

REPUBLIC

V

NAH

Date of Hearing: 3 November 2015, and 25 January 2016  
Date of Judgement: 8 February 2016

*Mr. Filimoni Lacanivalu of the Office of Director Public  
Prosecutions for the Republic  
Mr. Ravunimase Tangivakatini for the defendant*

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## Judgment

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1. The defendant is charged with 1 count of indecent assault contrary to section 350 of the Criminal Code 1899. Section 350 of the Criminal Code 1899 reads "Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years".<sup>1</sup> The offence is alleged to have been committed by the defendant on an unknown date between the 1<sup>st</sup> july 2014 and 31 August 2014.
2. The defendant pleaded not guilty. The prosecution called the complainant to give evidence and closed its case. The defence called two witnesses.
3. For the purposes of protecting the complainant's identity, this court will not refer to the defendant and the complainant by name.

### PROSECUTION CASE

5. The complainant's evidence is that on the night in question, at about midnight she and a friend of hers named Zoreh left the mess and were going back to the single ladies section when they met the defendant and his friend Amir on the foot path walking towards them from the opposite direction. The foot path is narrow with fencing on both sides, that one would need to give way for those coming or going in the opposite direction to go pass.

6. The complainant's evidence is that her friend Zoreh went ahead of her and waited for to catch up with her and that the defendant's friend Amir went passed her and waited for the defendant who was

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<sup>1</sup> Section 350 of the Criminal Code 1899

standing in front of her blocking her from going any further. She then tried to move back to go around passed him, but the defendant went in front of her and blocked her way again. At this stage her evidence is that the defendant was close enough to her to touch her chest. She then told the defendant words to the effect of "what can I do for you to leave me alone, I don't want to be your friends with you, you can't force me". Her evidence is that the defendant then used his hands and pointing to his genitals and said "you have to eat this before I can leave you alone"

7. The complainant further gave evidence that she had not consented to the defendant touching her breast. She did not feel well after that, so she spent the night at her friends place. She further gave evidence that she did not like the defendant, and that she felt that the defendant had interfered with her personal space. Her evidence is that she went back with her friend Zoreh who was with her and she spent the night at Zoreh's place, because she wasn't feeling well and she was crying.

8. The complainant's evidence is also that on the way to the room she came across a Somalian man who asked her what happened and she told him there's nothing and she further explained that she told him nothing because she doesn't have to tell anyone anything. She only have to tell an officer at the RPC (Regional Processing Centre).

9. The complainant further gave evidence in chief that the next day; she told Nazarine the cultural advisor. She further gave evidence that she complained to Wilson. (On the evidence Wilson is a reference to Wilson Security Officers) and that the report was made between the 7 July and end of August 2014. In evidence in chief she denied having any form of relationship with the defendant.

10. During cross-examination, she gave evidence that on the night in question she did not go and see anyone or lodged any report to any of the officers responsible. She gave evidence that the next day she went to see someone and that she also verbally spoke to Wilson securities but she did not write anything. She further gave evidence that she did make a written complaint to Wilson Security but she does not remember the date she made the report.

11. When it was put to her during cross-examination that the procedure for making a complaint is that one has to fill in a complaint form she agreed, that that's the process but further said that sometimes they make verbal reports and that officers talk to someone and make them understand. She further gave evidence that the next day she made a verbal complaint to Wilson Security. She agreed during cross-examination that Wilson Securities provide 24 hour security services and that she did not make any complaints to the securities on that night in question but that she did wrote a formal complaint but was unable to remember when.

12. The complainant during cross-examination gave evidence that the first person she lodged a complaint with was Nazarine. That she lodged the complaint with Nazarine the next day after the incident. When it was put to her that she did not wish for Nazarine to put her complaint in writing she answered, "the cultural advisors duty is

any asylum seeker talk to her, they have to record it in the book" and when asked why she did not lodge a complaint with Wilson Security officer on duty she said she found it stressful to go and complain and that she prefer to talk to the cultural advisor and that she was hoping that verbally the guidance can go talk to the defendant and get him to accept what is going on.

