



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 32 of 2019

THE REPUBLIC

-v-

RICHARD DAKO AGIAGANG

Before: RM Penijamini R. Lomaloma
Republic: Ms. Susan Serukai
Defendant: Mr. Ravunimasei Tagioakatini
Date of Hearing: 29-30 October 2020
Date of Ruling: 10th November 2020

JUDGMENT

Catchwords: *Observing a private act contrary to section 110(1)(a)(b)(ii)(c) and (d) of the Crimes Act 2016. Private act complained of consists of several acts; Private act complained of not clearly described; Indecent Acts—complainant believed at the time of the act that it was a cockroach; Later change her belief to say it was the accused—reasons for change in belief not given and court cannot judge if the reasons were logical. Accused acquitted.*

Introduction

1. The accused stands charged with one count of observing a private act contrary to section 110(1)(a)(b)(ii), (c) and (d) of the Crimes Act 2016. The particulars allege that he on the 26th of November 2019, intentionally observed Tawake Mwarara getting dressed after a bath without her consent.

2. In the second count, he is charged with one count of indecent acts contrary to section 106(1)(a)(b)(c)(ii) and (ii) of the Crimes Act 2016. The particulars allege that he indecently touched Tawake Mwarara's back, shoulders and neck on the night of the 29th of November 2019.
3. The prosecution called the victim, Tawake Mwarara and her sister in law, Derigado Agiagang while the accused, elected to give an unsworn statement.
4. The complainant and the accused are the only witnesses to the allegations. The Court therefore has to decide who of the two is the more credible witness and for the analysis to be complete, the full evidence of all the three witnesses are set out below.
5. I have separated the evidence-in-chief and cross-examination relating to the first count which happened on 26th November 2019 from the evidence for the second count which took place on 29th November 2019.

Count 1—Observing Private Acts

6. Tawake Mwarara is 22 years old. Her evidence is that on the 26th November 2019, she was living in Yaren District with her husband at his house with 6 other people—her sister in law Derigago, the accused Dako, Jolene, Terimea and Forin.

26th November 2019

7. At about 1 pm, she had a shower and she was getting dressed in Jolene's room when she felt someone watching her. She states:-

There was someone I saw who was in the room. I was changing in Jolene's room. He was peeping through a hole at the end of the room—at the corner. I knew it was him because when I came out of the room, he also came out of the other room on the other side. The hole is about 5 cm in diameter. When I saw him, I confronted him and asked him, "What are you doing?" He just laughed and went inside the same room and picked up his clothes from the other room where he was peeping from. It's like a store room.

I felt like someone was staring at me when I was changing. I looked at the hole and I saw someone looking at me through the hole. It was Dako. He was about 4 meters away. There was no obstruction. There was no light inside the room but light was coming from outside—daylight. It was not dark. The hole is in the middle of the corner on the wall.

8. In cross-examination, Tawake said that as she was changing, there was a person watching her through the hole in the door; that the hole was at the center of the wall opposite the door, that she was standing behind the door; that the hole was about hip or navel high from the door; and that Dako kept his clothes in the storeroom where the person was peeping from; that she saw the accused's face at the

hole. Tawake said when she was changing, she felt someone was watching her and she saw a face in the hole watching her; denied that she didn't see anyone; agreed that Dako would reach where his clothes were before reaching the hole; and said that from where she was standing, she could only see into part of the room.

9. Tawake agreed with defence counsel that she did not tell her husband immediately after the 26th November that the accused had been peeping at her through the hole in the wall while she changed; and that she shared meals with the rest of the members of the household, including Dako in the next few days. Tawake agreed with defence counsel that she asked Dako to drop her off at Location and he agreed and dropped her there.
10. She clarified when asked by the Court that she did not go to the storeroom after Dako came out on 26th November.

29th November 2019

11. She remembers the 29th of November 2019. She states:-

At about 3:00 am, I was at Yaren, at home sleeping. I was sleeping in the lounge. Me my 2 kids, Dako and his kid and Jolene. We were all sleeping on the mats on the floor. When I was sleeping, I felt a hand. I was surprised. The hand was moving back and forth on my back. I stood up and saw Dako lying down opposite me—he was about 1 meter away. The hand was touching my back, my head and shoulder. I stood up and told him I was scared of a cockroach because to me at the time I thought it was a cockroach. To me at the time, I really thought it was a cockroach. I realised it was not a cockroach the second time I was touched. The second time I was touched on my shoulder. When I spoke to him the first time, he said nothing. He was moving. He didn't speak to me. It was dark. I could recognize Dako because all of us were sleeping together and I know our positions. When I went to sleep, no one was sleeping beside me, me and my 2 kids.

