



IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

**Criminal Appeal No.4 of
2021**
Supreme Court Criminal
Case No.7 of 2021

BETWEEN

THE REPUBLIC

Appellant

AND

TOMMY TEBOUWA

Respondent

BEFORE:

**Justice R. Wimalasena,
President
Justice Sir A. Palmer
Justice K.A. David**

DATE OF HEARING:

26 August 2025

DATE OF JUDGMENT:

16 October 2025

CITATION:

**The Republic v TOMMY
TEBOUWA**

KEYWORDS:

**Indecent act and Rape, Rule in Browne v Dunn, in
criminal trial, it is the duty of the court to assess**

the evidence in relation to each offence, order of acquittal set aside and retrial ordered.

LEGISLATION: Sections 105 and 106 of the Crimes Act 2016, Nauru Court of Appeal Act 2018, Rule 6 of the Nauru Court of Appeal Rules 2018

CASES CITED: **Browne v Dunn (1893) 6 R 67 (HL), State of Uttar Pradesh vs Nahar Singh, 1998 INSC 197, R v Foley (2000) 1 Qd R 290**

APPEARANCES:

COUNSEL FOR the Appellant:

Ms. M Suifa'asia

COUNSEL FOR the Respondent:

Ms. J Olsson

JUDGMENT

INTRODUCTION

1. This is a decision on an appeal by the appellant, The Republic (the Appellant) against the decision of the Supreme Court of Nauru on 2 July 2021 in Criminal Case No.7 of 2021, *The Republic v Tommy Tebouwa* which acquitted the respondent, Tommy Tebouwa (the Respondent) of two counts of committing an indecent act and rape. The appeal was commenced by Notice of Appeal dated 2 August 2021.

2. On 1 September 2021, the Respondent filed a Respondent's Notice pursuant to Rule 22(1) of the *Court of Appeal Rules 2018* through which he contended that the decision of the Supreme Court be affirmed. At the hearing, Ms. Olsson for the Respondent sought leave to withdraw the Respondent's Notice which was granted.

THE TRIAL

3. The Respondent was charged with one count of rape contrary to s.105 of the *Crimes Act 2016* and one count of committing an indecent act contrary to s.106 of the *Crimes Act*. The Respondent denied both charges in the Supreme Court so a trial was conducted to determine his guilt or otherwise. The prosecution called five witnesses including a doctor from the RON Hospital to give evidence and tendered four exhibits which included the Respondent's Record of Interview, seventeen selected coloured photographs, a sketch and the victim's medical report. In his defence, the Respondent gave sworn evidence and called four other witnesses including his wife. All witnesses were cross-examined. On 2 July 2021, the Supreme Court returned verdicts of not guilty and acquitted the Respondent on both charges.

BRIEF BACKGROUND OF CASE

4. This is a case where the Respondent who was referred to as "uncle" was accused of committing an indecent act against the victim who was his "niece" and also raping her at a relative's house in Yaren District on the night of Sunday, 27 September 2021 while his family was attending church. The victim had just finished having a shower and only had a towel wrapped around her in a room in the relative's house as she was looking for a change of clothes when the Respondent went in and committed the offences.

RIGHT OF APPEAL

5. The Appellant through the Director of Public Prosecutions instituted this appeal pursuant to s.29(3)(a) of the *Nauru Court of Appeal Act 2018* (the Act).

6. The right of appeal against a judgment, decision or order of the Supreme Court under s.29(3)(a) of the Act is available to the Director of Public Prosecutions where a

person tried before the Supreme Court in the first instance is acquitted on a question of law or a question of mixed law and fact.

GROUND OF APPEAL

7. The Appellant's Notice of Appeal substantively raises three grounds of appeal and these are:

1. The Honourable Chief Justice erred in law and in fact when he failed to consider the evidence of the victim which was never challenged by the Respondent.
2. The Honourable Chief Justice erred in law and in fact when he failed to consider the rule in *Browne v Dunn*.
3. The Honourable Chief Justice erred in law and in fact when His Honour asked questions which amounted to cross-examining the victim who was testifying as a witness.

