



IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No.17 of 2019

BETWEEN

Republic

v

Rocky Thoma

Before: Rapi Vaai, J

APPEARANCES:

Counsel for the Prosecution: F.Lacanivalu

Counsel for the Accused: F.Akubor

Date of Hearing: 17th March 2020

Date of Submissions: 02nd April 2020

Date of Ruling: 8th May 2020

Case may be cited as: Republic v Rocky Thoma

RULING

Introduction

1. The accused is charged upon indictments alleging rape and indecent assault. He denied the allegations.

COUNT 1

Indecent assault contrary to Section 350 Criminal Code 1899

Particulars of Offence

Between the 1st January 2012 and the 31st December 2012 the accused indecently assaulted a girl VJT.

COUNT 2

Rape of a girl contrary to Section 347 and 348 of the Criminal Code 1899

Particulars of Offence

The accused sometime between the 1st January 2016 and the 12th May 2016 had carnal knowledge of a girl VJT without her consent.

COUNT 3

Rape of child under 16 years old contrary to section 116 (1)(a)(b) (ii) Crimes Act 2016.

Particulars of offence

The accused between 12th May 2016 and 31st December 2016 engaged in sexual intercourse with VJT a child under 16 years old.

COUNT 4

Rape of a child under 16years contrary to section 116 (1) (a) (b) (ii) Crimes Act 2016

Particulars of offence (as amended)

The accused sometime between 1st January 2017 and 6th September 2017 intentionally engaged in sexual intercourse with VJT a child under 16 years old.

Prosecution Case as to Count 1

2. In the year 2012 the complainant and her family (parents and a brother) were living in one of the rooms in Mr Cecil's house at Aiwo district. It is at Mr Cecil's home that the indecent assault allegation arose. Her family is not related to Mr Cecil.

3. The complainant told the court that sometime between the 1st January 2012 and 31st December 2012 in the evening around 6 to 7pm she went into one of the rooms and the accused, her grandfather was lying on one of the beds, he was awake, she ran over and lay down beside him. It was there that the accused put his hands on her stomach, moved it down beneath her pants and underwear, and he then fingered her vagina. Someone then came into the room and the accused removed his hand. She then got up and ran outside.
4. The accused lived in his own house close by and sometimes visit Mr Cecil's home.
5. When questioned why she did not report the incident she said she was afraid to tell anyone or her family. She was asked;

(Question) Why did you not scream out or call for help?

(Answer) It's because I know it's wrong and afraid to say or to do anything.

Prosecution case as to counts 2 and 3

6. Sometimes after the first incident, the complainant's family moved to live with the accused in the accused's two storey house. They lived upstairs whilst the accused and others lived downstairs.
7. The complainant told the court that in 2016 just after they moved to live at the accused's house, it was one evening about 9 or 10pm, she visited her cousins on the ground floor and she fell asleep in the grandparent's room. She was sleeping facing downwards when she felt someone licking her vagina. She woke up, her pants were down to her ankles, the lights were off, and she turned her head from her face down position and recognised the accused.
8. When questioned if the accused did anything else she said; "and also my backside, he was doing oral sex from my vagina to my backside."

9. Since it was dark, she was asked how she knew it was the accused. She said; “because that’s the only person who does those kinds of things to me and I also saw his face. She was then asked;

(Question) By what light that you were able to see him?

(Answer) The lights were off; it was out when he was doing that to me, I know it was him. I said I have to go to the toilet, that’s when he stops. I stood up pulled up my pants and ran to our place upstairs.”

10. Under cross examination she conceded that in her written statement to the police she said when she woke and turned to see the person she saw a shape. She told the court it was the shape of the accused that she saw.

Prosecution case as to Count 4

11. Count 4 arose from an incident which the complainant said occurred in the room upstairs where she was living with her family. It happened after the incident downstairs. It was in the evening. She was either 12 or 15 at the time.
12. She was in the room asleep in the evening, with the lights on, fully clothed when her pants and underwear were pulled down and the accused was doing oral sex from her vagina to her backside when she woke up. She got up, put on her clothes and said to the accused; “stop doing that, are you crazy doing that, are you out of your mind.”
13. The accused did not respond, he got up and went outside.

Counts 2 and 3

14. It became obvious during the course of the trial that the accused was charged twice for the same offence alleged in Counts 2 and 3. When confirmation was sought from the prosecution, counsel conceded, but he contended that the two information should be considered alongside each other. When asked to explain counsel, submitted that although the accused cannot be convicted twice for the same offence, the accused however was charged under two separate legislations, namely the Criminal Code 1899 and the Crimes

Act 2016. Count 2 was laid under the Criminal Code and Count 3 under the Crimes Act 2016.