13. The complainant further gave evidence during cross-examination that after she spoke with Nazarine, then Nazarine spoke to Daniel because Daniel was the officer with Wilson Security and is referred to as Whiskey three and who was one of the officers on duty on that night in question. The complainant further agreed during cross-examination that she wanted the cultural advisor and Wilson Security to go and sort out the problem with the defendant and that she was not interested in in making a police complaint against the defendant, further giving evidence that she prefer to sort this problem verbally because he (defendant) would respect himself enough that if somebody or a girl doesn't like him he will stop. She further gave evidence during cross-examination that she also made a verbal report to officers Bagman and Greg from behaviour and that these reports were verbal because the officers were supposed to go and talk to the defendant and until that conversation happened she didn't file any complaint. The complainant gave evidence that her friend Julia knew about everything. When it was asked if her friend Julia recorded her complaint she answered that it is the responsibility of the case manager to record everything that they are told.

14. During cross-examination it was put to her, that Daniel the officer with Wilson Security whom she had given evidence, about reporting the matter to in her evidence, made a report regarding her complaint dated the 6 September 2014, she said she didn't put the date and she doesn't remember. And when it was put to her during cross-examination the report from Daniel whiskey 3 regarding her complaint was dated 6 September 2014 she said that she doesn't remember the date and that the person who had made the report should be asked that question and that she doesn't understand why the date of the report is being stressed.

15. During cross-examination, she was asked if she was shown the complaint she had made before coming to court, she agreed. She was shown a copy of the complaint she agreed that she had signed the complaint and she had been shown the complaint. When it was pointed out to her that the report containing her complaint show that it was made at Transfield stamped and dated 7 September 2014, she said she doesn't know any date. During cross-examination, she denies having any relationship sexual or otherwise with the defendant. It was further put to her during cross-examination, that she is angry and bitter that the relationship between her and the defendant had ended, she denied this. It was further put to her that she was the aggressor and that she had punched the defendant in the chest and she denied this as well. The complainant agreed during cross-examination that between 1 July and 31<sup>st</sup> August she has been speaking to other people trying to get them to speak to the defendant. When it was put to her that the defendant would not apologize to her because he did nothing wrong, she gave evidence that the defendant

is the one who had been trying to make friends with her and had sent her messages through telegram on her phone.

16. During cross-examination, it was put to her that it was not until after two months when she realized that the defendant was not going to apologise to her, that she decided to report the matter that she went and pushed for a formal complaint against him, she denied this explaining that this is not true at all and she thought if some goes and talk to him and his got enough respect for himself to understand, and then she realised that he doesn't that's when she did report the matter.

17. In re-examination, she gave evidence that the defendant's mother and sister were the ones causing trouble to her and that she had lodged a separate complaint against the mother of the defendant but later reconciled with her in court because of the respect they have for elders. During re-examination she agreed that she wanted the officers to speak to the defendant so he can stop bothering her when she doesn't like him and that he repulses her how can she have a relationship with him. During re-examination she explained that she lodged this complaint because the defendant hadn't stop approaching her. During re-examination she further gave evidence that the defendant was trying to have a relationship with her and that is why his mother attacked her and that she is not feeling safe. She further gave evidence that a few days before she came to give evidence in court, the defendant through a friend sent a message to her wanting to be friends with her and that he also asked another friend that he wanted to see her.

#### **DEFENCE CASE**

18. The defendant gave evidence and called evidence. In essence the defendant denied pointing to his private part and asking her to eat it and he denied touching her breasts. In evidence in chief the defendant agreed that he sees the complainant at the camp and he gave evidence that he doesn't know why she would make the accusations against him saying that may be she has a problem with him. In his evidence in chief he further gave evidence that before ending the friendship they used to see each other on a daily basis. He further gave evidence that if she doesn't have any problems she wouldn't make a complaint. In examination in chief the defendant was asked to explain further on his friendship with the complainant and he said the complainant went to their room with one of their friends and then step by step comings and goings grow up and then they made friends. Her friend told him that if he wants he can be friends with the complainant because she thinks the complainant likes him (defendant). When asked in examination in chief what he has to say about the complainants evidence that he asked her to suck his manhood, the defendant answered that he has no explanation that's it's a lie and there is no explanation for a lie. During cross-examination the defendant agreed that he and his friend Amir met the complainant and her friend and that they were going towards them in the opposite direction. The defendant also agreed that the foot path was narrow but said that if they move aside one step from each other it would be possible to go pass. He agreed that Zorah went passed him and went ahead but disagreed that Amir went passed the