RELIEF SOUGHT

8. The relief the Appellant seeks are

1. The order for acquittal by the Supreme Court be set aside and substituted with an order for a retrial.
2. The retrial be heard by a differently constituted court.

LEGAL ISSUE

9. The grounds of appeal are interrelated and together suggest that the learned trial judge erred in law and in fact in not finding that the Respondent had proven the two charges of committing an indecent act and rape preferred against the Respondent

on the requisite criminal standard of proof beyond any reasonable doubt on the assertion that the learned trial judge:

1. failed to accept and convict the Respondent on both counts on the victim's unchallenged evidence;
2. failed to consider and apply the rule in *Browne v Dunn*; and
3. asked questions to the victim while giving evidence that amounted to cross-examining her.

10. Did the learned trial judge commit any error of law and in fact in those alleged circumstances?

SUBMISSIONS

11. The Appellant through Ms. Suifa'asia submitted that the learned trial judge erred in law and in fact when His Honour:

1. failed to consider the victim's evidence with other evidence;
2. took into account irrelevant matters and facts raised by the Respondent's witnesses such as family feud and attribution of blame on the victim for her alleged stealing of \$2,000.00 in Stephanie's room;
3. found that the victim was an unreliable and dishonest person;
4. the victim was banned from going to Mary Tebouwa's house because she was known to have taken money to buy smokes;
5. the allegations against the Respondent were made-up as cover-up for the allegation against the victim for stealing \$2,000.00;

6. failed to consider the rule in *Browne v Dunn*, the breach of which would have amounted to the victim's evidence being taken as unchallenged; and
7. descended into the arena by asking a multiplicity of questions to the victim while giving evidence that went beyond that allowed by law and amounted to cross-examining her and demonstrating a perception of bias and taking sides.

12. The Respondent though Ms. Olsson submitted that all the grounds of appeal have no merit and should be dismissed as:

1. the credibility of evidence takes precedence over any procedural irregularity in relation to the observation of rules of professional practice and procedure in the examination of witnesses including the rule in *Browne v Dunn*;
2. a learned trial judge has discretion in assessing the relevant evidence, whose evidence to accept and what weight to be given;
3. The Appellant did not state which of the questions or line of questioning posed to the victim by the learned trial judge materially affected the outcome of the case;
4. Judges' questioning is permissible and in the present case, the trial judge's questioning of parties' witnesses including the victim for clarification of ambiguous testimony did not exceed the bounds allowed by law;
5. The learned trial judge's questioning alone did not constitute bias;

6. the learned trial judge did not descend into the arena and his questioning and conduct remained within the limits of judicial propriety;
7. the rule in *Browne v Dunn* applies to counsel and not to judges;
8. the learned trial judge had discretion to accept other evidence even where the evidence of the victim may not have been tested or challenged in cross-examination pursuant to the rule in *Browne v Dunn*;
9. the medical report did not support the prosecution case when it failed to confirm vaginal penetration, laceration and bleeding;
10. police only conducted an investigation into the allegation of the victim stealing \$2,000.00 and not in relation to the two sexual assault charges;
11. the victim said an allegation was made against her for stealing \$2,000.00;
12. there was evidence of the victim being a habitual liar and thief;
13. the victim lied about the sexual assaults to cover-up the allegation made against her of stealing \$2,000.00;
14. there was delay in formally reporting the alleged sexual assaults to the police and even when an off-duty police officer friend of the victim's namely, Rosalie Dediya was informed about the alleged sexual assaults, she did not pursue it.

QUESTIONING BY TRIAL JUDGE

13. We will discuss the third ground first and followed by our discussion of the first and second grounds together.

14. Before embarking on our discussion, we remind ourselves of the requirement of Rule 6 of the *Nauru Court of Appeal Rules 2018* which states:

Appeal to be confined to grounds of appeal

Subject to any amendments to the grounds of appeal made under the Rules, the Court shall confine the appellant or respondent to the grounds of appeal contained in the notice of appeal or Respondent's notice.

