

REGINA -v- IRO GWAGWANGO AND CASPER TAEDOLA

High Court of Solomon Islands

(Muria J.)

Criminal Case No. 21 of 1991

Hearing: 18 November 1991 at Auki

Judgment: 20 November 1991

R. B. Talasasa for prosecution

A. Radclyffe for the Taedola

J. Remobatu for Gwagwango

MURIA J. The accused Iro Gwagwango and Casper Taedola stand charged with the offence of rape contrary to section 129 of the Penal Code. It is alleged by the prosecution that Iro Gwagwango and Casper Taedola on 6 November 1989 at Oneima Village in the Malaita Province had unlawful sexual intercourse with Joy Musufa'alu without her consent. Both accuseds pleaded not guilty to the charges.

The undisputed facts in this case are that one of the accused, Casper Taedola, is the husband of the victim Joy Musufa'alu. They were married about 13 years ago and have six children of whom one died. At the time of the alleged commission of the offence they were still living together as husband and wife.

The other accused, Iro Gwagwango is related to the victim's husband. They are cousins. Iro Gwagwango up until November 1989 had frequently visited the house of the victim and her husband, sometimes when the husband was present and other times when the husband was absent from the house. Iro Gwagwango's house was not far from the victim's house.

There was no dispute also that on 6 November 1989 the two accuseds and the victim went together to the bush to cut canes and that while in the bush Iro Gwagwango had sexual intercourse with the victim Joy Musufa'alu. After cutting canes both accuseds and victim returned home.

What is in issue here is whether the victim consented or not and if she consented, whether that consent was obtained by force or threats administered by the victim's husband Casper Taedola.

I remind myself that the burden is on the prosecution to prove beyond reasonable doubt the guilt of the accused. If I have any doubt, though slight it might be, I must acquit the accused.

The evidence for the prosecution is that prior to the 6 November 1989, for no apparent reason, the husband, Casper Taedola had on a number of occasions insisted by force or threats of custom swearing upon his wife, the victim, that she must have sexual intercourse with his cousin Iro Gwagwango. That one occasion, the husband forced Iro to take his wife to the beach to have sexual intercourse with her. The prosecution's evidence was that on that occasion, they did not have intercourse but the wife lied to her husband saying that they did. Later on the wife told the husband that that was a lie and that in fact they did not have intercourse on the beach. The prosecution said that on hearing that, the husband was angry because his wife and Iro disobeyed him and that they disregard his swearing in custom. That swearing was that his wife and Iro were to shit in his mouth if they did not have sex with each other.

The prosecution also, says that on other occasions, the husband threatened Iro that on other occasions, the husband threatened Iro that if he did not have sex with his wife he would kill Iro with a knife. Then on 6 November 1989, the husband and his wife, the victim, went to the bush to cut canes. Iro followed them to the bush. The evidence for the prosecution was that while in the bush, the husband raised his knife and angrily told his wife and Iro that because they lied to him about having sex on beach earlier, they must now have sexual intercourse there and then. In evidence the victim stated that she was told to lay down and she was told to have sex with Iro. She said she had sex with Iro because her husband Casper allowed her to do so. She also said her husband forced her to have sex with Iro. In cross examination she said she had sex with Iro because her husband swore at her in custom while they were on their way to the bush.

The prosecution also relied on the Caution Statements obtained from the husband and Iro. In the husband's statement he said that on the first occasion he forced his wife to go and have sex with Iro at the beach, but which they did not do. The second time on 5 November, 1989 he forced his wife again to go and have sex with Iro at the beach but again they did not have sex. Then on 6 November 1989 while in the bush he forced his wife and Iro to have sex. He said he forced his wife to lay down and told Iro to lay on top of her and have intercourse with her. He said while they were having sex he was there watching them about a foot away. He also said he was holding his knife while watching them.

When Iro gave his Caution Statement he told the police that when they were in the bush the husband Casper Taedola forced him and the victim to have sex. Iro also stated that the victim at first refused but that the husband insisted that if they did not have sex he would cut his wife and that he and Iro would hide her body. Iro said that he was willing but only if the victim was willing. Then Iro said to the victim to allow herself as her husband had already permitted her to have sex with him. Iro said it was the husband who forced the victim to lay down and to open her legs. According to Iro, the husband was standing up beside them watching while they were having intercourse and that the husband remarked that he was happy that they listened to him.

In Court the wife said that she had sex with Iro because of her husband's custom swearing and not because of knife threat. She also said, in chief, that she did not allow Iro to have sex with her and that she was not willing. She also said that her husband was some distance away in the bush when Iro had sex with her.

In cross examination by Counsel for Iro, she said that after husband forced her to have sex with Iro, her husband went away to cut canes. When her husband returned he saw her and Iro having intercourse. Then she said her husband saw her lie down then he went away and she was still lying down when her husband was away. When pressed by Counsel, she said when the husband, went away Iro came on her and they had sexual intercourse with her. Again in cross examination, she said it was Iro who ordered her to lift her skirt and that she agreed and said nothing. She also said in cross examination that Iro told her to separate her legs and that she agreed.

