



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

Criminal Case No. 17 of 2020

BETWEEN: THE REPUBLIC **PROSECUTION**

MYSON TANNANG **ACCUSED**

BEFORE: Keteca J

Date of Hearing: 19th- 27th October 2021

Date of Judgment: 29th January 2025

Catchwords: Indecent Acts: Contrary to Section 106(1)(a)(b)(c) (ii) of the Crimes Act 2016.

Appearances:

Counsel for the Prosecution: **S. Shah**
Counsel for the Accused: **E. Soriano**

JUDGMENT

BACKGROUND

1. This matter was heard by my brother Judge, Chief Justice Fatiaki in 2021. The Covid -19 epidemic intervened. Counsels agreed that I rely on the trial transcripts and judge accordingly.

THE CHARGE

2. The Information reads:

Statement of Offence

Indecent Acts: Contrary to Section 106(1) (a)(b)(c) (ii) of the Crimes Act 2016.

Particulars of Offence

MYSON TANNANG on the 16th of August 2020 at Denig District in Location, Nauru, intentionally touched ZIVANIA BATSIUA on her breast and the touching was indecent and that MYSON TANNANG is reckless about that fact and that ZIVANIA BATSIUA did not consent to the touching and MYSON TANNANG is recklessly indifferent to consent of ZIVANIA BATSIUA.

C. THE LAW

3. Indecent Acts

(1) A person (the defendant) commits an offence if:

- (a) the defendant intentionally touches another person;
- (b) the touching is indecent and the defendant is reckless about that fact;
- (c) the other person does not consent to the touching and the defendant:
 - (i) knows that fact; or
 - (ii) is recklessly indifferent to consent of the other person.

D. THE EVIDENCE

4. PW4- Zivania Batsiua- is 18years old. On 16th August 2020, at around midnight, she was drinking alcohol with some friends at Ella Park. They, Ta-lita Notte, My-Talina Notte and Japir Halstead- then went to Osintai's house, in Denig at about 6am- 7am. (Osintai is Myson Tannang, the accused.) They went into the accused's room. She sat on the bed with Ta-lita. The accused sat on a chair. The others were drinking except her. Ta-lita and My- talina went downstairs at about 11-12 noon. She remained upstairs with Japir and the accused who were drinking. She lay at a corner of the bed. Japir left to get some food. She was alone with the accused. The accused locked the door. She was still on the bed. The accused touched her breast. She tried to push his hands away. He kept on trying to touch her body. He got on top of her. He asked that they have sex. She said no. They struggled for about 15 minutes. She was scared. She told him to stop. His hands were inside her clothes. She kicked him in the stomach. She got loose. The accused asked for forgiveness and for her not to tell anyone about the incident. She said that she had to go. She opened the door and walked out. The accused followed her asking for forgiveness. She went downstairs where Ta-lita opened the door and let her in. She was still confused and scared. Shaky. She told Talita what happened to her upstairs. Talita told her to call the police. She did not consent to the accused touching her breast.

5. Cross- Examination. She was kissing Japir when the accused walked in on them. Japir is not her boyfriend. When Japir left to buy food, the accused asked her whether she was going to join her friends downstairs. She said that she couldn't go downstairs as she had 'family' there. After Japir left, the accused came and sat on the opposite end of the bed. The accused asked if he could kiss her. She denied saying – 'The other boy didn't need to ask permission.' The accused attempted to kiss her. She turned away.

Counsel referred to her statement to the police. She agreed that in making that statement, she was clear of what happened and was not confused. She was referred to para 7 of her statement where she called her cousin Denagaro. What she said in her statement was true. It was recorded on the same day of the incident. She did not make up the story. She didn't tell her cousin Denagaro about what the accused did to her. The accused did touch her. She was 13 years old when she started drinking alcohol. It's common in Nauru when people drink in groups, there's always a lot of kissing. Japir asked for her permission before they kissed.

6. She can't recall who she called on that day. Later said- it was Talitha. The accused saw her kissing Japir.

Questions from the Court- she did not object to the accused sitting closer to her on the bed. She did not object to Japir kissing her. She had not kissed Japir before that day. Japir is not her boyfriend.

7. PW1-My-Talina- 18years old. On 16th August 2020- early morning- she was at the accused's place with the complainant, Talita and Japir. They were drinking Vodka. Before that they were drinking at Ella park. They drank in the accused's room from 8am. Zivania, the complainant, was drinking alcohol. She and Talitha sat on the bed. She and Talitha later went downstairs and joined many people drinking there. Zivania later came down to Talita- she was crying. A Denagaro asked Zivania why she was crying. Zivania told him that- accused 'kabadae'. (several meaning- disturb, indecency)

8. Cross- Examination- She did not hear Zivania say that the accused tried to rape her.

9. PW2- Ta-lita Notte-20 years old. They drank vodka at the accused's room. She then went downstairs with PW1 to drink with others. Zivania later came down- she was shaking and crying. Zivania-PW4 said 'that guy tried to rape me and cover my nose, cover my mouth.' PW4 was referring to the accused as 'that guy.'