15. The requirement is mandatory.
16. The rule appears to stem from the general principle of law governing pleadings that states that unless there is foundation in the pleadings of a party, no evidence or relief on matters not pleaded can be allowed.
17. It is in the light of Rule 6 that we ask ourselves whether the ground under consideration meets the mandatory requirement of the Rule? We answer the question in the negative. In our view, the ground is too general and vague as it does not specifically identify the questions that the Appellant asserts amounted to cross-examining the victim while giving evidence that went beyond that allowed by law and demonstrating a perception of bias and taking sides. We therefore dismiss this ground.

FAILURE TO CONSIDER THE VICTIM'S UNCHALLENGED EVIDENCE AND THE RULE IN BROWNE v DUNN

18. The Appellant submitted the following summary of the victim's evidence:
 1. On the evening of Sunday 27 September 2020, the victim had drinks at the Temaki's residence at Meneng District.
 2. After a while she thought to have food and a shower at her grandmother's (Mary Tebouwa) house at Yaren District. She walked over there which was about 600-800 meters in between the two points.

3. The victim reached the house and saw her uncles and aunts and their children at Mary Tebouwa's house. Her uncles were Laurie and the Respondent, their wives Docas and Tileidin respectively.
4. The victim felt shy because she was already drunk. She asked her uncle Laurie for food. Laurie told her to go to their main house located at the back of Mary Tebouwa's house.
5. The victim's uncles' wives accompanied her to the house. Her aunty Tileidin served food for her, and she sat to eat, and they told stories.
6. After eating, the victim asked Aunty Tileidin for a change of clothes as she wanted to take a bath. Aunty Tileidin gave her a change of clothes and told her to go Mary Tebouwa's house to take a shower, because their own shower had no supply of water.
7. The victim went to Mary Tebouwa's house, but there was no one at home. The door was closed but unlocked. She went into the middle room which has a connecting bathroom.
8. In the middle room she looked for a towel when uncle Laurie came into the room. She asked him where he could find a towel. She was told to look in the cupboards. Uncle Laurie went out and there was no one else in the house.
9. The victim took a long shower. After she was done, she wrapped herself with a towel, took her change of clothes and went to a room next to the one she was in before (the middle room).
10. In that room the lights were off, and she closed the door. But there was some light streaming in from the middle room which had lights on.
11. The victim was drying off when suddenly the door opened. She was standing behind a cupboard which concealed her from the door. When the door opened, she called out, "I am here changing." The door closed again.

12. The victim turned to see her uncle; the Respondent walk in. She had thought that he came to get something from the room and did not expect that he would do anything to her.
13. The Respondent went to the victim and touched her, and she asked him, "what's up with you?", and she pushed him away. But he kept on touching her and moving onto her and she felt disgusted.
14. The Respondent kept on doing what he was doing, and the complainant struggled and wrestled with him. She could not believe that her uncle whom she respects and was close to her would be doing such thing.
15. As they struggled the Respondent managed to push her onto the bed. She saw that he wore a towel around his waist.
16. When he wrestled her on the bed, her towel fell off, and the Respondent got on top of her. She struggled to push him off and he wrestled to open her legs and thighs apart.
17. She was telling the Respondent, "Why are you doing this? We grew up together and this is what you do to me?"
18. The Respondent did not say anything to her, he just grinned at her and then he managed to penetrate her.
19. She felt his penis insides her vagina. She pushed him away, yet he still pushed himself into her. She swore at him, and slapped his face and pushed him and he still penetrated her.
20. It took five times for the complainant to push the Respondent out of her and for him to enter her again. Until suddenly, he stopped, got off her and went out.
21. After the Respondent left, the victim got up and went to the place where she was towelling herself and looked for clothes in the drawers and cupboards. She lost her other clothes that her aunty gave to her, so she looked for random clothes.
22. As she was raffling through the clothes, the door opened again and the Respondent stepped in and said, "don't touch those clothes, they are

Stephanie's favourites." Stephanie is the victim's aunt. She found a shirt and underwear.

23. The victim went to wash in the shower and changed into her own clothing shorts and bra. She went out to the lounge room and the Respondent was there. No one else was around. He had a cigarette and a mango in his hand.

