

IN THE SUPREME COURT OF NAURU

COPY

CRIMINAL CASE NO. 2/2002

THE REPUBLIC

V

BOOMBA ADAM

Dates of Hearing : 15 & 16 October, 2002  
Date of Judgment : 18 October 2002

D. Seneviratne, Director of Public Prosecutions  
for the Republic with W. Togamae of Counsel  
V. Gadoengin for Accused.

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**JUDGMENT OF CONNELL, C.J.**

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1. At a Preliminary Inquiry concluded on 24 September 2002 the Resident Magistrate committed the defendant, Boomba Adam, for trial on a charge of Rape under section 347 of the Criminal Code Act 1899 of Queensland (First Schedule) Adopted. Subsequently, the Director of Public Prosecutions exercising his powers under S.180 of the Criminal Procedure Act further charged the defendant with two additional charges, defilement of a girl under the age of seventeen years under S.215 of the Criminal Code Act 1899 of Queensland (First Schedule) Adopted, and indecent assault

under S.350 of the Criminal Code Act 1899 Queensland (First Schedule)

Adopted.

2. The defendant, Boomba Adam, pleaded not guilty to all three charges. He gave evidence on oath.

3. The prosecutrix, Carli-Jade Moses, was a girl aged thirteen years. The defendant gave his age as twenty nine years.

4. On the late evening of 8 August at about 10 p.m., two girls, the prosecutrix and Crynsia Deidenang, aged twenty years, met with the defendant at his house in the district of Boe. Crynsia was a friend of the prosecutrix and had been a girlfriend of the defendant on intimate terms with the defendant for a couple of months. Both remained in the defendant's bedroom with the defendant for some time.

5. The two girls said they were just socializing though the accused said they visited him to smoke marijuana. In any event, Crynsia felt sleepy and was taken home by the accused on his motorcycle. Carli-Jade remained at the house in the bedroom.

6. Upon the accused's return, the evidence of prosecutrix, Carli-Jade, was that he turned off the light, closed the door and asked her to take off her clothes. She stated that she refused but after she was threatened, she took off her clothes. At that point, the evidence was sexual intercourse took place the accused penetrating her vagina with his penis. Thereafter he put his fingers into her vagina, and this was followed by act of intercourse involving penetration by his penis into her vagina.

7. At which point, he got off her, with his terms, after he climaxed. The accused then put his clothes on and she did likewise.

8. There followed some noise created by her banging the wall after she had shouted outside whereupon the accused's aunt was woken up and came out from her room in the same house to inquire what was going on. The prosecutrix, on the accused's instructions, then apologized to the aunt for her yelling and creating a noise.

9. In the meantime, Crynsia returned to the Boe house on her own motorcycle and took the prosecutrix either home or to another friend's place in the course of which journey, she learned from Carli-Jade what had

taken place.

10. Whatever the different versions of the night were, it was common to the evidence of both the accused and the prosecutrix that she had been penetrated in two acts of sexual intercourse and that he, the accused had put his fingers into her vagina.

#### **THE CHARGES.**

11. (1) Rape. The ingredients of this charge are basically two – carnal knowledge of a woman or girl and secondly, such carnal knowledge without her consent or with her consent if obtained by force, intimidation or fear of bodily harm. In addition, there should be corroboration.

(2) Defilement under the age of 17. The ingredients are carnal knowledge, secondly, proof of age, thirdly, corroboration and finally, the prosecution must be begun within six months of the committal of the offence.

(3) Indecent Assault on Females. Under this provision there

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must be an indecent assault which would be one in contravention of standards of decent behaviour relating to sexual modesty or privacy. See *R v Court* [1987] 1 All E.R. 120 and, further the act is associated with some intention to obtain sexual gratification. See also *R v McCormack* [1969] 3 All E.R. 371. With this charge, absence of consent is required.

#### **RAPE.**

12. There is no divergence in the evidence on carnal knowledge between that of the prosecutrix and the accused. Carnal knowledge took place. There was the evidence of both Carli-Jade and the accused that penetration of the vagina by the male penis took place on two occasions on the night of 8 August 2002. Corroboration was not, therefore, an issue of contention. Evidence of carnal knowledge was supported by the evidence of Dr. Epeli Nailatikau who stated upon his examination of the victim on 12 August 2002 that there was evidence of recent penetration of an erect penis or finger.