complainant. The defendant maintained during cross-examination that Amir was standing beside him. He agreed that he was standing face to face with the complainant and denied blocking the complainant's way. The defendant during cross-examination gave evidence that he stood aside and asked her to go but she was standing there and he insisted that she can pass but she stayed there and used bad words to him. He further denied that the complainant told him to leave her alone but said that she said some nonsense and bad words to him. He further denied that the complainant told him that she didn't want to be friends with him or that she told him that he can't force her to be friends with him. During cross-examination, he denied pointing to his genitals and saying that she should eat it before he can leave her alone. The defendant denied touching the complainants breast. In essence the defendant's evidence is that he stood aside to allow her to pass and she just left saying some nonsense again. The defendant agreed that there was a brawl between the complainant and his mother and sister but said he did not know what the issue was between them. During cross-examination it was put to the defendant, that, he and the complainant were never friends at all and the defendant answered that they were friends. It was also put to the defendant during cross-examination that a few night before the complainant came to give evidence in court, he sent another telegram message through a friend that he wanted to see her and the defendant denied this. The defendant denied sending text messages to the complainant that he wanted to see her before she came to give evidence in court.

19. The second witness called by the defence is Mr. Amir Akbarizadeh who confirm that he was there and remembered that time the argument with the complainant happened. Mr. Akbarizadeh's evidence is that he was with the defendant and that they were going towards the mess hall and there was a narrow pathway. And that everyone one of them (referring to the complainant and the defendant) told the other (referring to the complainant and defendant) to get out of my way. And except for him and Zoreh who witnessed what happened. His evidence is that the argument lasted for one minute and he jumped in the middle and said stop guys. But they didn't listen and continued to argue with each other very intensively. And that after that argument and exchanging some bad words they got separated and moved towards their way. Mr. Akbarizadeh's evidence is that he was a couple of centimeters behind the defendant and that he thought that Zoreh was behind the complainant because the pathway was narrow and that they all couldn't stand in line together. Mr. Akbarizadeh was not able to say what they said to each other but that he observed that none of them was willing to let the other go past. After that he and the defendant continued to the mess hall and that he saw nothing else that night. During cross-examination he agreed that he knew the defendant well and that he knew the mother and sister of the defendant well and that he and the defendant are very close friends. During cross-examination, he said that he only knew about the complaint against the defendant later on from the defendant. He maintained that Zorah was behind the complainant and were witnessing the argument between the two until Zore was talking to the complainant telling her to stop it and moved forward angrily and then the complainant followed her. He denied going past the complainant and gave evidence that he was trying to stop the argument because the defendant is his friend and they used to say

hello to the complainant and that he considered it his duty as the oldest to mediate between them. Mr. Akabarizadeh agreed that the defendant was really close face to face with the complainant but disagreed that the defendant blocked the complainant's way. Mr Akabarizadeh's evidence during cross-examination is that both the complainant and the defendant were stubborn. That both were arguing with each other and saying some nasty words to each other. He denied seeing the defendant touching the complainant's breast and making any indecent gestures to the complainant. He further gave evidence that he was close to them, and that there was a projector light there if he was very close to them and would have witnessed any touching.

#### **FACTS NOT IN DISPUTE**

20. From the evidence, the only facts that are not disputed are, that, on the night in question, the complainant and her friend were on their way to the girls single quarters at the RPC3 (Regional Processing Centre Camp 3) when they met up with the defendant and his friend walking towards them from the opposite direction and that the pathway is narrow and if going pass one has to make way for the other to pass by.

#### **ISSUE FOR DETERMINATION BY THE COURT**

21. The issue for this court to determine is whether or not the defendant pointed to his genital area and told the complainant you have to eat this before I can leave you alone and whether or not the defendant touched the complainant's breasts.

#### **BURDEN OF PROOF AND STANDARD OF PROOF**

22. I remind myself that the burden of proof lies with the prosecution and never shifts to the defence and the standard of proof is one of beyond reasonable doubt.

#### **THE ISSUE OF CORROBORATION**

23. The complainant's evidence is not corroborated. The Supreme Court in R v Saeed Mayahi MC No. 60 of 2015 held "Accordingly the Court exercises its inherent powers to hold that hence forth there will be no rule of practice or requirement that a corroboration warning is to be given in all cases involving complainants in sexual offence matters before the Courts in Nauru"<sup>2</sup>. There is therefore no need for this court to give a warning regarding the lack of corroboration in this case.

#### **ANALYSIS OF THE EVIDENCE BEFORE THE COURT.**

24. This is a case that centres on the issue of credibility. Whose version is the court to accept? I must therefore look at the whole of the evidence presented.