24. The victim went to the kitchen, took a drink, and came out to the porch and the Respondent was there. He offered her the cigarette and the mango. She took the items and walked away from the house.

19. The Appellant argues that the learned trial judge failed to consider the material evidence relating to the offences against the Respondent. We have considered the judgment of the learned trial judge, and we will discuss if the learned trial judge had evaluated the evidence relating to the offences.

20. In paragraph 99 of the judgment, the learned trial judge stated that he had considered "all of the evidence and counsel's closing address" and identified the following reasons for not accepting the evidence of the victim:

- (1) I disbelieve the complainant's feigned ignorance of being sent away from Mary's home because of her unacceptable behaviour and her unconvincing claim of maintaining good relations with the Tebouwa family at Yaren since her departure;
- (2) I accept the adverse general reputational evidence from the defence witnesses that the complainant "had a bad habit of stealing money and lying";
- (3) I prefer and accept the contrary testimony of Dorcas and Tiledin that the complainant was told not to shower at Mary's place or that the defendant's house had "no water" when at the same time, the defendant was using the toilet in his own house;

- (4) I prefer and accept the contrary evidence of Stephanie that both she and her mother Mary would not have approved of the complainant showering in their house in their absence and without their permission.
- (5) The highly significant and "suspicious" fact that the complainant specifically chose Stephanie's bedroom (H) in which to dry herself and change and in doing so, she would have had to transit through the middle bedroom (D) which was the bedroom she had used and slept in when she stayed at Mary's house;
- (6) I reject the complainant's unbelievable gratuitous claim that the defendant re entered Stephanie's bedroom for "second time" after he had indecently assaulted and raped her and for the sole reason, to tell her not to touch Stephanie's clothes in the drawers;
- (7) I also disbelieve the complainant when she claimed on oath that she first learnt of the defendant losing his employment and about his family's consequent suffering when defence counsel mentioned it during her cross-examination. Needless to say in this regard, I prefer and accept the evidence of "Dorcas" about the complainant hand-delivering a complaint letter about the defendant to the Chief Secretary's office a month after the alleged incident had occurred;
- (8) I accept and prefer the evidence of "Lloyd" (Vunipola) that he saw the complainant return to the drinking party at the Temaki residence with two (2) bottles of AK47 Vodka and he saw her drinking and behaving normally after she returned to the drinking party;
- (9) The not unimportant fact that the complainant was aware that there was no-one in Mary's house "not even the defendant" when she came out of the shower to dry and change. She therefore had her choice of bedrooms in the house and it was only the defendant who had the misfortune of finding the complainant in Stephanie's bedroom. The defendant was the only other person who saw and knew that the complainant had been in Stephanie's bedroom after her shower and was seen rummaging

through the drawers in Stephanie's bedroom. In other words, only the defendant could place the complainant in Stephanie's bedroom close to the time when her money allegedly went missing.

21. It appears that the reasons stated by the learned trial judge in paragraph 99 of the judgment for disbelieving the victim are predominantly concerned with peripheral issues, such as alleged disputes between families, the victim's reputation, or matters relating to household permissions and conduct. While such matters may have some bearing on general credibility, they do not go to the core of the victim's evidence regarding the elements of the alleged offences. By focusing on these collateral issues, the learned trial judge failed to adequately engage with the central question of whether the victim's account of the alleged offences was reliable and sufficient to establish the charges. As such, we are unable to ascertain how the evidence directly relating to the offences was evaluated, notwithstanding the learned trial judge's statement at paragraph 99 that "all of the evidence" had been considered.

22. The learned trial judge did not provide a clear analysis of the victim's testimony in respect of the material elements of the alleged offences. Rather than scrutinising her evidence on the critical aspects of the case, including the unchallenged evidence of her presence at the scene of the alleged offences, the Respondent's entry into the room, and her account of the sequence of events that the Respondent merely denied, the learned trial judge relied on extraneous factors to disbelieve her. The Appellant contends that the learned trial judge failed to evaluate the victim's evidence regarding the alleged offences in an objective manner. This omission leaves the judgment without a cogent explanation as to why the victim's direct evidence of the offences was rejected, particularly when it remained unchallenged during cross-examination.

