



**IN THE SUPREME COURT OF NAURU
AT YAREN
[CRIMINAL JURISDICTION]**

Criminal Case No. 1 of 2023

BETWEEN: THE REPUBLIC

PROSECUTION

AND: TOM TOM BILL

ACCUSED

BEFORE: Keteca J

Date of Submissions: 13th September 2024

Date of Judgment: 24th September 2024

Case may be cited as: Republic v Tom Tom Bill

Catchwords: Rape of Child under 16 years old: contrary to Section 116(1)(a)(b) of the Crimes Act 2016, admission of Count 2

Appearances:

Counsel for the Prosecution: **M. Suifa'asia**

Counsel for the Accused: **R. Tom**

JUDGMENT

A. BACKGROUND

1. The accused is charged with two counts of 'Rape of child under 16 years.' It is alleged that he committed one act on BT (first complainant) and LD (the second complainant).

B. THE CHARGE

2. The Information reads;

Count 1

Statement of Offence

RAPE OF CHILD UNDER 16: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.

Particulars of the offence

Tom Tom Bill between the 1st October 2022 and 31st October 2022 at Meneng District in Nauru, intentionally engaged in sexual intercourse with BT and BT is a child under 16 years old.

Count 2

Statement of Offence

RAPE O CHILD UNDER 16: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.

Statement of offence

Tom Tom Bill between the 1st October 2022 and 31st October 2022 at Meneng District in Nauru, intentionally engaged in sexual intercourse with LD and LD is a child under 16 years old.

3. The prosecution called 6 witnesses:
- i. PW1- Barbara Akubor;
 - ii. PW2 Police Senior Constable Dogeiy Alefaio Ramanumnu;
 - iii. PW3 LD (Second complainant)
 - iv. PW4 Mordecai Agege
 - v. PW5 Max Togo Kamatura
 - vi. PW6 BT (First Complainant)

C. THE LAW

4. Rape of a Child Under 16 years Old: Section 116(1)(a)(b) and (i) of the Crimes Act 2016 provides: _
- (1) A person commits an offence, if:
- (a) The person intentionally engages in sexual intercourse with another person; and
 - (b) The other person is a child under 16 years old.
5. Section 8 of the Crimes Act 2016 defines

‘Oral Sex’ – means:

The bringing into contact of any part of the genitals or anus of a person with any other part of the mouth including the lips or tongue) of another person.

‘Sexual intercourse’ means:

- (a)...
- (b)...
- (c)..
- (d)..
- (e) Oral sex
- (f) the continuation of an activity covered by paragraphs (a) to (e).

Section 17 of the crimes Act 2016 defines:

‘Intention’ means

- (1) A person has ‘intention’ with respect to conduct, if the person means to engage in the conduct.
- (2) A person has ‘intention’ with respect to a circumstance, if the person believes that it exists or will exist.
- (3) A person has ‘intention’ with respect to a result, if the person means to bring it about or is aware that it will occur in the ordinary course of events.

D. THE EVIDENCE

6. Count 1- Rape of Child under 16 years- : Complainant Number 1- PW6BT
7. **A person-** PW6BT identified the accused in court through dock identification. PW1- Barbara Akubor is a child protection officer. She viewed a video on 22 Nov 22 with a colleague Justin. **This Justin recognised the accused, Tom Tom Bill in the video.** The accused was performing oral sex on a child. She reported and gave the video to police officer Dogeiy Alefaio Ramanumnu of the police cyber unit. PW2 Police Officer Ramanumanu showed the video to RD who identified his son PW3LD as the boy on the video.
8. **Intentionally-** the accused picked PW3LD and PW6BT up in his vehicle. He told them to sit in front with him. The accused asked to suck their penises. He did.
9. **Engages in sexual intercourse-** PW3LD and PW6BT both testified that the accused performed oral sex on them. In his testimony, PW6BT said –“he put his mouth on our genitals- eating us.’ Whilst being cross examined, PW6BT was asked:
 - i. Ques- Did you say No to the oral sex?
 - ii. Ans- I did but he did not want to stop
 - iii. Ques- Aroused?
 - iv. Ans- Yes
10. **The other person is a child under 16 years old.-** PW6 BT testified that he was born on 26 Feb 2009. He is 15 years old. He was 12 years old in October 2022.
11. **Count 2-** Complainant Number 2 – PW3LD
12. **A person-** PW6BT identified the accused in court through dock identification. PW3LD testified that the accused picked him and PW6BT on the day in question. He also testified that the accused performed oral sex on both of them.
13. **Intentionally-** Both PW3LD and PW6BT testified that the accused picked them in his vehicle. They went for a joy ride. He told them to join him in the front cabin of the vehicle. PW3LD testified that that the accused asked to suck their penises.
14. In examination in chief PW3LD said- “the accused had oral sex with us.” When asked to explain, he said-“ He put his mouth on my genital and performed oral sex on me.’ **In cross examination PW3LD was asked:**

- i. Ques- When he asked to do oral sex on you, did he force you?
- ii. Ans- No- I willingly gave it to him.
- iii. Ques- You enjoyed it?
- iv. Ans- Yes
- v. Ques- You didn't tell him to stop?
- vi. Ans- I did.
- vii. Ques- Why did you ask him to stop?
- viii. Ans- Already enough for me

15. **Engages in sexual intercourse-** in addition to [13] above, PW3LD was cross-examined further:

- i. Ques- You asked him to stop you finished enjoying yourself?
- ii. Ans- Yes, I wanted him to stop. I consented for him doing this to me.