It was while they were having sex that she told Iro that she was two months pregnant and that she said this while Iro was moving his buttocks up and down on her.

Asked why she said she was not happy, she said because she was pregnant. That was why she kept quiet about it until she reported to her brothers about two weeks later.

She further told the Court that her husband never threatened her and Iro with a knife in the bush on 6 November 1989. She said the story she and Iro told the Police about her husband threatening them with a knife was false and that it was Iro who insisted that they must tell the police that her husband threatened them with the knife. She said when she gave her story to the police in December 1989 she was still cross with her husband.

When cross examined by Counsel for the husband, she said she had sex with Iro because of her husband's custom swearing. She also said that she reported to her brothers because her husband allowed her to have intercourse with Iro.

The wife also admitted having sex with Iro three days after the incident in the bush on 6 November. That second incident was in the coconut plantation. She said she was willing to have sex with Iro and that Iro did not force her. They had sex while her husband was away picking coconuts.

Iro gave evidence on oath and said that on the 6 November 1989, the husband held a knife high and threatened him and the victim to have sex. Iro said he was frightened but he could see the victim was willing. He said the husband ordered his wife to lay down and that he (Iro) being frightened knelt between the victim's legs, removed his trousers and inserted his erected penis into the victim's vagina. He said it was the husband who bent down and opened the victim's legs for him and moved her skirt up. Iro insisted that the victim was willing. He said while he was having sex with Taedola's wife, the husband (Taedola) was there standing watching them. After they had sex, they and the husband returned home. Iro denied any subsequent act of sexual intercourse with the victim.

The prosecution have asked the Court to accept that the custom swearing was a very serious matter and that it constitutes threat or force sufficient to make Iro and the victim have sexual intercourse. Because of the presence of the threat upon her mind, when she had sex with Iro, the victim was not consenting. The prosecution asks the Court also to bear in mind the background of the victim and the effect of such swearing in custom would have on her. The evidence the prosecution says, is sufficient to establish beyond reasonable doubt the accused's guilt.

Counsel for Iro however submitted that when Iro had sexual intercourse with the victim, she was willing and that from his observation the victim indicated she was consenting. He had every reason to believe that at the time they had sexual intercourse, the victim was willing. Counsel referred to the cases of *R -v- Cogan* and *R -v- Leak* [1975] 2 All E.R. 1059 and *DPP -v- Morgan* [1975] All E.R. 347. Counsel further submitted that if Iro had sex with the victim under threat then he is entitled to rely on Section 16 of the Penal Code which provides that a person is not criminally responsible for an offence if it is committed under compulsion by the other offender.

Counsel for the husband submitted that for the husband to be guilty, the prosecution must prove that he aided and abetted Iro to rape the victim. Counsel further submitted that the Court is entitled to look at the subsequent act of sexual intercourse between the victim and Iro, three days after the alleged horrific rape committed upon her by the same Iro with whom she said she was not willing to have sex with in the bush on 6 November. Counsel further submitted that in so far as the victim's evidence is concerned she said that if she did not have sex with Iro then she

would have to pay compensation for disobeying her husband's custom swearing. The choice, Counsel says, was therefore, either, to disobey and pay compensation or have sex with Iro. She chose to have sex with Iro in this case.

I must admit that this case is the first of its kind I have come across in Solomon Islands. The version of evidence presented to the court shows a most extraordinary story of what happened, if at all, before and on 6 November 1989.

Rape is defined in Section 128 of the Penal Code which provides that:-

"128. *Any person who has unlawful sexual intercourse with a woman or girl, without her consent, or with her 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*".

It will be seen that the prosecution, in this case, must prove that the victim did not consent or that if she consented that consent was obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm.

I consider the case against the husband, Casper Taedola first.

The prosecution's case against the husband is that he aided and abetted Iro to rape the victim. The husband was not the actor. If he was the actor himself, it would be necessary for me to consider the issue whether the husband could be guilty of rape upon his wife. My consideration of the husband's case in this present case therefore would be as to the extent of his being a party to the offence as an aider and abettor. It suffices however to state that the present law in Solomon Islands, in my view, is that a man could not be guilty of rape upon his wife, this exception being depended on the wife's implied consent given to intercourse with her husband until that consent is revoked by a decree nisi, a separation order or in certain circumstances by a separation agreement. See *R -v- Clarke* (1949) 33 Cr. App. R. 216, *R -v- Miller* (1954) 38 Cr. App. R. 1 and *R -v- O'Brien* [1974] 3 All E.R. 663. But a husband may be an aider and abettor. See *Archbold*, 44th Ed. 1992, Vol 2 para 20 - 24 page 2221.