23. It should also be noted that the law does not require corroboration to prove an offence of a sexual nature. Section 101 of the *Crimes Act* expressly provides that "any law requiring corroboration of a witness's evidence for a conviction under this Part is

abolished". The learned trial judge referred to the medical evidence in paragraphs 44–46 and observed that "the doctor's evidence, which was of little assistance in establishing recent penetration, brought the prosecution case to a close." This suggests that the learned trial judge sought some form of medical corroboration by treating the absence of such evidence as a weakness in the prosecution case. The proper approach, however, is for the court to evaluate the complainant's evidence objectively without searching for corroboration in sexual offence cases.

24. Although the learned trial judge listed nine reasons in paragraph 99 of the judgment to explain why he disbelieved the victim, this stands in contrast to the observation in paragraph 98 where he said "I confess that at the end of the complainant's and defendant's sworn testimony, and on the basis of their oral evidence and demeanour alone, I was undecided as to who was telling the truth. Both gave their evidence confidently and were mostly unshaken in cross-examination." It is therefore unclear how the learned trial judge analysed the evidence directly relating to the alleged offences, or what weight was attached to the victim's evidence in respect of the elements of the offences, as the reasoning appears to rest largely on defence evidence used to discredit the victim.

25. In a criminal trial, it is the duty of the court to assess the evidence in relation to each element of an offence. This is particularly significant in circumstances where the learned trial judge himself observed that both the victim and the Respondent gave their evidence confidently and were mostly unshaken in cross-examination. It appears, however, that the learned trial judge placed undue reliance on evidence concerning the victim's reputation, based on alleged disputes between the families, rather than on the material evidence relating to the offences. It is further observed that the learned trial judge did not state with specificity the reasons for rejecting the victim's evidence in relation to the elements of the offences. While the learned trial judge listed various grounds for doubting the victim's credibility, the judgment does not explain how the victim's evidence on the material aspects of the alleged offences

was assessed or why it was rejected. The absence of such analysis makes it unclear on what basis the victim's evidence on the essential elements of the offences was disbelieved. It appears that the learned trial judge approached the evidence of the victim with an eye attuned to find reasons to disbelieve her rather than assessing the relevant evidence that was adduced to prove the charges.

26. In the second ground of appeal, the Appellant claims that the learned trial judge failed to properly apply the rule in *Browne v Dunn* when analysing the evidence. The Appellant contends that the allegations made against the victim during the defence case, through the defence witnesses, were never put to the victim during cross-examination. Counsel for the Respondent also conceded in written submissions that this had not been done. It appears, therefore, that the victim was never given an opportunity to respond to those allegations, which were independent of the offences in this case. Despite this, the learned trial judge placed reliance on such evidence and concluded that the victim's testimony was not credible. Several of the matters relied upon by the learned trial judge were introduced through the evidence of defence witnesses, but were never put to the victim during cross-examination. This deprived the victim of the opportunity to respond to allegations that were subsequently used to discredit her evidence. Such an approach is inconsistent with the rule in *Browne and Dunn* and undermines the fairness of the trial process. It was therefore an error in both law and fact for the learned trial judge to rely on these untested allegations in rejecting the victim's credibility.

27. For these reasons, we are of the opinion that the learned trial judge erred in both law and in fact by failing to consider the evidence relevant to the offences and by relying on the evidence of the defence witnesses in contravention of the rule in *Browne v Dunn*.

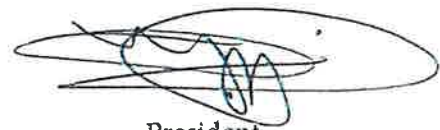
ORDER OF THE COURT

28. The formal orders of the Court are:

1. The order of acquittal is set aside.
2. Retrial is ordered.

Dated this 16 October 2025.

Justice Rangajeeva Wimalasena



President

Justice Sir Albert Palmer



Justice of Appeal

Justice Kingsley A. David



Justice of Appeal