15. The Crimes Act 2016 came into force on the 12th May 2016; so that Count 3 was laid to cover the period after 12th May 2016 and Count 2 was intended to cover the period before the 12th May.

16. Obviously the prosecution was suggesting that if the evidence proves that the offences alleged in Counts 2 and 3 was in fact committed, and was committed after the 12th May 2016 then Count 2 should be disregarded and dismissed. Similarly if the offence was proven to be committed before the 12th May then the Count 3 be likewise dismissed.

17. But the prosecution knew very well that the time period in 2016 the offence was allegedly committed cannot be ascertained with accuracy from the evidence. It was for that very reason that the two informations covered all of 2016, namely between the 1st January 2016 to 31st December 2016.

18. The complainant told the court the offending was in 2016, but that was through the leading question of counsel. After dealing with the events which supported Count one, the complainant was then questioned about the allegations in Counts 2 and 3. The year and the time was given to her by counsel. She was asked:

(Question): I want to take you back, I like you to recall in 2016, just after you moved to the house you are in now between 1st January 2016 and 31st December 2016, would like to take you back one evening, this is about 9 or 10 o'clock at night, do you recall that evening?

(Answer): Yes I remember.

Prior to asking the above question there was nothing in the complainant's evidence to suggest that the offending in the second or third count was in 2016.

19. When the complainant was questioned about the events which supported the fourth Count, the complainant told the court she was 15 or 12 at the time, which would place the allege offending in Count 4 in 2014 to 2016.

20. Vanessa Appi the 25 year old friend of the complainant to whom the complainant allegedly spoke to about the alleged offending in Count 4, told the court she could not remember the exact year she spoke with the complainant but she thinks she was 20 years at the time. Vanessa was born 13th January 1995 so that would place the alleged offending in the fourth Count in 2015.

21. It follows that the evidence significantly points to the alleged offending in Counts 2 and 3 to be well before the 12th May 2016. As the prosecution has left it open for the court to decide the evidence suggests that the alleged offending was before the 12th May 2016 if not before January 2016.

22. Count 3 is accordingly dismissed.

Recent complaint evidence

23. Fifi Tsitsi a 20 year old female friend of the complainant told the court that she lived in Aiwo close to the accused's house before she moved to where she now resides. She recalled she and the complainant talked at her house (Fifi's house). The complainant told her more than three times that the accused touched her breast and vaginal area. They both swore not to tell anyone.

24. Vanessa Appi, 25 years of age and is the aunt of the complainant. The accused is Vanessa's uncle. She talked to the complainant once about the accused; she was about 20 years of age. The complainant would be 13 or 14 then. The complainant said to her that she was asleep in the room upstairs where her family are currently staying. Her parents were at work and her brother was at school. The accused pulled down her pants and licked her vagina; she stood up, pulled her pants and ran away. Vanessa did not tell anyone on request from the complainant.

25. Fifi Tsitsi's testimony was obviously in relation to the allegation in Count one, and Vanessa Appi's testimony was concerned with the allegations in Count four.

Submissions by the Prosecution

26. Concerning the issue of identification it was contended that the complainant satisfactorily identified the accused, her grandfather, whom she has known all her life, to be the perpetrator of the criminal acts alleged in the three incidents. Nothing impeded the complainant from positively identifying the accused.
27. In respect of count one, all the elements of indecent assault have been proven namely the intentional touching of the body of the complainant, the touching was indecent and the accused knew the touching was indecent according to the values of Nauruan people.
28. In respect of counts 2 and 3, the prosecution contended that pursuant to the definition of rape under the Crimes Act 2016 all the required elements have been proven through oral sex by the accused upon the complainant. The complainant was under sixteen and consent was accordingly not an issue.
29. On the issue of inconsistencies, counsel addressed the inconsistency of the testimony of the complainant in relation to allegations in Count 4. The complainant told the court that the sexual offending occurred at night. Vanessa Appi, whom the complainant talked to about the offending said, the offending took place while her parents were at work and her brother was at school, which logically indicated that the offending was during the daytime.
30. There was also inconsistency of the written statement given by the complainant to the police and her testimony. In relation to count one the complainant testified that the sexual offending occurred in an open room. In her written statement to the police she said it happened in the room where her family were living. With reference to this inconsistency, counsel submitted that following a procedure outlined by the High Court of Fiji in *State v Ameo Ramokosi and ors*¹ the statement should have been exhibited as a previous inconsistent statement after the alleged inconsistency was identified and read to or by the witness who should also respond to the inconsistency.

Submissions by Defence.

