IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal Nos. 68,70,75 of 1980

Between:

1. SITIMA VULITOUDUA
2. PETER JULIAN
3. WINSTON ALEXANDER — Appellants

and

REGINAM — Respondent

1st and 2nd Appellants in Person
A. Lateef for the 3rd Appellant
D. Fatiaki for the Respondent

Date of Hearing: 7 July 1981
Delivery of Judgment: 31 July 1981

JUDGMENT OF THE COURT

Marsack J.A.

These are appeals against convictions for rape, and sentence imposed thereon, entered in the Supreme Court sitting at Suva on the 20th November 1980. At the original trial six persons were convicted of rape and varying sentences imposed. Three only of the convicted persons have appealed.

The relevant facts may be shortly set out. On 29th May 1980 all six accused, Joseph Fonorito, Jitendra Singh, Mohammed Shameem and the three appellants abovenamed, went to a nightclub called the Chequers to attend a dance organised by their Football Club; they were neighbours living at Delainavesi and close friends. Inia, a friend of the six

accused and a member of their football club, was at "Chequers" with his girlfriend Taina; the latter was accompanied by her cousin Seini. Another girl cousin, who (for the purposes of the trial) was called U had been to a different nightclub, "Trio". She met Taina and Seini outside "Chequers" when it closed at 1 a.m. At Taina's suggestion it was agreed that Inia, Peter Julian and Winston Alexander would take the three girls Taina, Seini and U to Delainavesi; and they left together to get a taxi to Navesi Primary School. On arrival at the school they went to a guava patch close to the school building where Inia with Taina, Peter with Seini, and Winston with U, indulged in sexual intercourse. The remaining accused, including Sitima the 1st appellant, travelled by a separate taxi or taxis to the Navesi Primary School. U stated in evidence, that while intercourse was taking place between Winston and herself she noticed the heads of some people peering through guava bushes about 30 feet away; Winston at the request of U chased these people away. It was clear from the evidence that the onlookers were some of the accused. Winston and U then left the guava patch, U saying she was hungry and wanted something to eat. Winston replied by saying that he would take U to his friend's house near the school for food. Winston however took U to one of the school rooms, the one furthest from the access road. The room was locked; Winston gained admittance by breaking a glass louvre and opening the door. They entered the classroom where consensual sexual intercourse took place between them. During intercourse U saw heads moving by the windows, and at her request Winston went out and chased them away. Shortly after his return he called out to someone; this person, Sitima the 1st appellant, entered the classroom. Sitima was not known to U, and according to U he proceeded to have intercourse with her. She stated in evidence that Sitima closed her mouth and held her right arm. Sitima denied having intercourse with U.

The evidence of U then proceeded to the effect that the 2nd accused Jitendra Singh, whom U had never met, entered the room and had intercourse with her without her consent while Sitima sat alongside her; Sitima squeezed her mouth and held her down; attempts by U to get away were frustrated by Sitima. Fonorito the 1st accused and Shameem the 3rd accused then entered the classroom and both these men, whom U had never met, had intercourse with her while Sitima sat alongside and held her down. U stated that she was crying out and screaming. Peter Julian the 2nd appellant entered the room. In her evidence U said:

> "At this stage Sitima stood up and Peter (5th accused) had sexual intercourse with me. I tried to get up. I couldn't get up. Peter was holding me. He was on top. I tried to get up. I couldn't. He did not speak to me. I did not agree to having sexual intercourse with him. I cried for help".

Seini gave evidence that Peter, after having inte course with her, left her in the guava patch, whereupon she went to Taina. The two girls walked towards the school building, where Seini met Winston outside the school and enquired the whereabouts of U and was advised that U was still at his friend's place eating.

Seini gave evidence that she heard someone yelling and recognised U's voice. She peered through the window of the classroom where U was and called out to Winston; whereupon Winston threw a piece of timber at the window and broke a louvre. He told Seini to go away.

Taina in her evidence stated that she saw Winston and U leave the guava patch; about 15 minutes later Taina, Seini and Peter walked towards the school and Taina heard a cry "as though U was forcing herself to scream". Taina stated that she looked into the classroom and saw 5 heads surrounding " who was lying down. Taina did not go inside, but spoke in admonishing terms to those present.

An Indian boy then came out of the classroom with U; others followed with their shirts removed and covering their faces therewith. U gave evidence that she was led from the room by Jitendra, the 2nd accused, and walked for some distance along a road until a taxi stopped and the three girls boarded it. U states that she instructed the driver to drive to Samabula Police Station where she "wanted to report because what they had done to her was terrible". U was taken to the hospital that morning and examined; the doctor found no marks or bruises inside or outside her vagina. U was examined again three days later, when the doctor found bruises with scab on her right elbow and left knee. The doctor stated that on the first occasion he examined U he had not looked at her knees and elbow. U gave evidence that she got the scratches while trying to get up when the accused were having sexual intercourse with her.