13. As to consent, there was some conflict between the evidence of the prosecutrix and that of the accused. The prosecutrix, a young girl of thirteen years, denied that she had consented. She had only taken off her

clothes once she had started to cry and he had threatened to punch her. At the conclusion of the sexual intercourse, she got dressed. Her evidence was then that she opened the door and started shouting but no one came. The accused pulled her back into the room and she started to punch the walls. At this point, the accused's aunt came to the room and stared at both of them. The aunt then went out and the prosecutrix went outside and apologized to the aunt on the accused's instructions. She then asked to stay with the aunt and went into her room. Soon after, she was picked up by Crynsia Deidenang who had come back to the Boe house.

14. The evidence of Crynsia was that she took Carli-Jade with her on the motorcycle. At the time she was crying. They went to Ella Beach Park in Yaren where she asked Carli-Jade what happened and she said she had been raped by the accused. The prosecutrix also told her that she would talk to her brothers about it. Crynsia then returned to the accused's house and confronted the accused as to why he had done such a thing to Carli-Jade. He made some reply which she could not recall and then she went straight home.

15. The evidence of the accused's aunt, Brenda Adam, was slightly

different but not markedly so as to the incidental facts after the sexual intercourse. On that night she was about to sleep when she heard a noise like people struggling. She opened the door and saw the accused and Carli-Jade in the corridor. She asked what was wrong and the accused answered that nothing was wrong. She went back to her room and soon there was a knock. It was Carli-Jade who asked for a cigarette and she came in. Carli-Jade wanted to go home and asked Brenda Adam to take her but she did not have transport. The prosecutrix apologized for the noise and asked if she could stay with her for a few minutes. Then the accused called the aunt who asked what was happening. He said nothing was wrong, they had been only smoking a strong cigarette. Then the aunt heard a motorcycle and saw that Carli-Jade had left. The aunt added that Carli-Jade had been dressed and did not appear to be crying.

16. On the other hand, so far as consent was concerned, the evidence of the accused painted a rather different picture of the event. He gave his evidence in a straightforward, matter of fact style with infinite detail of the sexual acts that he performed on the girl. His narrative attempted to display himself more or less as an experienced seducer. There was certainly no remorse and it was his belief that he had done nothing wrong

to this girl, just thirteen years old.

17. Some aspects of this evidence need to be considered. He once had been Crynsia's boyfriend, and on the day in question he related that the two girls came to his house, having made the arrangement earlier, to smoke marijuana at about 10 p.m. After he took Crynsia home, he returned. He then commenced to convince the reticent Carli-Jade to have sexual intercourse with him. She said no but 'do it tomorrow' was her reply. But he was persistent and said he was working tomorrow. She protested that Crynsia would know. He still kept on and he said he just wanted it this one time. At that point, he said she conceded and removed her clothing.

18. His evidence was that she then lay across the bed. He then undertook a number of foreplay sexual acts and then asked if she would do it now. She answered "Yes", and he then started to enter her. She wanted him to take it slowly and to oil his penis. He did so. He then had intercourse with her for five minutes, after which he masturbated her, placing his finger in her vagina. After a few minutes, he resumed sexual intercourse again with her until he climaxed.



19. Upon the conclusion of the intercourse both put their clothes on. It was then that the noise incident took place with the aunt's intervention.

20. The gist of *Harling's* case [1938] 1 All E.R. 307 is to remind courts that the younger the age of the victim the stronger should be the evidence that there was consent. This makes sense too when one considers cases where age differentials, often occurring between the young immature adolescent girl and the older man, can play a major factor. That is the case here. Nevertheless, it is still necessary for the prosecution to establish non-consent.

21. The Director of Public Prosecutions carefully submitted that there was circumstantial evidence to evidence lack of consent. He asserted that the resistance of a minor in the house of a much older man will be tempered by the circumstances. There will be a degree of resistance. In her evidence she said she did not at first consent but only did so upon him threatening to punch her. Furthermore, there was the pattern of resistance and refusal to his blandishments and begging. There was some indication that after the act she was in some state of turmoil where she wanted to go home and created a mild fracas. That, of course, may only be the realiza-

tion of the enormity of the act that she has just experienced and the effect of it upon herself, and her inevitable explanations to Crynsia and her family. This, no doubt, was added to by her realization that the act was really designed for the gratification of the accused and certainly not for her.

