rejected those parts which don't support it. But even with Paulina's evidence the magistrate had reservations about her descriptions of the sex act, the time each took, the time it took to move from place to place, how each accused had intercourse in a prototype fashion. He seems though not to have had any doubts about whether accused 1, accused 2, accused 3 and accused 4 were capable of having intercourse five or six times within a period of four hours, at the same time moving about from place to place in the bush.

I think the magistrate should have had more reason to question Paulina's evidence on these points. The record shows that when Paulina started giving her evidence she would not describe the various acts of sex. After about an hour of questioning by the prosecutor, with some help and explanation from the court (apparently explanations of the sort of evidence the court required), without success, the magistrate adjourned the case so that the prosecutor could explain to her what sort of evidence was required of her.

The magistrate seems to have bitterly resented defence objections to this procedure, but I find it hard to understand how he can possibly justify this course of action. Any explanation to the witness which he thought necessary should have come from the court, in court, not in private by the prosecution in the middle of the case.

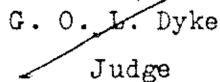
It will be noted that after this interval Paulina went on to describe every sexual act with each appellant in considerable detail in almost exactly the same terms. Presumably this was the prototype fashion of having intercourse that the magistrate found unacceptable. That is not surprising and one wonders what sort of instruction or explanation the prosecutor gave her during the interval.

Taken together with the doubts I have already expressed about the case and the way the magistrate dealt with the evidence of witnesses he considered hostile or unfavourable there must be a

considerable element of doubt as to whether the Crown discharged the onus of proving its case. I note also that the magistrate expressed dissatisfaction with the evidence of the investigating officer in the case, the officer who interviewed each of the appellants, and how he conducted his investigation.

Clearly this was not an easy case to deal with to be fair to Paulina and to do justice to the appellants and clearly the investigation of the case could have been more thoroughly and better handled; and the prosecution could have been better conducted.

But in the result I do not consider that it is safe to let the convictions stand. The appeals are therefore allowed and the convictions and sentences set aside.



G. O. L. Dyke
Judge

Lautoka,
26th November, 1982