The grounds of appeal put forward by first appellant amount to a complete denial of sexual intercourse with U, and an allegation that his statement to the police, which included an admission that he raped her, was fabricated and he was forced to sign it. It must be observed that this statement - as put before the Court - is most unsatisfactory. In the course of it he denies any penetration into the girl; but later the statement reads:

" Q. Was there any time when Miss U consented to you having sexual intercourse?

A. No.

Q. This means that you raped her?

A. Yes. "

In his unsworn statement at the trial he said that he had seen sexual intercourse take place between U and other members of the party but does not admit doing so himself. However, the prosecution case was framed in the alternative, in that if 1st appellant did not have sexual intercourse with U, or if ther were any reasonable doubt as to whether he did or not, then it was necessary to consider whether he encouraged and aided the other accused to have sexual intercourse with U knowing full wel that she was not a consenting party. Complainant's evidence was to the effect that first appellant was the first one

to have intercourse with her after the third appellant; and when that was over he had remained near her, holding her down, closing her mouth, and encouraging others while they had sexual intercourse with her. In their evidence the girls Taina and Seini testified that at the relevant time they heard screaming which they recognised as coming from U.

In his summing up the learned Judge first dealt with the evidence concerning those of the accused the case against whom consisted of an allegation that they had had sexual intercourse with U against her will. He then proceeded to direct the assessors as to the case against 1st appellant. His summing up proceeded:

> " Sitima's case again is different. He (4th accused) does not admit that he had sexual intercourse with U. In his case, if you are satisfied beyond reasonable doubt that he did have sexual intercourse with U, you will then decide the issue of consent in accordance with the direction I have given you in relation to Fonorito (1st accused), Jitendra (2nd), Shameem (3rd) and Peter Julian (5th) accused.
>
> If you are not satisfied that he had sexual intercourse with U, you will then consider the other aspect of his case. Did he, as the prosecution allege, aid and encourage the other accused, even a single one of them, to have sexual intercourse with U knowing full well that she was not consenting to such sexual act? If you are satisfied beyond reasonable doubt that he did, he would be as guilty of rape as he would be if he had committed the sexual act himself with that knowledge."

His appeal therefore depends on credibility of the evidence given. The summing up of the learned trial Judge was scrupulously fair on this issue; whether the assessors found that 1st appellant had had intercourse with U when she did not consent, or that he had aided and abetted the others to commit rape, knowing that she did not consent, is immaterial. In either case he would be guilty of rape. In our view there was ample evidence, with sufficient corroboration, to justify the finding that 1st appellant was guilty as charged. The appeal of the 1st appellant is accordingly dismissed.

The appeal of the 2nd appellant was also based on questions of fact. In his grounds of appeal he alleges that all three girls were of bad character; that Miss U had played sexually with 2nd appellant, and later when he saw her lying naked she called him to come. He contended that it was his firm belief that she was a consenting party. In his unsworn statement at the trial he said:

> "I asked her if she still agreed to have sexual intercourse with me and she agreed."

In his summing up the learned trial Judge drew the attention of the assessors to the unsworn statement, and directed them that they might give to it whatever weight they considered proper.

He also drew the attention of the assessors to the evidence against 2nd appellant. He said:

> "You must remember that Peter (5th accused) was the last person to have sexual intercourse with her. If you accept Taina's and Seini's evidence, Taina was, at that stage crying outside and U was crying and screaming inside. If you accept that evidence, it is then for you to decide whether in those circumstances Peter Julian, or anyone, could have had the belief that U would be a consenting party to sexual intercourse."

The complainant also said when Peter Julian came into the classroom:-

> "At this stage Sitima stood up and Peter (5th accused) had sexual intercourse with me. I tried to get up. I couldn't get up. Peter was holding me. He was on top. I tried to get up. Couldn't. He did not speak to me. I did not agree to having sexual intercourse with him. I cried for help."

The assessors and the learned trial Judge unanimously accepted the evidence of the complainant that she had been raped. Once again we can see no grounds upon which we can hold that the Court below was wrong in coming to its conclusion on this point. There was ample evidence which, if accepted - as it was by all assessors and the Judge - justified the finding. Accordingly the appeal of the 2nd appellant is also dismissed.

We now turn to the appeal of the 3rd appellant which is differently framed from those already dealt with; in that the basis of the charge against him is that he remained on the scene and encouraged the other accused to have sexual intercourse with U, knowing full well that she was not a consenting party. The formal grounds which were argued before us are in the following terms:

(a) That the learned trial judge failed to direct himself and the assessors as to the necessity for proof of the mental element in the crime of rape.