¹ (2003) FJHC 179 (4/9/2003)

31. Counsel submitted that the evidence adduced to identify the accused as the offender was insufficient and unsafe. In respect of count one, the offence was alleged to have occurred in one of the rooms in the house in the evening and the only light that was turned on at that time was outside. In the circumstances it could not have been the accused if there was sexual offending.
32. In respect of counts 2 and 3 the room was dark. The complainant description was she saw the shape of a person; the accused was the only person who would do it to her. She was also facing downwards when she identified the accused standing behind her.
33. In respect of counts 2 and 3 the defence appears to proceed on the basis that the information laid under the Crimes Act 2016 should be discarded, so that the proper count for the accused to answer is the one laid under the Criminal code 1899. That being the case the information should be dismissed as there is no evidence of sexual intercourse.
34. A great part of the submissions attempted to treat the complainant's testimony as unreliable, illogical, irrational, and lacks credibility. Taking count one for instant, it was irrational and illogical for the accused who is not related to Mr Cecil to walk over to Mr Cecil's home, enter a bedroom and slept on a bed as if it was his own house.
35. As a result of the unsatisfactory nature of the evidence, counsel invites the court that there is reasonable doubt, as the prosecution has failed to prove the elements to the required standard.

Recent Complaint - Relevance

36. The relevance and effect of the evidence of Vanessa Appi and Fifi Tsitsi, to whom the complainant allegedly complained, seems to be misunderstood. Prosecution counsel in his written submissions said at paragraph 23;
- “Vicki was adamant in her evidence. She was confident and did not waiver in cross examination. She maintained that the defendant did all these vulgar and lewd actions against her on many different occasions. Both Vanessa and Fifi supported her evidence in terms of sexual abuse that she was going through with her grandfather.”

37. The fact that the complainant told Vanessa and Fifi of what she says happened does not or itself proves that it did in fact occur. Obviously if the complainant was wrong about it then she is still wrong about it now. The only relevance of such evidence is that it may show that there is a consistency between what she said and did soon after the incident and what she now says about it. It may be of assistance in assessing her credibility, that is, whether to believe her or not. How much weight should be given to it is a matter for the judge or jury (in jury trials) to decide.

Identification

38. Both counsels have dealt comprehensively with the issue of identification. Experience has shown, as acknowledge in a number of authorities that it is quite possible for a perfectly honest witness to be mistaken about identification. An honest witness convinced of the accuracy of what she says may come across as a convincing witness, but may still be mistaken. It must be borne in mind that sometimes we all make mistakes in thinking we recognise people even those we know very well. That is not to say identification evidence cannot be relied upon. Indeed a judge, or jury, as the case may be, may rely on it. But care must be taken whether the evidence is good enough to be relied upon.

39. It is common sense that consideration must be given to the circumstances under which the witness saw the accused at the time for instance, how long the witness observed the accused, at what distance, what was the lighting like, did anything impede the observation, was there anything about the situation that would cause the witness to take particular note of the accuse, and many others.

Inconsistent Statements

40. The complainant under cross examination was asked about the inconsistency of her testimony with her written statement to police. She told the police in her statement that the first offending happened in the family room where she was living with her family. In her testimony the offending took place in another room. She told the court her testimony is the correct version of where the offending took place.

41. Counsel for the prosecution submitted that the correct procedure for challenging inconsistent statements is that after the inconsistency is identified and the witness has

responded to the inconsistency then the written statement should be produced as is the practice in the Fiji High Court. I disagree. The written statement need not be produced if only one sentence in the statement is disputed. It is sufficient for the record if the witness accepts the inconsistency and responds to the inconsistency.

Delay

42. The explanation was given by the complainant for the delay in laying a complaint. The law recognises that there are good reason, often deeply buried and personal why people do not complain about such things as sexual violations for long periods.
43. The law also recognises that the delay has prejudiced the defence by denying the accused the opportunity to a contemporaneous medical examination of the complainant which may reveal evidence to exculpate him, as well as depriving the accused of defences such as alibi.

Recent complaint

44. The relevance of the complainant's complaint to her two friends is to assist in assessing her credibility. It is of vital importance in this trial to determine whether to believe the evidence of the complainant about the events which allegedly took place several years back, of which she complained to her friends about 5 years ago. If the accused is to be convicted, it would be on the evidence of the complainant alone since there was no eye witness and medical or forensic evidence was inevitably not available. The court in the circumstances should bear in mind the remarks of Lee J in *R v Murray*²:

"In all cases of serious crime it is customary for a judge to stress that where there is only one witness asserting the commission of a crime, the evidence of that witness must be scrutinized with great care, before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness evidence is unreliable."

45. Although the law as to corroboration was abolished by Section 101 Crimes Act 2016, the High Court of Australia nonetheless ruled that despite similar provisions in the Queensland legislation the judge should not be prevented from making a comment on the

² (1987) NSWLR 12

evidence that is appropriate to make in the interest of justice. In *Tully v R*³ and *Robinson v The Queen*⁴ the High Court emphasised that there are cases where there is perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinize the evidence of a complainant with great care before arriving at a conclusion of guilt. That is not because complainants in sexual crimes as a class are to be treated as intrinsically untrustworthy. In fact the relevant provision of our Crimes Act 2016 preclude such reasoning.