12. The witness then drew a diagram of how they were positioned relative to each other when they went to sleep. If she was lying face up, she would be on the extreme right with her 2 children on her left in a row. In a row parallel to her and her children were Dako and his children Joleen and Teri with their heads towards Tawake and her children. Dako was lying parallel to and opposite Tawake with their heads towards each other. She testified that in this position, Dako could without getting up or moving closer to her, reach above his head and touch her head and upper body. She said:

When I stood up, Dako was still in the same position. I have known Dako for 3 years. My husband and Dako's wife are brothers and sisters. He is in court. Identified Dako as the accused.

13. Tawake said in cross-examination that on 29th November, they were all sleeping in the lounge because there was a leak in the roof of the bedroom; and that the sleeping arrangements on the 29th was the norm. She agreed with Defence Counsel that at about 3:00 am, one of her children cried and that Dako tried to wake her up to stop the child crying. When it was put to her that that was the only time Dako touched her, she said he touched her back and shoulders after that.
14. The following question was put to her:

Put: Is it true that when he touched you, he was lying down and just reached over with his hand?

A: Yes.

15. In re-examination, Tawake said that the touching on her back was over her clothes and was inappropriate compared to the touching on her head.

Prosecution Witness 2 (PW2) – DERIGADO AGIAGANG

16. Derigado is 18 years old and unemployed. She is the sister of Tawake’s husband. She lived in Yaren with Tawake and the accused in November 2019. She remembers the 27th of November 2019, a day after the allegation in count 1. She was outside their house at about midnight playing games when Tawake came outside and joined her. Tawake told her about an incident where someone had peeped at her from the room next to Jolene’s. The person was peeping through a hole in the wall. Derigado said she has seen the hole and it is about 3-4 cm in diameter. The hole is at about waist height and about an arm’s length from the corner of Jolene’s room. She recounted what Tawake had told her and is consistent with Tawake’s testimony about how it happened. She said she was having a shower and she felt someone looking at her. She felt she was being watched as she showered. She walked out and went to change. She kept feeling like someone was looking at her. She was changing behind the door because it has no lock. There is only 1 door to Jolene’s room. She felt someone looking at her. She saw someone peeping at her from the hole in the wall. When she walked out to see who was there, she saw Dako walk out of the room. She said she is not related to the accused.
17. The evidence of what Tawake told her is hearsay and is only admitted as evidence of recent complaint.
18. In cross-examination, Derigado said Tawake did not tell this to her husband. Derigado said she believed the matter was reported on 29th November to the Police but in the meantime, everything was normal at their home. Dako however, had gone to Denig but this was not explored further.
19. There was no re-examination of this witness.
20. At the end of the prosecution case, I found that there was a case to answer and I put the defendant to his defence. The options set out in section 201(b) of the Criminal

Procedure Act 1972 were put to the accused and he elected to give an unsworn statement which is set out below.

Unsworn Statement of Accused

On 26th November 2019, I was at home and I went to have a shower. I went into the storeroom to get a change of clothes and I was wearing a towel around my waist. When I came out, I met Tawake outside and I went straight into the shower to have a shower. Then I went into the storeroom and changed there after my shower. We then sat down had a meal together. We were talking to each other. This was myself, Jolene, Deragado, Tawake and 3 children—2 of them Tawake's children and another child. Then I went into Vivien's room (another brother in law) and I watched movies there. Tawake came into the room asking to be dropped at Location. I told her to tell her husband to take her, that they can use the bike. I don't feel like taking you. About 4-5 times, she kept on asking me to drop her but I didn't want to.

On 29th November, we were all sleeping together in the lounge. We were sleeping head to head. On my side was me, my daughter Jolene and Derigado. On the other side was Tawake and her two children and another child she was taking care of.

We were sleeping and the child started crying and the mother did not wake up. That's when I went to wake her up. I reached out and touched her head and back to wake her up and check on the child that was crying.

In the morning, nothing strange happened. Everything was normal. We were seating and eating together. In the evening, the police came and picked me up at around 6:00 o'clock and they asked me. They said, "We came to get you. Do you know what you are being accused of? How old are you?" I told them, "50." There were 3 officers that came. They didn't take me then. They left. When they returned, there were 5 of them. Sgt Tokaibure was with them. He spoke to me and said they would take me to take my statement. He told me he doesn't know what I am being accused of but the ones at base said to take me. We reached the station, they put me in the cell and they didn't charge me. The next day they charged me.

Analysis

21. It is the duty of the prosecution to prove beyond reasonable doubt the elements of the offence charged. The accused is charged in count 1 with observing a private act contrary to section 110 of the Crimes Act 2016. The section states:

110 Observing private acts

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

(a) the defendant intentionally observes another person; and

(b) the other person does not consent to being observed and the defendant:

- (i) knows that fact; or
 - (ii) is recklessly indifferent to consent of the other person; and
 - (c) the other person is doing a private act and the defendant is reckless about that fact; and
 - (d) in the circumstances, a reasonable person would reasonably expect to be afforded privacy for that act.
- Penalty: 5 years imprisonment.
- (2) The question whether a reasonable person would reasonably expect to be afforded privacy for an act is one of fact.