(b) That the learned trial judge failed to direct himself and the assessors of the inconsistencies in the evidence of the Complainant and prosecution witnesses 5 and 7 in his direction on corroboration.

(c) That the learned trial judge failed to direct himself and the assessors on the law in relation to aiding and abetting of the offence.

(d) That the learned trial judge erred in his direction to himself and the assessors in respect of the unsworn statement given by the appellant.

(e) That the sentence is harsh and excessive in all the circumstances.

Ground (a): Under this head the third appellant relied largely on the judgment of the House of Lords in DPP v Morgan 1975 2 All E.R. 347. The basis of Mr. Iateef's argument on this head was that the learned trial Judge erred in not making it clear to the assessors that if the appellant thought the complainant was a consenting party to the sexual intercourse which ensued, then he was guilty of no offence. He cited the head note in DPP v Morgan to this effect:

> "Held: The crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential mens rea were absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape."

Mr. Lateef further submitted that the prosecution must prove beyond reasonable doubt that at the time the alleged offence was committed the accused person had the intent to have sexual intercourse whether the woman consented or not.

In Mr. Fatiaki's submission the point in question was adequately covered by the learned trial Judge in his summing up when he said :

> " To prove rape the prosecution must prove beyond doubt each of the following elements:-
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> Firstly, that sexual intercourse took place;
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> Secondly, that the woman did not consent to the act of sexual intercourse; and lastly that the accused knew that the woman was not consenting to sexual intercourse when he committed the act or when he committed the act, he was determined to have sexual intercourse with the woman anyway, consent or no consent."

In Counsel's submission the use of the word "determined" sufficiently covers the intent which is to be proved; as a person cannot determine to carry out an act without having the intent to do it.

In our view the direction to the assessors was in accordance with the statement of the law as expressed in Ilaitia Koroiciri v. Reginam FCA No. 43 of 1979 where this Court said:

> "Thus, in the definition of rape as quoted above no intent is stated but a long line of cases has settled the law that not only must the fact of intercourse without consent be proved but it also must be proved that the accused intended to commit the crime. The recognised mental element has been stated to be that the accused had actual knowledge of the fact that the woman was not consenting, or, was determined to have intercourse with her whether she was consenting or not. The intent of the accused and the act (namely that the woman was not in fact consenting) must both concur to constitute the crime."

Further the direction was consistent with the judgment in DPP v Morgan (supra), page 362 where Lord Hailsham said:

"I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been to commit that act or the equivalent intention of having intercourse willy - nilly - not caring whether the victim consents or no."

The other limb of the defence argued by Counsel for 3rd appellant was the 3rd appellant's claim that he had taken U inside the classroom; had sex with her consent, and immediately went outside and fell asleep, on account of his overindulgence in liquor. He maintained in his unsworn statement, that he had no idea whether anyone else had sexual intercourse with the complainant thereafter.

The 3rd appellant denied in his unsworn statement that he had invited anyone to have sex with U, or that he aided and encouraged anyone to have sexual intercourse with her.

However, an examination of the transcript of evidence reveals that the 3rd appellant had made arrangements with other accused for them to partake of sex at the Navesi Primary School.

The second accused Jitendra Singh gave evidence and said:

"Accused 6 and U saw the three of us. We talked. We learned that they were going to the school and that we were invited. U was present all the time during the conversation. Winston (6th accused) said, "When we go to the school, follow me." The girl was there. He said, "Follow me to have sexual intercourse." U was there, she did not say anything."

The third accused Mohammed Shameem said:

"I did not know the three girls before that night. Outside Chequers I spoke to Winston. Winston said, "You people come to the school. I am taking the lead. You come and have sexual intercourse"."

In cross-examination by the 3rd appellant the first accused Joseph Fonorito said:

"Winston did invite me to go to Delainavesi School and have sex. Not true that he only said he was taking the lead. He did say to come and have sex".

The learned trial Judge in our opinion gave a clear direction that the onus lay on the prosecution to prove that the 3rd appellant encouraged, aided and invited the other accused or anyone of them to have sexual intercourse with U, he the 3rd appellant knowing that she was not a consenting party thereto. It was obvious from the evidence that U had not previously met any of the accused. The learned trial Judge said:

> "In the case of Winston Alexander (6th accused) the prosecution concede that the sexual intercourse between him and U was with U's consent. In order to find him guilty of rape you have to be satisfied beyond reasonable doubt, that he, by word or conduct, invited, encouraged or aided the other accused, or any one of them, to have sexual intercourse with U, knowing all the time that U was not consenting to such an intercourse."