In this case, as I have said, the prosecution's case against the husband is that he aided and abetted Iro to rape the victim. I consider it essential therefore that the prosecution must show that the accused has acted in such a manner as he contemplated which would bring about or assisted the commission of the offence. The evidence for the prosecution clearly shows that the only act of threat or force on the part of the husband was that of the custom swearing of "shitting" in his mouth and on his father's and grandfather's heads. Taking that custom swearing as a threat, if at all, one must

then look at the other acts on the part of the accused which assisted Iro to commit the alleged rape on the victim.

The prosecution suggested that the use of knife, if accepted, was an additional threat which enabled the victim to consent and Iro to have sex with her. That suggestion comes from the evidence of Iro alone. Unfortunately, the victim swore on oath and gave evidence that at no time did her husband ever raise his hand with a knife threatening them. The husband's evidence also did not show he ever raised his knife at Iro and the victim.

Quite to the contrary, the victim swore that after the husband swore in custom for his wife and Iro to have sex, he left to cut canes and it was when he was away that Iro laid on her and pushed his erect penis inside her vagina. The husband's evidence on oath shows that he was "at the other side of the bush" and his wife and Iro were on another of the bush. The wife stated that it was Iro who advised her to tell lies to the police about the husband's threat with the knife. Comparing the Statements made to the police by the victim and Iro, I have no doubt that they sing the same tune. In the husband's statement, there was no mention of him using the knife to threaten them although he agreed he forced them by swearing in custom. I accept that the victim and Iro had been behaving strangely and in such a manner that aroused suspicion in the mind of the husband.

I accept the husband's evidence that his wife, and Iro have been seeing each other during the day and at nights even to the late hours of the night, not once but frequently. I further accept the husband's evidence that because of his wife's behaviour toward Iro, they had rows. Consequently I accept that it is reasonable to expect a normal husband such as the accused to tell his wife to go ahead to do what she wanted and added to it with a so-called custom swearing.

Custom swearing can operate as a threat or force in the minds of a person in the society like Solomon Islands. But on the facts as I have found them in this case, the alleged custom swearing did not amount to threat or force sufficient to bring about or assist Iro to have sexual intercourse with the victim on its own.

I am therefore satisfied that Iro had sexual intercourse with Joy Musufa'alu without any threat or force from Casper Taedola. I am further satisfied that the wife's willingness to have sexual intercourse with Iro was not obtained through any threat or force from her husband.

That leaves me to consider Iro's position on the question of whether or not he had unlawful sexual intercourse with the victim without her consent.

I have already found that the husband had noticed his wife and Iro were behaving as intimate friends. On the 6 November 1989, I am satisfied on the evidence of the wife and husband that the husband was not present when intercourse took place between Iro and the wife. I am further satisfied that Iro and the victim lied to the Police about the knife threat. I am equally satisfied that three days after the alleged rape upon her by Iro, the victim again had consensual intercourse with the same man whom she said had raped her on 6 November. I found Iro was lying when he said that the husband earlier threatened to kill him with a knife if he did not have sexual intercourse with Joy Musufa'alu. I found him also to be devoid of truth when he said that Casper Taedola. (who had been married for 13 years to the victim with six children) stood one foot away beside him while he was about to put his erected penis into Casper's wife vagina and that it was Casper who bent down and opened his wife's skirt for Iro so that he (Iro) could push his erected penis inside her vagina. I found that to be outrageous and I simply do not believe Iro on that.

In my judgement Iro and Musufa'alu had already had close association with each other before 6 November 1989 and they had sexual intercourse with each other on 6 November 1989 in exactly the same manner as they had three days later. Those acts of sexual intercourse were consensual. They have tried to lie their way out attempting to paint the picture that Casper Taedola was the one responsible for making them have sexual intercourse with each other and that it was Casper who should be blamed for their sexual intercourse. Unfortunately for them, they have shown themselves on the witness box as very unbelievable witnesses and poor actors. I simply do not believe and cannot accept their concoction. There is nothing to dissuade me from the conclusion I have found on the evidence that the sexual intercourse between Iro and Musufa'alu on 6 November 1989 was not a rape.

In view of my finding, it is unnecessary for me to consider the effect of *R -v- Cogan* and *R -v- Leak*, *DPP -v- Morgan* and Section 16 of Penal Code referred to me by Counsel.

The alleged offence occurred on 6 November 1989, exactly two years and two weeks today. It does not help the prosecution when such a delay takes place as one can imagine in the present case. But these accuseds have been charged with a criminal offence and however unattractive I find them to be, it is for the prosecution to prove their guilt and not for them to prove their innocence. The prosecution must make me sure of their guilt.

On the evidence before me the prosecution have failed to prove beyond reasonable doubt that the accuseds are guilty of rape as alleged.

I found both accuseds not guilty and they are acquitted.

(G.J.B. Muria)

JUDGE