22. The elements of the offence are (1) that the accused; (2) on the 26th of November 2019; (3) intentionally observed Tawake Mwarara getting dressed after taking her bath (4) without her consent; (5) the accused knew he did not have Tawake's consent; (6) Tawake was doing a private act; and (7) a person would reasonably be expected to be afforded privacy for the act.
23. The evidence of PW2 regarding what Tawake Mwarara said is hearsay and can only be admitted if it meets one of the exceptions to the admission of such evidence.
24. Making a complaint proximate to the time of the offence to a witness is evidence of the consistency of the conduct of the victim in a sexual offence: *Kilby v The Queen*¹ approved the proposition in Halsbury's laws of England (1952) 4th Ed, Vol 10, p 468 par. 859:

The admissibility of the particulars of a complaint made soon after the commission of an alleged offence in the absence of the defendant by the person in respect of whom a crime is alleged to have been committed is peculiar to rape, indecent assault and similar offences against females, and also offences of indecency between male persons. This evidence is not to be taken as proof of the facts complained of, but only as a matter to be borne in mind by the jury in considering the consistency and therefore, the credibility of the complainant's story, including the consideration of the question of consent if the prisoner raises that as a defence."

25. The complaint was not made at the first opportunity but it was proximate to the event. Whilst making the complaint is consistent with the behaviour of a victim of a sexual offence, other behaviour by Tawake is not consistent with a victim in sexual offences or offences of this nature. One would expect a person in her situation to not wish to be alone with the perpetrator for fear that the act, or similar acts may be done to her yet Tawake asked him to take her and he did take her to Location on his motorbike that same afternoon.
26. According to the accused, she asked several times and he told her she could use the motorbike and ask her husband to carry her. They had meals together, on the 26th

¹ 1973) 129 CLR 460 at 471-472

after the complaint, they talked together as a group, and both Tawake and PW2 said in cross-examination that things were “normal.” This behaviour is not consistent with what one might expect from a person she is sure peeped at her while she was changing.

27. I turn now to the actual complaint. Tawake said that she “felt” someone was watching her when she was having a bath but no evidence was given on whether someone was capable of peeping at her when she was bathing. She “felt” eyes on her when she was getting dressed and finally she said she saw a face through a hole that was some 5 cm in diameter. She was about 4 meters from the hole and she did not say how far the “face” was from the hole. We can infer that if someone had their eye right against the hole, as would be natural for someone trying to peep through, Tawake would have seen the eyeball and the area about 5 cm around it. If the person was further from the hole, it is more difficult to see from 4 meters away because the cone of visible area decreases
28. The complainant did not see an eye at the hole. For the peeper to be able to see the complainant, the principle of inter-visibility requires that the complainant must be able to see the eye of the peeper.
29. The only time that the complainant saw someone watching was immediately before she went outside to find out who had been watching her. There was no evidence of how she was dressed at this stage. I can infer that she had finished dressing because she did not mention it and there was no evidence by the accused that she was partly dressed when he met her. If she was partly dressed, I am certain she would have mentioned it. This then leads to one of the elements of the offence: **the other person is doing a private act and the defendant is reckless about that fact.**
30. The private act complained of is that Tawake was getting dressed after taking a bath. The act of getting dressed is a process that involves many acts and can be accomplished in many ways, some of which can be done in the presence or in the close proximity and even view of other family members of the opposite sex. The complainant could have put on her undergarments in the shower and completed dressing in the room. Where was the shower? How was she clothed when she came from the shower to Jolene’s room to get dressed. PW2 said that Jolene’s room has only one door and we can safely presume that the door did not lead to the bathroom so the complainant must have been dressed or partially dressed when she came from the bathroom to Jolene’s room. Evidence must be led to show what actually took place and what the accused saw when he was observed watching the victim. No such evidence was led.
31. To be able to determine if what the peeper saw was a private act requiring the protection of section 110 of the Crimes Act 2016, the act must be clearly described. Since the state of dress or undress of the complainant was not established from the evidence, there is doubt about this element of the offence of whether the act observed was a private act.

32. I turn now to the evidence of identification. The complainant could not have seen the whole face of the peeper though a hole 5 cm in diameter when she was about 4 meters away from the hole. There was no evidence that she saw and recognized the accused from that distance. The legal requirements for identification as set out *R v Turnbull*² have not been made out.
33. The only evidence on identification is circumstantial evidence that immediately after seeing evidence of peeping, she came out of the room and saw the accused coming out of the store room. The complainant's evidence is that there ^{were} six other people living with her including some children. The hole is described as about waist high and it might have been accessible to children. To rely on circumstantial evidence, the prosecution need to prove that there was nobody else present in the storeroom except the accused at the time the complainant saw that she was being watched. In *Doney v The Queen (1990)*³, Deane, Dawson, Gaudron and McHugh JJ said:

Circumstantial evidence is evidence which proves or tends to prove a fact or set of facts from which the fact to be proved may be inferred. Circumstantial evidence can prove a fact beyond reasonable doubt only if all other reasonable hypotheses are excluded."