22. On the other hand, there was no violence noticeable. The statement that she did not consent until she cried and he threatened to punch her was not in character with other evidence. The medical evidence did not lend any support to violence. She was happy to wait behind when Crynsia went home early. Upon the accused's return, she made no attempt to leave. The sexual acts covered a fair period of time and it was not until their conclusion that she made any effort to call out or make a noise. The evidence of Brenda Adam is basically of a girl who has had enough, wants to go home, and is rather disgusted.

23. The evidence of the accused, at this point, was that she was 'stoned' and needed to 'sober up'. He had told his aunt that there was nothing wrong only smoking a 'strong' cigarette. There may have been in this some evidence of marijuana the use of which may have had the effect of reducing the ability of the prosecutrix to give consent. However, neither the prosecu-

tion nor the defence went down this path, and, therefore, little could be attributed to it.

24. After the incident, she had informed Cynsia when she came to get her that she had been 'raped'. That, in the circumstances, was not very strong material to work on, given the fact that the young prosecutrix was a close friend of the older Cynsia described as the accused's girlfriend. Her statement was unlikely to be otherwise, if she was to maintain the friendship.

25. There must be considerable sympathy for a young girl finding herself in the clutches of a practised seducer. But the evidence does not display that degree of resistance which would allow me to be satisfied beyond reasonable doubt that there was an absence of consent.

26. I, therefore, find the accused not guilty of rape.

#### **INDECENT ASSAULT ON FEMALES.**

27. The third charge, indecent assault on females, also requires

absence of consent. Consistently, I am not satisfied beyond reasonable doubt that there was absence of consent.

28. I, therefore, find the accused not guilty of the third charge, namely, indecent assault on females.

**DEFILEMENT UNDER THE AGE OF 17 – S.215.**

29. The section states -

“Any person who -

(1) has or attempts to have unlawful carnal knowledge of a girl under the age of seventeen years ..... is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years.”

30. The prosecutrix was born on 15 June 1989 according to the official Register. On the date of the act she was 13 years and two months.

The accused was originally charged with rape within one month after the offence was committed. Defilement of a girl under 17 years of age is a cognate offence to rape – S.135 (Criminal Procedure Act 1972). The accused was therefore charged within the period of six months as required under the Criminal Code.

31. The accused in his evidence admitted two acts of carnal knowledge with Carli-Jade on the night of 8 August 2002. Her evidence was also of two acts of carnal knowledge by the accused. I was satisfied beyond reasonable doubt that the accused perpetrated upon the prosecutrix two acts of carnal knowledge.

32. Absence of consent is not an ingredient of this offence.

33. It is a defence to prove that the accused believed, on reasonable grounds, that the girl was of or above the age of seventeen years. It is for the defence to raise it, and the onus of proof is with the defence. Such proof is to be determined on a balance of probabilities.

34. Under the law, the accused must have had reasonable cause to believe and must have in fact believed that the girl was of or above the age of seventeen years. *R v Harrison* [1938] 3 All E.R. 134.

35. There was no real attempt at the trial by the defence to establish the defence of belief of age by the accused. Indeed it would have been extremely difficult to establish such reasonable belief with one so young.

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In answer to questions in cross-examination by the Director of Public Prosecutions, the accused thought she looked young but that her body was mature. This was not taken up or explored by the defence. Indeed her countenance in the witness stand displayed a nervous young girl who could raise not much more than a whisper. There was little sign that in features she was far into adolescence. However, the defence was not established, nor was an attempt made to establish it at any point in the evidence of the accused. The statutory offence of defilement of a girl under the age of seventeen years was proved.


36. I, therefore, find the accused guilty of defilement of a girl under seventeen years of age under S.215 of the Criminal Code Act 1899 of Queensland (First Schedule) Adopted, in that he did on 8 August 2002 at Nauru defile a girl under seventeen years of age, one Carli-Jade Moses.

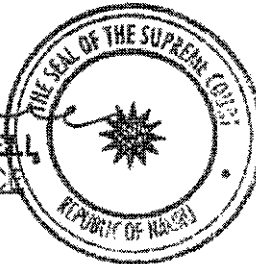
37. In summary, I find the accused

On Charge One	Not Guilty
On Charge Two	Guilty
On Charge Three	Not Guilty


38. I shall hear any plea on Tuesday 22 October 2002 at 9 A.M. before determining conviction and sentence.

39. The accused is remanded in custody to appear on Tuesday 22 October at 9 A.M.

  
BARRY CONNELL  
CHIEF JUSTICE



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SAMPATH B. ABAYAKOON  
REGISTRAR, SUPREME COURT