10. Cross -Examination- PW4 was just crying and not drinking alcohol whilst downstairs. Denagaro went upstairs and wrecked the accused's house. She did not call the police as she didn't want to be part of it.

11. PW3- Japir Halstead-28 years old. Works as a PPS- police protection service. He identified the accused. He called the accused for his group (three girls including PW4) to go and drink alcohol at his place. He's known PW4 for 4 years as an online gaming partner. They were drinking alcohol in the room. PW4 sat on his lap and they kissed for a few seconds. When the other two girls went downstairs, he and PW4 started kissing again. When he left. PW4 and the accused were in the room.

12. Cross Examination. At 8am, Sunday, 16th August 2020, he waited at Capelle Mini Mart for PW4 and her friends. He kissed PW4 when they were alone in the accused's room. He then went downstairs, got on his bike and left. His bike does not need a key. He did not return to the accused's place on that day.

13. PW5 Constable Conway Detabane- 4 years with the traffic unit and patrol frontline of NPF. On 18th Aug 2020, he was instructed to go and look for the accused. On instructions, he escorted the accused to the station.

14. Cross- Examination- No arrest warrant. Didn't know what the allegation against the accused was. Just told to go and bring the accused. He told the accused- "I'm going to arrest you.' Accused said he knew the allegation against him.

15. PW6 Sgt Lady-Jane Hilo-9 years in the force. She took PW4's statement. She drew a sketch of the accused's room.

EVIDENCE OF THE ACCUSED

16. The accused opted to give sworn evidence. He is 35 years old. He is also called ' Osintai.' Japir called on the morning of 16th August 20 and asked to drink at his place. He came with 3 girls. It was after 7am. They drank alcohol. He conversed with all of them as they drank. Two girls left the room and he was left with PW4 and Japir. He saw Japir and PW4 kissing. Japir left. He was alone with PW4. He closed the main door. He asked PW4 to move closer to him. She didn't. PW4 did not join the drinking downstairs as she had a cousin there. He asked PW4- **'Can I hold you and kiss you?'**

PW4 said- 'your friend didn't ask permission, he just came and held me.' The transcripts record-

'I just slowly came to her. I thought what she wanted so I went closer to her face as she was sitting next to me. She turned the other way and stood up. I didn't have to hold her as she lay beside me, my hands were on either side of her body and when I lowered my head to her, she turned her head and I knew she refused me. Then she stood up.

She said, she had to go. He said sorry. Her last words- 'I have to go.' He went to Meneng. His brother called him that someone had damaged his home and killed his dog. The police took him from his work place 2 days later.

17. Cross- Examination. When alone with PW4, he closed the main door to his unit. He thought PW4 wanted him. He asked permission to hold and kiss PW4. She turned her face away from him. He did not touch her breast. He did not apologise to her. He said- 'sorry, is something wrong- because 'she refused me and I don't know why.' He later left for Meneng and he was drinking alcohol with a lady there.

Q- When your brother called, you knew it was the girl, how did you know it was Zivania?

Ans- Because I blame the girl, I can feel it

Q- You knew it will be Zivania because you did all those things to her?

Ans- Yes, I knew it was Zivania but I did nothing to her

Q- Are you telling the truth in court today?

Ans- I know the truth, she knows the truth and no-one else knows the truth

Court

Q- Can you explain why your truth and Zivania's truth are so different?

Ans- She said I struggled with her for 15 minutes which is too long. How could she survive the 15 minutes and kicked me and get away?

Q- **Struggle was shorter?**

Ans- **It lasted 1 or 2 minutes. I am much stronger than her, she would not last 15 minutes and escape.** I asked permission and if she doesn't agree then she can leave, she's not mine to control

Q- Do you consider kissing an indecent act?

Ans- It's wrong if you don't get permission

Q- Did you have permission from Zivania?

Ans- No, I didn't get permission, she said no.

Re- Examination

Q- **Was there a struggle between you and Zivania?**

Ans- **There was struggle there.**

CLOSING SUBMISSIONS

18. Prosecution- Identification is not an issue. On absence of consent, the evidence comes from PW4. The accused denies touching PW4. PW4 says that the accused tried to kiss her. The accused admits there was a struggle between him and PW4. It was not for 15 minutes but 1 or 2.

19. The Defence- The burden of proof rests with the prosecution. The standard of proof is beyond reasonable doubt. The elements are- whether the accused intentionally touched PW4, whether the touching was indecent, whether PW4 did not consent to the touching and whether the accused was reckless as to PW4's consent. **(The Court observed that the accused had already admitted that kissing someone without her consent was indecent).** The accused denies intentionally touching PW4.