34. Children often peer into holes in the walls of rooms because they have not learnt yet that it is impolite or rude to do so. There was no detailed evidence of what the complainant saw through the hole in the wall—whether the face was that of a male, a female, an adult or a child. The complainant said she did not check if there was anyone else in the storeroom. The prosecution have therefore not excluded the possibility that the peeper could have been a child or another of the occupants of the house where the complainant and the accused were living.

Conclusions on Count 1

35. For the reasons given, I am not satisfied that the prosecution have proved their case against the accused beyond reasonable doubt in Count 1 and I therefore find him not guilty and I acquit him of the charge.

Count 2—Indecent Acts contrary to section 106(1)(a)(b)(c)(ii) and (ii) of the Crimes Act 2016

36. Section 106(1)(a)(b)(c)(ii) and (ii) of the Crimes Act 2016 and it provides:-

106 Indecent acts

² [1976] 3 All ER 549 at 552 per Lord Widgery CJ

³) 171 CLR 207

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

(a) the defendant intentionally touches another person; and

(b) the touching is indecent and the defendant is reckless about that fact; and

(c) the other person does not consent to the touching and the defendant :

(i) is recklessly indifferent to consent of the other person.

Penalty:

(ii) in any other case—5 years imprisonment

37. The elements of the offence which the prosecution need to prove beyond reasonable doubt for a conviction are: (1)the accused(2) intentionally touched the complainant; (3) the touching was indecent; (4) the accused was reckless about the touching; (5) the complainant did not consent to the touching; and (6) the defendant was recklessly indifferent to the consent of the complainant.

38. The evidence of the complainant on count 2 is that she was sleeping when she felt a hand:-

I was surprised. The hand was moving back and forth on my back. I stood up and saw Dako lying down opposite me—he was about 1 meter away. The hand was touching my back, my head and shoulder. I stood up and told him I was scared of a cockroach because to me at the time I thought it was a cockroach. To me at the time, I really thought it was a cockroach. I realised it was not a cockroach the second time I was touched.

39. She agreed in cross-examination that the accused woke her up by reaching up from where he was lying and touching her head and shoulders to wake her up because her child lying next to her was crying. She did not clarify whether this was the first touching, the second touching or a third touching. There are therefore at least 2 if not three occasions when the complainant said she was touched. It appears that the touching described above is the one alleged to be indecent.

40. It is clear that the complainant was woken up when she felt something at her back. It is also clear that she was confused. Her evidence is inconsistent. Her immediate **belief** was that it was a cockroach but when she gave evidence in court, this had changed to a fact--- she said it was a hand touching her back and shoulder. There is a big difference between a belief and a fact. What she stated to be a fact in court is but a conclusion that she drew after she was touched a second time. How she reached this conclusion is not explained so that the Court cannot determine if it is a logical inference. If it was a logical inference, then the Court still has to determine if the inference was the only inference available so that it could be proof of the

touching as circumstantial evidence. This is because she did not see the touching and her sense of touch was confused.

41. There is a big difference between a cockroach and a hand caressing her back. A cockroach is very light whilst a hand is heavy. She did not testify whether she was lying on her back or on her side or on her face. These are circumstances that the Court needs to know to be able to judge where the touching was and to judge whether the touching was indecent. The back is a very big area and while it might be indecent to touch certain parts of it, it is not indecent to touch other parts. The method of the touching is also relevant. If the accused was trying to wake the complainant by reaching above his head, in the dark trying to touch and wake the complainant to attend to a crying child (as she agreed in cross-examination), it is foreseeable that his hands could touch her face, her back or even some inappropriate parts.
42. The complainant was confused about what touched her—and that confusion has not been cleared. That confusion has not been cleared and there is therefore doubt about whether she was touched by a person or a cockroach.
43. I find from the analysis above that the prosecution have failed to establish beyond reasonable doubt that the accused touched the complainant. This is an element of the offence that must be proved first before the question of whether the touching was indecent can be assessed. I therefore find the accused not guilty of the second count and I acquit him of it.

Conclusions

44. For the reasons given in the judgment, the accused is found not guilty and acquitted of count 1 and count 2.


.....
Penijamini R Lomaloma
Resident Magistrate



The seal of the District Court of Nauru is circular, featuring a central emblem with a bird and a shield, surrounded by the text 'DISTRICT COURT OF NAURU' and two stars.