In our view, therefore, the learned trial Judge correctly directed the assessors as to the necessity for the prosecution to prove the mental element in the crime brought against 3rd appellant.

Accordingly the ground (a) fails.

On the second ground Counsel submitted that the learned trial Judge was in error when he directed the assessors that the evidence of Taina and Seini was more than ample corroboration of what U had told the Court about the occurrences in the classroom. He pointed out that Taina said she saw five heads in the classroom whereas the other evidence spoke of only three persons or two persons. We do not think that this discrepancy is of any moment, given the circumstances in which Taina made her observation. On two points Taina and Seini are in complete agreement: that they heard U screaming when the events were taking place, and that it was U who wished to go to the police station to report the matter.

"Corroboration" is authoritatively defined by Lord Simon in DPP v Kilbourne 1973 1 All E.R. 440 at page 463:

> "Corroboration is therefore nothing other than evidence which confirms or supports or strengthens other evidence. ..... it is, in short evidence which renders other evidence more probable."

Adopting this definition, it is clear that the evidence of Taina and Seini as to screaming on the part of U does support the evidence of U that she was not a consenting party to the sexual intercourse which took place. Accordingly we are of the opinion that the learned trial Judge was justified in inviting the assessors to consider the evidence of Taina and Seini as corroborative of complainant's story.

As to ground (c) Counsel submitted that the abettor must do more than merely encourage the commission of a crime; he must take some positive steps to persuade the others to commit it. He argued that the onus lay on the prosecution to prove beyond reasonable doubt that the person charged with being an abettor intended the others to have intercourse with the girl without her consent, and wilfully encouraged them in this direction. The assessors, said Counsel, should have been directed accordingly. At the beginning of his summing up, in the passage already cited, the learned trial Judge stressed the intent which is a necessary ingredient in the offence of rape. At the commencement of his consideration of the charge against the present 3rd appellant the learned trial Judge said:

> "In order to find him guilty of rape you have to be satisfied beyond reasonable doubt, that he, by word or conduct, invited, encouraged or aided the other accused, or any one of them, to have sexual intercourse with U, knowing all the time that U was not consenting to such an intercourse."

The principles to be applied to the charge of aiding and abetting are authoritatively set out in Clarkson and Others 55 Cr. Ap. R 445 at page 449:

> ".... to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not."

In our view the passages cited from the summing up on this point are fully consistent with the principles laid down in Clarkson's case, and the learned trial Judge directed himself and the assessors correctly thereon. This ground of appeal therefore fails.

In his submission on ground (d) Counsel for the appellant argued that in his summing up the learned trial Judge gave the assessors the impression that the 3rd appellant was present when sex took place with the others, whereas according to his own statement he was asleep at the time. But, as has already been pointed out, the learned trial Judge directed the assessors that they could give to the unsworn statement of the accused whatever weight they considered proper. And later when referring to the cross-examination of U by the 3rd appellant, he drew attention to appellant's question to U: had she not wanted sexual intercourse with all the others, and had she not enjoyed the experience? The summing up proceeded:

> "You will no doubt bear this in mind when you consider his statement that he was fast asleep when the other accused had sexual intercourse with the complainant and that he knew nothing about it."

The direction to the assessors on this ground is in our opinion not open to objection.

The other point raised was that the learned trial Judge was wrong in refusing the application by the defence to recall U for further cross-examination. The facts were

that at the commencement of the hearing in the Court below all six accused conducted their own defence, none being represented by Counsel. Complainant U was cross-examined by each of the accused in turn, the present 3rd appellant's cross-examination being lengthy. Mr. Singh accepted the defence brief from the accused when the prosecution case had all but closed. His application to have the complainant recalled for further cross-examination was refused, the learned trial Judge saying:

> "Each accused has had the fullest opportunity of cross-examining her and other witnesses, and she was particularly rigorously cross-examined by the 6th accused" (that is the present 3rd appellant) "who would appear to have put forward a joint defence on behalf of all the accused. Mr. Singh does not wish her recalled for clarification of any particular matter but to subject her to a full cross-examination a second time."

In our opinion the learned trial Judge acted correctly in refusing the application. Accordingly, this ground of appeal also fails.

Turning now to the appeals of all appellants against the sentences imposed on their conviction, namely 3 years, 2½ years and 4 years imprisonment respectively: we are unable to say that any one of the sentences was unduly severe or imposed upon a wrong principle. In fact, it might be argued that if anything they were unduly lenient. So all appeals against sentence are dismissed.

In the result the appeals of all three appellants both against conviction and against sentence are dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal