



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

CASE NO 21 of 2017

Between: The Republic

APPELLANT

And: Lahn Debao

RESPONDENT

Before: Judge Rapi Vaai

APPEARANCES:

Appearing for the Appellant: John Rabuku (DPP)

Appearing for the Respondent: Vinci Clodumar(Pleader

Date of Trial: 26th – 27th February 2019

Date of Submissions: 6th March 2019

Date of Ruling: 19th March 2019

Ruling

1. The accused D is charged upon an indictment alleging:

Count 1

Statement of Offence

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

Particular of Offence

Between 01 January 2016 and 31 December 2016 at Yaren District in Nauru, did intentionally engage in sexual intercourse with another person, namely L, a child under 16 years of age.

Count 2

Statement of Offence

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

Particulars of Offence

D, between 01 January 2016 and 31 December 2016 at Yaren District in Nauru, did intentionally engage on sexual intercourse with another person, namely, T a child under 16 years old.

2. At the conclusion of the evidence of the prosecution I held, in response to a No Case To Answer submission by the defence:
 - (a) dismissing the rape allegation in count 1 but there was a case to answer in the alternative charge of indecent assault remains, and
 - (b) there was a case to answer concerning the allegation of rape in count 2..
3. The accused testified and called one witness.

Agreed Facts

4. A memorandum of agreed facts signed by the Prosecution and Defense was tendered.

It states:

1. The accused D is 42 years and is the person present in court for these proceedings
2. The accused is charged on the information before the Court on two counts of Rape of a Child under 16 years contrary to section 116(1)(a)(b)(i) of the Crimes Act 2016.
3. The accused resides at Yaren District, Nauru and runs a construction company.
4. The complainants are L and T, of Nauruan descent and are both known to the accused.
5. L was born on the 16th June 2008.
6. T was born on the 12th November 2009.
7. Both L and T are children below the age of 16 years old.
8. Pursuant to 116(3) of the Crimes Act 2016, absolute liability applies to the offences with which the accused is charged with and therefore the prosecution is not required to prove "lack of consent"

The following statements are agreed between the Prosecution and the Defendant for the purposes of the trial.

- a. Birth Certificate of L
- b. Birth confirmation report of T
- c. Caution Interview of Mr D conducted on 15th November 2017.

The following issues are to be determined in trial:

- a. Whether the accused sometimes in the year 2016, at his home at Yaren District, raped L. In alternative, whether the accused sometimes in the year 2016 at his home in Yaren District, indecently assaulted L.

b. Whether the accused, sometimes in the year 2016, at his home at Yaren District raped T. In the alternative, whether the accused sometimes in the year 2016 at his home at Yaren District, indecently assaulted T.

Dated this 26th day of February, 2019

Undisputed Facts.

5. It is also not disputed that:

(a) The mother of complainant L is a cousin of the wife of the accused. The mother of complainant T is the sister of accused's wife. Both complainants are therefore blood nieces of the accused's wife.

(b) The accused and wife have a young daughter W about the same age as the two complainants. They are cousins and close friends. On several occasions the wife of the accused would collect the two complainants from their homes to spend time and spend the night with their daughter W.

(c) The house of the accused at Yaren is a two storey building. Two bedrooms, one for the accused and his wife, and one for W are on the top floor. The kitchen is on the ground floor. The television set was in the accused/wife bedroom.

(d) W and the two complainants often watched TV in the evenings. Usually they sat on the floor and watched- they were not allowed on the queen size bed.

(e) In 2017 the complainant L went to Fiji with the accused, his wife and W for schooling. They returned at the end of 2017. Shortly after their return to Nauru in 2017, L told her grandma about the alleged abusive conduct of the accused. Police investigations then commenced.

Prosecution Case (Count 1)

6. In support of the allegation of indecent assault in count 1, the complainant L told the court that in 2016 she was watching television in the accused's bedroom with the complainant T and the accused's daughter W. She was on the bed with the accused and T while W was on the floor watching television. The accused touched and tickled her vagina. He ceased touching when his wife walked inside the room, but continued the touching when the wife walked out again.
7. After the touching (tickling) L went to the floor where W was sitting. L was 8 years at the time of the alleged offending. She was accompanied by her aunt in the witness box when she testified.
8. L resisted suggestions under cross examination that the three of them slept in W's bedroom after watching television. She said W's bedroom was used as a storeroom at the time, so the three of them slept on the floor in the same room as the accused and his wife.
9. L conceded under cross examination that when the accused or his wife entered the bedroom, anyone sitting or lying on the bed would get off the bed and sit on the floor.
10. It was also conceded that in the year 2017 she went to Fiji for schooling with the accused, his wife and W. It was sometimes after she returned from Fiji at the end of 2017 that she reported the accused's alleged offending to her grandmother. She did not tell any adult the incident soon after in 2016 because she was afraid she might get smacked.

Prosecution Case (Count 2)

11. Complainant T is aged 9. She was 7 at the time of the alleged offending. She was accompanied by her grandmother in the witness box when she testified.
12. She told the court that she was asleep on the accused's bed with the other two girls when the accused put his finger inside her vagina. The bedroom light was off but she was able to see as the lights at the corridor and bathroom were both on.

She then left for the bathroom to wipe herself as she was wet from the touching.

When asked whether she told anyone she responded she told W and L. She did not tell any adult as she was afraid to tell.

13. Under cross examination she told the court a girl Thirma was present when she told L and W about the accused putting his finger inside her vagina. She was questioned:

Q : Now you said you, L and Thirma had been talking about the incident. That correct?

A: Yes

Q : Where was this?

A : In Yaren. At uncle L's place when he went outside.

Q: Thirma was there?

A : Yes.

Defense Case

14. Thirma testified. She is 13 and attending college. She denied being at accused's D's house in 2016, she denied being at the house with other girls and she denied discussing the accused's touching of T.
15. She came to testify after she was visited by the wife of the accused and the mother of T. She was told that both L and T have mentioned her name in their evidence.
16. The accused testified and denied he touched L and T as alleged. He denied being on his bed in his bedroom with either L or T at any given time when L and T slept in his house.
He said that the girls were never allowed to sit or lie on his bed when they watched television. And if they were on his bed when he entered, they would immediately move to the floor.
He also denied that L and T never slept in his room; they always slept in W's room.

Submissions by Prosecution.

17. It is common ground that the specific issue for the court to decide on this trial are:

(a) Did the accused touch L's vagina as demonstrated by L; and

(b) Did the accused insert his finger inside T's vagina.

18. It was submitted that both L and T remained consistent logical and transparent in their evidence in chief and under cross examination. They both discussed their experiences with W but were too afraid to tell any adult.

19. Both counsels conceded in chambers that it was not certain from the evidence as to when the two complainants talked with W about the alleged touching by the accused.

20. Counsel contended that it was not logical for the accused to deny being on the bed with L and T at any given time. What would be logical is if the accused said that:

“Yes I have been on the bed with all my nieces numerous times, including L and T and my daughter W, but I have never touched any of them at all, not even once.”

21. It was also contented it was not logical for the accused not to attempt to get the family together and sort out what he believed to be false accusations against him.

Furthermore it was submitted at paragraph 10.9:

“The accused had not indicated at all as to why he thinks these false accusations have been made against him. No questions have been asked in cross examination to both L and T about any of this. That indicates that the accused has not given any plausible explanation to his counsel as to why L and T may have made such allegation.”

22. The submissions continues onto paragraph 10.10

“ Whilst the burden of proof is not the accused- I would assume that given the accused standing in the community as a construction business owner and given that the two girls are his wife’s blood nieces and given that the grave allegations came from very young girls who are in no position to concoct a story against him for their own private agendas, he would have gone out of his way to ensure that the family sorts out the issue and the girls return to the police to explain that they had lied and of course explain why they lied. He did none of that.”

