



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 99 of 2016

THE REPUBLIC OF NAURU

V

ISLAM JAN

Before: Judge Rapi L Va'ai

For the Prosecution: F Lacanivalu

For the Defence: R Tagivakatini

Dates of the Hearing: 9 October 2017

Date of Judgment: 20 October 2017

Ruling

1. The accused Islam Jan a 32 year old Pakistani national is charged with the crime of rape contrary to section 105(1)(a)(b)(i)(ii) of the Crimes Act 2016. It is alleged that on an unknown date between the 1st June 2016 and the 30th June 2016, the accused did intentionally engaged in

sexual intercourse with Shinie Dabwadauw who did not consent to the sexual intercourse and the said Islam Jan knew that fact.

2. The accused denied the charge. He denied having sexual intercourse with the complainant. He denied being in the company of the complainant at the time of the alleged offending.

Testimony of the complainant

3. The complainant told the court she first met the accused in December 2015 at the Boat harbour at Anibare where they were both swimming. They talked. She gave him her name and her mobile phone number when he asked. From then on they spoke on the phone on many occasions. She wanted money and a new phone when she was asked as to what she wanted. He gave money about five times, usually at night. Cash she received ranged from \$25 to \$30. She was not told to repay the money.
4. In 2015 the complainant was a student at 3rd form level. She was then 15 years old.
5. On the night of the alleged offending the complainant and her boyfriend Hartson rode to a restaurant at Aiwo on Hartson's bike at about 10pm. While at the restaurant her phone rang; it was the accused; they talked, and whilst talking Hartson told her to ask the accused for money and she did. The accused told her he had money and will give her money. He then hung up.
6. She said the accused called again and told her to meet him at the Centennial hall. They have met there before. She then took Hartson's bike and rode to the hall while Hartson stayed behind. It was dark at the hall and the accused was not there. He rang to tell her he was at the beach behind the hall. She rode to the beach. He was there sitting on his bike. No one else was at the beach and it was dark. She parked her bike besides his.
7. It was at the beach that she claimed she was raped.

8. She told the court the accused held her and told her he missed her; he then handed her the money and they walked on the beach. He then held her in a weird and strange manner and repeatedly told her he missed her. She took his hands away but he kept on grabbing her. He then grabbed her shoulders and put her on the ground. They struggled when he tried to undress her. She was wearing jeans and a t-shirt. At times she tried to get up to run away but she could not.
9. She said she was afraid and felt like crying. He did manage to take off her clothes; she was sore; he squeezed her breasts; he also pinched her between the thighs; he then removed his pants and inserted his penis inside her vagina. She told him to stop but he kept moving in and out inside her until he finished.
10. When he finished he got up, got dressed and told her to leave. She did not leave. She instead told him to go and he did. He smiled as he left.
11. She cried. She did not believe what happened to her. After a while she left to go back to Hartson.
12. When questioned by Hartson why she took so long she told him she went home after getting the money. She said Hartson asked her why she looked sad and she told him her family were unhappy with her. She did not respond when Hartson queried why her family were unhappy.
13. The complainant and Hartson then rode around the island.
14. It was not until September that the complainant told Hartson about the incident. She told the court it was too difficult for her to keep the incident to herself. Hartson was very angry; he wanted to do something to the accused after she told Hartson.

Testimony of Hartson

15. In June 2016 Hartson did not know the accused. Hartson confirmed that on the night of the alleged incident the complainant's phone rang twice while they were at a restaurant. He told the court that when the phone rang the first time it was on speaker so that he heard what

Issues

22. The critical issue to decide is whether the accused had sexual intercourse with the complainant.

Complaint or failure to complain

23. In a trial by jury the judge should at least as a general rule direct the jury that absence of complaint or delay in making a complaint may be taken into account in evaluating the evidence of the complainant. However that is not a hard and fast rule. See *Crompton v R* (2000) 206 CLR 161.