Court- Why should I believe your client?

Ans- His demeanour- when asked what is the truth, he was firm – I know the truth, she knows the truth..

‘The defence case is that the accusation was out of fear of the cousin brother who was drinking downstairs.’

Court- Mr Shah- why should I believe the complainant?

Ans- She maintains about the indecent act that occurred, she goes further to another indecent act- about kissing.

Q- Can this court convict on a kissing?

Ans- it can, it came out in evidence though not particularised in the information. The court can consider the second act of kissing. He did admit that it is indecent. PW4 was steadfast, unshaken during cross- examination.

Q- is her evidence corroborated?

Ans- By PW1- she went downstairs and informed her about what transpired upstairs.

Q- recent complaint can corroborate?

Ans- It is not. No one else was present- only the defendant and her

Q- I didn't ask you that- is her evidence corroborated? Her observed physical condition?

Ans- the traumatic encounter with the defendant was shown in her physical demeanour

Q- Mr Soriano, is corroboration required?

Ans- For rape cases, No.

Court- in which case, indecent act must be almost zero.

DISCUSSION

20. There was much discussion between the Court and Counsels on corroboration. Counsels did not submit that under Section 101 Crimes Act 2016- the corroboration rule required for conviction of sexual offences is abolished.

21. Indecent Acts- The elements of the offence are:

- the defendant
- Intentionally touched PW4
- the touching is indecent
- The defendant is reckless about that fact
- PW4 did not consent to the touching
- the defendant knew that PW4 did not consent OR
- the defendant is recklessly indifferent to the consent of PW4.

22. There is no dispute on the identity of the defendant.

23. ***'Intentionally touched the complainant.*** PW4 said- *'The accused touched her breast. She tried to push his hands away. He kept on trying to touch her body. He got on top of her. He asked that they have sex. She said no. They struggled for about 15 minutes. She was scared. She told him to stop. His hands were inside her clothes. She kicked him in the stomach. She got loose.'*

24. The accused denied touching her. He admits moving closer to her. He asked if he could hold and kiss her. He claims that PW4 said that Japir didn't ask for permission. He bent to kiss her. PW4 turned away. **The accused admits that he struggled with PW4.** He said that they struggled for only a minute or 2. The admission by the accused that he attempted to kiss PW4 and that they struggled supports the testimony of PW4 that there was indeed a struggle between the two.

Did the accused 'intentionally' touch PW4's breast? Section 17 of the Crimes Act 2016 defines 'intention' as:

- (1) A person has 'intention' with respect to conduct, if the person means to engage in the conduct.'

The accused knew what he was doing. He knew that PW4 did not welcome his approach. She did not consent to him kissing her or touching her. Yet, the accused had clear intentions not only to kiss PW4. He even suggested that they have sex. The accused touching PW4's breast during their struggle clearly shows that he 'meant to engage in the conduct.'

From the admission by the accused that he struggled and attempted to kiss her, it leads me to believe the testimony of PW4, that in that struggle, the accused did 'intentionally' touch her breast.

25. Was the touching 'indecent? In *R v Harkin (1989) 38 A Crim R 296 (NSW CCA)* Lee J said:

'[I]f there be indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas...'

Lee J added –

'The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury.'

26. Based on the observations of Justice Lee above- The defendant intended to kiss PW4. According to her, he touched her breast. He got on top of her. He asked that they have sex. The touching of PW4's breast has sexual connotation.

27. I find that the touching by the defendant, of PW4's breast during their struggle, **is indecent.**

28. Did PW4 consent for the accused to touch her breast? The evidence clearly shows that she didn't. As in paragraph [23] above- *'The accused touched her breast. She tried to push his hands away. He kept on trying to touch her body. He got on top of her. He asked that they have sex. She said no. They struggled for about 15 minutes. She was scared. She said no. His hands were inside her clothes. She kicked him in the stomach. She got loose.'*

She told him to stop. If she did consent, there wouldn't have been a struggle. If she consented, she wouldn't have kicked his stomach. Clearly, PW4 did not consent to the accused touching her breast.

29. I remind myself of the burden of proof under Section 25 of the Crimes Act 2016. Has the prosecution discharged the burden of proof beyond reasonable doubt? What does 'beyond reasonable doubt' mean?

In *Keeley v Brooking* (1979) 143 CLR 162, Barwick CJ said- *"To be satisfied beyond reasonable doubt is, for the purposes of the law, to be certain."* In the totality of the evidence in this case, all the elements of the offence are satisfied. I am certain that the accused did commit the offence as charged.

CONCLUSION

30. I find the accused guilty as charged.

DATED this 29th day of January 2025.


Kiniviliame Keteca
Acting Chief Justice