23. It was urged that the demeanor and conduct of the two complainants warrants and justify the acceptance of their testimonies as more reliable and credible than the denials by the accused.

Defence Submissions.

24. The two incidents of sexual violation it was contended, could not have taken place because the complainants were not on the bed at any time the accused was in the room.

The two complainants admitted they would get off the bed whenever the accused or his wife entered the bedroom.

The accused also maintained that no one is allowed on his bed when he entered the room.

25. The evidence of Thirma clearly indicated the unreliability, inconsistency of T’s testimony.

26. It was contended that in respect of the rape charge a medical report would have been adduced to confirm penetration. It was argued that T would have suffered injury to her vagina and it would have been impossible for T to hide from her mother that she was violated when she returned home from the accused’s home.

27. The delay in reporting and making a complaint was not accounted for by the prosecution .Delay raises the reliability of the evidence of the complainants. Someone reported the incidents to the police and there is no evidence who this person was.

28. In total, it was submitted that it would be dangerous or unsafe to convict. The evidence created a reasonable doubt.

Discussion

29. Each count turns on the complainants' word against that of the accused. There was no forensic or medical evidence and no eye witness, the prosecution case therefore hinged on the credibility of the complainant; so effectively then, if the accused was to be convicted it would be on the evidence of the complainant alone. In that regard the passage by Lee J in *R v Murray*¹ should be noted.

“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.”

30. Section 101 Crimes Act 2016 provides that a law is abolished if the law provides that the corroboration of the evidence of a witness is required for a conviction for an offence under this Part.

Despite similar provisions in Queensland, Australia, the High Court of Australia in *Tully v R*² and *Robinson v The Queen*³ held 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 cases, as a class are to be treated as intrinsically untrustworthy. The relevant provisions of the Queensland Criminal Code preclude such reasoning. And the same code does away with the former requirement to direct the jury that it would be unsafe to convict an accused on the uncorroborated evidence of the complainant. But those subsections do not prevent a judge from making a comment on the evidence given on the trial that is appropriate to make in the interest of justice. It is the interest of justice that dictates whether a warning should be given⁴.

31. Article 10(2) of the constitution guarantees unto a person charged with an offence a fair hearing ... by an independent tribunal. Section 187 Criminal

¹ (1987) NSWLR 12

² (2007) 231 ALR 712

³ (1999) 197 CLR 162

⁴ (2007) 231 ALR 712 @ 733 para.89

Procedure Act 1972 provides that subject to the express provision of this Act, the practice of the Supreme Court in its criminal jurisdiction shall be such as the court directs.

It is the duty of the presiding judge to ensure that the accused secures a fair trial in accordance with the law. If the evidence is such that poses a real risk of miscarriage of justice the judge should act to ensure a fair hearing under article 10.

32. In *Robinson*⁵ there were inconsistencies, a curious feature of the evidence, a long period of delayed complaint and other features which called for a judicial warning to the jury that drew attention to them and of the need to scrutinize with care the evidence of the complainant before arriving at a conclusion of guilty.

33. There has been a delayed complaint which the prosecution has not addressed in evidence or submissions. No explanation has been given for the delay. Both complainants simply said they were afraid to tell any adult about the allegations. But L did so in November 2017.

On 15th November 2017 the accused was apprehended by police.

34. No evidence was elicited from L as to the circumstances which led her to tell her grandma. She had spent almost all of 2017 with the accused, his wife and W in Fiji attending school. That grandma did not accompany her to the witness box. Neither did she testify.

36. There was no evidence of threats of violence, living under the same roof, conduct normalizing the alleged abusive conduct, or other evidence which may have caused the delay in complaining.

37. Nonetheless experience has shown that there may be good reasons, often deeply buried and personal why people do not complain about such things for a long time.