16. In examination in chief, counsel for the accused asked his client:

- i. Ques-You performed oral sex on him-PW3LD?
- ii. Ans- Yes
- iii. (At this juncture of the questioning, the court reminded counsel for the accused as to where he was leading his client!!)

17. **The other person is a child under 16 years old-** PW3LD testified that he was born on 04th June 2009. He is 15 years old now.

18. On 06th September 24, I ruled that there was a case to answer. The accused opted to give sworn evidence.

E. THE ACCUSED'S EVIDENCE

19. He is 27 years old. He picked up PW3LD and PW6 BT on a day in October 22. PW3LD asked to use his phone. Both PW3LD and PW6BT watched porn on his phone. He asked the boys to switch it off. At about 5am, at Bati Beach, PW3LD asked him to perform oral sex on him. Mr Tom confirmed this in the examination in chief of **his client** as follows:

- i. Ques- You performed oral sex on him?
- ii. Ans- Yes.
- iii. Ques-Did the boys stop you from doing oral sex?
- iv. Ans- LD, wanted it, he enjoyed it. I stopped myself.

PW6BT took a video of this episode. The accused later watched the video whilst abroad. He did not circulate the video. He was embarrassed and angry. He reported it to the police.

20. Under cross examination, the accused thought that the complainants were attending Nauru Secondary School. He did not know how old they were. He was also asked:

- i. Ques-You didn't say No when asked to do oral sex?
- ii. Ans- I did say No
- iii. Ques- You still did the oral sex?
- iv. Ans- Yes because he wanted it
- v. Ques- Oral sex too with BT?
- vi. Ans- Only LD, BT showed me his penis- I said No.
- vii. Ques- Video footage of you and LD?
- viii. Ans- Yes

F. DISCUSSION

21. From the evidence, the accused admits performing oral sex on PW3LD. He admits that PW3LD wanted it. He went further to say that PW3LD- 'enjoyed it.' He testified that PW6BT took a video of him performing oral sex on PW3LD. He confirmed having watched the video. He stated in his evidence that in the video, it was him that was performing oral sex on PW3LD. **In this regard Count 2 is settled.**
22. For Count 1- the accused denied performing oral sex on PW6BT. Even when pressed by the prosecutor that PW6BT was a victim of his 'Bati Beach performance that day- he was adamant and steadfast that he did not do so. He testified that PW6BT did show him his penis but the accused did not oblige to PW6BT's urges.
23. Both PW6BT and PW3LD testified that the accused performed oral sex on them. **Who is the court to believe?**
24. At common law, the credibility of a witness generally depends on the following factors:
 - i. Knowledge of the facts on which the witness gives evidence;
 - ii. Impartiality;
 - iii. Integrity; and
 - iv. Truthfulness.

In this case, the factor of truthfulness applies here. Should I believe PW3LD and PW6VD or the accused?

25. In *THE STATE OF WESTERN AUSTRALIA -v- COATES [2007] WASC 307*, BLAXELL J at [54] said this-
'The determination of a witness' credibility on the basis of demeanour does not require the exercise of any legal skill, and is not something which can be the subject of reasoned analysis. It is largely a semi-intuitive process, and most ordinary members of the community have the life experiences which equip them to make such an assessment.'

At [57], he said:

*'Obviously, the assessment of each witness' credibility will be a matter of critical importance in arriving at my findings of fact. It may be that I accept the whole of a witness' evidence or that I reject it all. It may also be that I accept part of what a witness has had to say but reject the rest. The fundamental question in relation to each witness, and in relation to each matter the subject of his or her testimony, is **whether or not I believe the evidence**. The answer to this question will turn on my evaluation of a number of factors, including the truthfulness of the witness, the reliability of the observations made by him or her at the material time, and the accuracy of his or her recollections'*

At [58] Justice Blaxell said:

'Matters to be taken into account in this evaluation include the witness' general demeanour whilst testifying, the consistency of the evidence (both within itself and with other evidence in the trial), personal characteristics such as powers of expression and apparent levels of intellect, the possible impact of alcohol or drugs, and the emotional state of the witness at the material time. In the end, I should carefully assess all relevant matters and decide whether or not I can accept the witness' evidence on a particular issue as being truthful and correct.'

26. Considering the observations of Blaxell J above, I will then apply them to the present case. I must guard against the fact that the accused has admitted Count 2. I must consider the totality of the evidence adduced and to conclude as whose version I believe.
27. In assessing the credibility of the complainants, I note that PW6VD had to be brought to court on a bench warrant to give evidence. According to PW3LD, it was PW6VD that asked for the accused to show them porn. He was evasive at times. He did not explain why he took the video of the accused and PW3LD. His version of the events, that the accused performed oral sex on both of them are supported by PW3LD.
28. The accused came across as a straightforward witness though he appeared disoriented at times. He admitted committing the offence against PW3LD. He admitted that PW6VD showed him his penis but denied doing anything to him.
29. Having considered all the above, I am persuaded to believe PW3LD and PW6VD.

G. CONCLUSION

30. I remind myself of the burden of proof being on the prosecution under Section 25 of the Crimes Act 2016 and make the following findings:
- i. Count 1- Guilty
 - ii. Count 2- Guilty.

DATED this 24th day of September 2024.


Kiniviliame T. Keteca

Judge.