Discussion of Count 1

46. The alleged sexual assault was the first she experienced during her lifetime and one would expect her to recall with accuracy where and when it happened. She told the police the incident happened in the family room where she was living with her parents but in her testimony it happened in another room. According to her testimony the accused who is not related to the owner of the house, walked inside the house and helped himself to a bed inside one of the bedrooms as it was getting dark. As she walked into the room she recognised the accused on the bed and ran to him. Someone else came into the room as the accused was allegedly indecently touching her whereupon she got up and ran out. By logic and good sense that other person should have seen the accused and the complainant. Similarly if the complainant ran out she should know who came into the room.

47. The evidence creates a great deal of doubt. For some reason the prosecution did not call that other person. That evidence could have confirmed or at least remove the doubt that the accused, a non-member of the household, was in fact inside the room.

48. The doubt must be exercised in favour of the accused and the allegation of indecent assault in count 1 is dismissed.

Discussion of Count 2

49. It is alleged that contrary to Section 347 and 348 of the Criminal Code 1899 the accused sometime between the 1st January 2016 and 12th May 2016 had carnal knowledge with the complainant.

³ (2007) 231 ALR 712

⁴ (1999) 197 CLR 162

50. Pursuant to Section 6 of the Criminal Code, carnal knowledge is completed upon penetration.

51. The alleged offence was alleged to be committed in a dark room at night while the complainant was asleep facing downwards on the bed. She woke up when someone pulled her shorts and panties down to her ankle and proceeded to lick her vagina. She turned her head over her shoulder and recognised the accused behind her. She was questioned during examination in chief;

Question: what did you see when you turned around?

Answer: I saw Rocky himself doing what he was doing to me

Question: How do you know it was him?

Answer: because that the only person who does those kinds of things to me, and I also saw his face.

52. The evidence in chief obviously does not support the charge of rape because there is clearly no evidence of penetration. The allegation of rape in count 2 is accordingly dismissed.

53. Section 135 Criminal Procedure Act 1972 empowers the court to convict the accused of a lesser offence of indecent assault pursuant to section 350 Criminal Code. The complainant's testimony as to identification of the accused inside the dark room was illogical and unsatisfactory. Her testimony that her vagina was licked while she was facing downwards with her pants and panties around her ankles was a lot more doubtful, illogical and irrational and would logically lead to a conclusion of not guilty of a lesser charge of indecent assault.

54. But the considerable doubt which the court held at the time was removed by the cross examination. A classic example of cross examination gone overboard. From her face down position she was questioned whether she was turned over onto her back. She was asked;

Question: While pretending to be asleep this person turned you over on your back?

Answer: Yes

Question: And this person was able to do that even though your panties are still intact around your ankles?

Answer: Yes, can.

Question: Are you sure?

Answer: Yes.

Question: So while still pretending to sleep, this person started to lick your vagina, isn't that right?

Answer: Yes

Question: And you felt humiliated by it?

Answer: Afraid of the same time, scared, afraid

Question: You hated the feeling?

Answer: Yes

Question: You were so horrified you did not even want to look at the person in face?

Answer: No, I did want to look at his face while he's doing that to me.

55. The cross examination not only confirmed the identification of the accused as the offender it also established that the complainant was indecently assaulted after she was turned over.

56. Pursuant to Section 135 Criminal Procedure Act 1972 I find the accused guilty of the crime of indecent assault.

Discussion of Count 4

57. The complainant testified the incident alleged in the fourth count happened in the family room in the evening. This was the incident she told her friend Vanissa Appi. But Vanissa Appi testified that the complainant said to her the sexual offending by the accused happened when the complainant's parents were at work and her brother at school. This so called complaint to Vanissa was made some five years ago. As noted above the relevance of Vanissa's evidence, which I accept is to assist in the assessing the credibility of the complainant. The inconsistency in her testimony and what she told Vanissa Appi cannot be classified as insignificant given the inconsistency noted in the first count, the seriousness of the allegation, her reasons for the delayed complaint as well as her demeanour.

58. The benefit of the doubt arising from the evidence must favour the accused.

Result

- (i) Indecent assault alleged in Count 1 is dismissed.
- (ii) Rape charge alleged in Count 2 is dismissed but the accused is convicted of a lesser charge of indecent assault.
- (iii) Offence of rape alleged in Count 3 is dismissed.
- (iv) Rape allegation in Count 4 is dismissed.
- (v) The accused is released on the same bail conditions to the 20th May 2020 at 12 noon for probation report and sentence on the indecent assault charge.

Judge Rapi Vaai