38. Experience has also shown that in trials before judge and jury in which delayed complaint in sexual offending is involved there is always a risk which the judge must address, that some if not all members of the jury might be under the impression that if complainant did not report sexual abuse promptly or continued to express affection for the alleged abuser then the abuse could not have occurred.

⁵ (1999) 1977 CLR 162

39. The delay has extinguished any opportunity of contemporaneous medical examination of the complainant T that might have revealed evidence to inculcate or exculpate the accused.

40. The contention by the defense that the two incidents of sexual misconduct could not have taken because the complainants were not on the bed at any time with the accused cannot be considered logical.

Although both complainants conceded under cross examination that they were not supposed to be on the bed when watching television and they would leave the bed when the accused entered the room, neither of them conceded not being on the bed with accused. It is not a logical conclusion to draw that they were not on the bed because they were told not to go on the bed. In fact T did say she did sleep on the bed even though she was not supposed to be.

41. The rejection of the submission does not logically lead to a conclusion of guilt of the accused. The same evidence may nonetheless create a reasonable doubt.

42. The suggestion by the prosecution that the accused should have sorted out the complainants allegations with the girl's family is contrary to logic, common sense and the law.

The submission shifts the burden onto the accused to prove his innocence. He does not have to prove his innocence. He does not have to do anything. Criminal trial is an accusational process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt.

43. To suggest also that it would have been logical for the accused to admit that he was on the bed numerous times with L and T but never touched them is also rejected as irrational and illogical. The accused testified under oath to tell the truth and to give his version of the events.

He did not testify to relate to the court what he thought the court would consider logical and credible. Both suggestions by the prosecution are, in any event, totally detrimental to the defense if the defense had adopted them.

44. The testimony of Thirma is in the court's view considered relevant to the circumstances surrounding the laying of the complaint in 2017 with the police. It seems to suggest that T's mother was very reluctant to support the allegation. It was suggested in cross examination of T that T's mother did question T and no satisfactory answer was illicit to support a complaint.

Thirma's evidence also suggests that the testimony of T was suspect and unreliable. Thirma, a close relative of the accused, testified not because she was

requested by the accused but as a result of the request by T's mother and the accused's wife.

T's mother and the accused's wife are sisters.

45. The court accepts the statement of defense counsel in paragraph 4.2 (e) of his written submissions that the defense during the latter part of the trial intended to call T's mother as a witness, but he was informed by the prosecution that the police took a statement from T's mother but did not disclose it to the Director of Public Prosecution.

46. This submission together with Thirma's testimony suggests very pointedly that T was in fact questioned by her mother as a result of which T's mother did not consider pursuing or supporting the allegations.

If the police withheld T' statement from the DPP there was reason and motive for doing so.

Conclusion

47. The court acknowledges the disadvantages and risks occasioned by the long delay which remains unexplained, and warn itself of the risks of accepting such evidence without careful scrutiny *Tully v The Queen*⁶; *Robinson v The Queen*⁷

48. The court, pursuant to article 10(2) of the Constitution must accord to the accused a fair trial by avoiding miscarriage of justice. The police withheld from the DPP and defense information which could assist the accused in his defense. This tantamounts to perceived miscarriage of justice resulting in unfair hearing contrary to article 10(2).

49. The circumstances surrounding the laying of the complaint, presumably not by the parents of the complainants (particularly in the case of complainant T) the unexplained delay of complaints about sexual abuse, said to have occurred, unwitnessed when the complainants were 7 and 8 and which medical evidence can now neither verify or falsify, leads the court to the conclusion that it would be unsafe to convict the accused as alleged.


⁶ Supra

⁷ .Supra

Result

- (i) Both counts against the accused are dismissed.
- (ii) Costs follow the event.
Counsels to file memorandum if costs are not agreed to.

Dated this 19th Day of March, 2019



Judge R. Vaai