24. The circumstances as to the first opportunity will vary according to the type of person in whose company the complainant is, and the closeness in time to her first seeing a person to whom she was likely to make a complaint. It is also now readily recognized by the courts that the criteria for deciding the question of what is reasonable was in the past more restrictive than it is today. In *R v Noble* (2000) QCA 253 it was said:

“that the question of whether an opportunity to complain which was not availed of was a reasonable one in the past was often decided by reference to more restrictive criteria than now.”

25. Counsel for the defence has emphasised that in the circumstances of the allegations in this case and in particular the nature of the relationship between the complainant and her boyfriend, the complainant could and should have complained to her boyfriend. She did not because nothing happened.

26. It is often said that if the incident of rape had really occurred, the complainant would have complained to somebody very soon afterwards. But the law accepts that experience has shown that there may be good reasons, often deeply buried and personal why people do not complain about such things for long periods. The point was made by Dawson J in *Crofts v R* (1996) 186 CLR 427 at 434:

was said. The complainant asked if there was any money and the response was yes he will deliver it. He then hung up. After the second call the complainant left to get the money. On her very late return he questioned her as to the delay. She told Hartson she went home after she got the money and she was stuck with her father.

16. He and the complainant then went for a ride. They called into a private area. The next day his penis was itchy. He suspected he had sexually transmitted disease. In September he went to the hospital for a check. He also questioned the complainant. She told him then the accused raped her. He was furious; he wanted to personally settle the matter with the accused.

17. In November 2016 the incident was reported to the police by a cousin.

The Defence

18. The accused testified. He was an asylum seeker; he attained refugee status in 2014, and before his arrest on allegation of rape he said he has been living a normal and peaceful life. He has been living at the fly camp since 2014 and for more than three years he has had a Nauruan partner.

19. He told the court that people do ask him for money and he would give \$3 but not more. He also conceded he does go to the boat harbor for a swim, he also visits other areas in Nauru and hang out with friends.

20. When it was put to him that he had given money to the complainant on several occasions prior to June 2016, he said he may have, but not the amounts she claimed she received. He could not recalled whether he met the complainant when a photograph of her was shown to him at the police station. Neither could he recall meeting her at the boat harbour as there are always lots of girls there.

21. On the day he was questioned by the police the police took his phone.

"a complainants delay in making a complaint in cases of sexual nature has no probative value as to any fact in contest but goes merely to the credibility of the complainant. Failure to complain or delay in complaining may cast doubt upon the reliability of the evidence given by the complainant. However it does not necessarily do so, particularly when there is an explanation for the delay or failure to complain. On the other hand a recent complaint may be consistent with the truth of the evidence given by the complainant and so assist in establishing his or her credit.

Discussion

27. As a trier of facts I have a great deal of difficulty in accepting the complainant's explanation for not wanting to tell Hartson, when she returned from the beach, the incident which she alleged took place. She knew she was late and Hartson wanted an explanation. Although Hartson told the court she looked sad, her conduct and appearance obviously did not prompt Hartson to suspect something was amiss.
28. It was only when Hartson pressured her when he suspected he had venereal disease, which only she could have transmitted to him, that she made the so called complaint in September and which finally reached the police in November through a cousin.
29. Although the rule of practice relating to corroboration has been abrogated by section 101 of the Crimes Act 2016, it is my respectful view that I must in the circumstances of this case, in order to avoid a perceptible risk of miscarriage of justice, consider the evidence of the complainant in the usual way having in mind such aspects of human nature and experience.
30. I must look for evidence which tend to support her claim of what took place at the beach. There is no doubt that she left the restaurant by motorcycle without Hartson. She returned to Hartson much later than

she should have. And she received two calls before she left the restaurant.

31. For the prosecution to succeed it must at least show that the accused was at the beach, and the most obvious way in the circumstances is to prove the two calls came from his phone. The police took no steps to facilitate the tracing through Digicel.

32. As I have already indicated the testimony of the complainant alone in my view cannot support the charge. It would be dangerous and unsafe to convict on her evidence. I am not sure; I am not satisfied.

Result

(a) The charge against the accused is dismissed.



Judge Rapi L Va'ai

Dated this 20th day of October, 2017