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<sup>2</sup> R v Saeed Mayahi MC No. 60 of 2015 at paragraph 25 page 2.

25. The complainant has given evidence that she was with her friend Zoreh. And that she was not feeling well and she spent the night at Zoreh's place because she was not feeling well and that she has been crying. Independent evidence of distress and recent complaint could have come from Zoreh. But she was not called to give evidence.

26. The complainant further gave evidence that on her way back to the single ladies quarter she met a Somalian man who asked her what was wrong and she said nothing. Again the Somalian man who may have formed an opinion as to her condition immediately after having met the defendant at that prompting him to ask her such a question seeming to raise concerns about her appearance has not been called to give evidence. This in effect would make this aspect of her evidence hearsay evidence and must therefore be rejected.

27. The complainant has given evidence that the first person she verbally reported the matter to the very next day was Nazarine the cultural advisor officer and whom she asked to speak to the defendant. Again, Nazarine was not called to give evidence. So whether or not Nazarine had in fact spoken to the defendant about the complaint that the complainant had lodged against him, this court does not know, because there is no evidence of that before this court.

28. The complainant had also given evidence that she had verbally spoken to Daniel whom she referred to as the Wilson Security Guard who was holding the position of Whiskey 3 on that day, and officers Bagman and Greg so that they could go and speak with the defendant about the complaint she has made and to ask him and make him understand that she doesn't want to be friends with him and for him to leave her alone. None of these officers were called to give evidence about whether or not they have been asked by the complainant to speak to the defendant and whether or not they have spoken with the defendant about his alleged unwanted, uninvited and unwelcomed attentions and approaches towards the complainant.

29. The complainant further gave evidence that a few days before she came to give evidence in court, the defendant asked a friend to send her a telegram asking her to be friends with him and that a few days before she came to give evidence in court, the defendant through a friend sent her telegrams asking her to see him. Again neither of these friends was called to give evidence nor was evidence led or called to show whose mobile was being used to send her the messages.

30. The complainant had given evidence that she had verbally lodged a complaint with the officers asking them to speak with defendant about his alleged behaviour. She was clear in her evidence that she did not want to pursue the matter with the police in the first

instance but because the defendant did not stop approaching her that was why she lodged her complaint against the defendant.

31. There is no evidence before this court on whether or not any of the officers she said she had reported the matters to have in fact received her report and had in fact spoken to the defendant. There is also no evidence before this court about other any other alleged incidents of the defendant approaching and making unwanted, uninvited and unwelcomed advances towards her after the alleged incident of the night the subject of this proceeding. There is also no evidence before this court as to when in terms of the date she had actually made the formal report against the defendant with the police. As such the court is unable to accept her explanation that she initially refused to lodge a police complaint but because he kept approaching her for friendship and would not stop, that was why she took long to lodge the complaint as being unreasonable, unreliable and is simply not supported by evidence.

32. The matter does not end here, in her evidence in chief she denied any form of relationship with the defendant and made it clear that she doesn't want to be friends with him and that he can't force her to be friends with him and she said she doesn't like the defendant at all and that it's a very bad feeling when somebody interferes with your personal space especially when you don't like that person, referring to the defendant. Yet as pointed out to her during cross-examination it took her almost two months or thereabout to make a formal complaint.

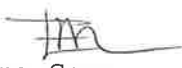
33. When her statement was shown to her she agreed that she signed it and that she had been shown her statement by the prosecution before she came to court. But when it was pointed out to her during cross-examination that the date shown on her statement is the 7 September 2014, said she does not remember the date and that she doesn't know why the date is emphasized. When it was put to her that her complaint was stamped and dated 7 September 2014, she again denied any knowledge of the date. Again it was put her that her formal complaint to Wilson Security was dated 6 September 2014; again she said she doesn't know the date. This was her same response when asked in cross-examination about whether or not she has made a written complaint. I find her to be an evasive witness in this regard.

34. In essence this is a case of what the complainant said happened as against the denial by the defendant. The onus to prove the case and every element of the offence beyond reasonable doubt lies on the prosecution. I am therefore not satisfied in this case, that the prosecution has proved its case against the defendant beyond a reasonable doubt.



35. I therefore find the defendant not guilty of the charge of indecent assault. The defendant is acquitted.

Dated this 8 February 2016

  
Emma Garo  
Resident Magistrate

