IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION] Miscellaneous Cause No. 60 of 2015

IN THE MATTER OF a Case Stated in relation to
Criminal Case No. CF 7/2015

THE REPUBLIC

-v-

SAEED MAYAHI

Before: Crulci J

For the Prosecution: L. Savou
For the Defence: J. Rabuku
Amicus curiae: F. Masaurua

Date: 5 August, 2015

Cases cited:
Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229
Balelala v The State [2004] FJCA 49
Hargan v The King (1919) 27 CLR 13
Longman v The Queen (1989) 168 CLR 79

R v Baskerville [1916] 2 KB 658, at 667
R v Graham (1910) 4 Cr App R 218
R v Henry and Manning [1968) 53 Cr App R 150
Teikamata v R [2007] SBCA 3

PRACTICE & PROCEDURE - Case Stated – Corroboration Warning for Sexual Offences – Whether Rule of Practice Discriminatory and Contrary to Article 3 of the Constitution – Regional Approaches Considered - Rule of Practice Abrogated

CASE STATED

1. This is a case stated by Resident Magistrate Emma Garo for the consideration of the Supreme Court on a question of interpretation of a provision of the Constitution arising from a criminal trial before the learned Magistrate in accordance with Section 38(1) of the *Courts Act 1972*.

> **"38 Transfer from District Court to Supreme Court**
> (1) Subject to the provisions of any written law for the time being in force, the District Court may and, where a question arises involving the interpretation or effect of any provision of the Constitution, shall, of its own motion or upon the application of any party thereto, report to the Supreme Court the pendency of any cause or matter which it considers ought to be transferred to the Supreme Court and a judge shall forthwith direct whether the cause or matter is to be transferred to the Supreme Court or is to be heard and determined in the District Court:
>
> Provided that, where a question has arisen involving the effect or interpretation of any provision of the Constitution, the judge shall order that the cause or matter be transferred to the Supreme Court;
> ....
> And provided further that no criminal cause or matter shall be transferred into the Supreme Court otherwise than by committal of the accused person under the provisions of any written law for the time being in force relating to the procedure in criminal causes, save where a question involving the interpretation or effect of the

Constitution has arisen, in which event the cause or matter shall be transferred to the Supreme Court only for the determination of that question."

2. The case before the learned Resident Magistrate is a charge of Indecent Assault on Females, contrary to the Criminal Code 1899:

> **"section 350**: Any person who unlawfully and indecently assaults a woman or a girl is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years."

3. The question posed by the learned Resident Magistrate, through the submission of the *amicus curiae,* is whether the practice of the Courts requiring a corroboration warning for the evidence of women or girl victims relating to sexual offences, is contrary to Articles 2 and 3 of the Constitution. The *amicus* postulates that the ratification by the Republic of Nauru of the Convention on the Elimination of all forms of Discrimination against Woman (CEDAW) and being a signatory to the International Covenant on Civil and Political Rights (ICCPR) committed to compliance with treaty obligations, negates the rule of practice in requiring corroboration for female complainants in sexual offence cases.

4. Submissions from prosecution and defence counsel support the referral of the case stated to this Court and both endorse the representations made by the *amicus.*

5. The relevant sections of the Constitution referred to by the *amicus* are:

> **"Supreme Law of Nauru**
> 2.(1.) This Constitution is the supreme law of Nauru.
> (2.) A law inconsistent with this Constitution is, to the extent of the inconsistency, void.
>
> **PART II**
>
> **PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**
>
> **Preamble**

3.Whereas every person in Nauru is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to the rights and freedoms of others and for the public interest, to each of the following freedoms, namely:-

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;
(b) freedom of conscience, of expression and of peaceful assembly and association; and
(c) respect for his private and family life,

the subsequent provisions of this Part have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by a person does not prejudice the rights and freedoms of other persons or the public interest.

6. The offence before the learned Magistrate, like the offence of Rape contrary to section 347 of the *Criminal Code*, can in this jurisdiction only be committed against females. For offences of a sexual nature the rule required that the evidence of the female complainant be corroborated. Before a trial with a jury the judge was required to warn the jury of the need for corroboration of the complainant's testimony; in this jurisdiction where cases are tried before judge or magistrate alone, the requirement has been for the judge (or magistrate) to make clear that the need for corroboration of complainant evidence had been considered.

7. The corroboration warning to be given is in relation to the evidence of women or girls only, who are the complainants in the case. It is important to note that this is a rule of practice and not required under the *Criminal Code* or by statute; such corroboration *is* required in other offences for example, for perjury[1] or accomplice evidence[2].

8. What constitutes corroboration was considered by the court in *R v Baskerville* [1916] where Lord Reading, CJ held:

[1] section 125 *Criminal Code* 1899
[2] section 632 *Criminal Code* 1899

"..evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime...it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute."[3]

9. The position of *amicus curiae* was outlined by Salmon LJ (as Lord Salmon then was) in *Allen v Sir Alfred McAlpine & Sons Ltd*[4]:*"...the role of an amicus was to help the court by expounding the law impartially..."* This has in recent years come to include representations made on behalf of, or in relation to, matters of international law and human rights; such cases often having wiser implications than those of the immediate parties concerned.

10. Corroboration is required as a matter of law in certain cases. In the *Criminal Code* 1899, section 123 Perjury, outlines as follows:

> **125 Evidence on Charge of Perjury**
> *A person cannot be convicted of committing perjury or of counselling or procuring the omission of perjury upon the uncorroborated testimony of one witness.*

11. Corroboration is also required as a matter of law under section 632 in relation to accomplice evidence:

> **632 Accomplices**
> *"A person cannot be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices."*

12. There is no such express provision in the *Criminal Code* 1899 in relation to corroboration requirements for sexual offences. Historically

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[3] *R v Baskerville* [1916] 2 KB 658, at 667
[4] *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, at 268

the practice came into use around the 1900s following cases which postulated that extra caution was needed when looking at the evidence

of women and girls in relation to sexual matters. In a matter dealing with rape and carnal knowledge of a girl under sixteen, the rule was reported in the decision of Channell J in *R v Graham* (1910):

> "*It is not a case in which corroboration is necessarily required. But it is one of those cases in which the judge should explain that the burden of proof is upon the prosecution to make out the case to the satisfaction of the jury; that it is dangerous to act upon the evidence of one person, and in which the judge should point out to the jury that they had one person saying one thing and the other person another thing. Mr. Justice Pickford pointed out the risk of acting on the evidence of the girl, unless corroborated; and at the same time he explained that strictly speaking the law did not require her evidence should be corroborated, and that if they believed the girl's evidence they could act upon it.*" [5]

13. The practice of giving a corroboration warning in these types of cases was followed to the extent where in cases of where women and girls were complainants, not giving a warning in relation to the need for corroboration frequently resulted in a successful appeal against conviction. *R v Graham*[6] was cited and approved by Isaac J:

> *"...in sexual cases, such a caution ....should be given. ...It is a recognition of the justice and fairness to the accused* ***in that class of cases,*** *that the jury should be warned...that though corroboration is not strictly essential it is necessary to scrutinize with very special care the evidence of the prosecutrix before accepting it to condemn the accused. There are obvious reasons for the practice which need not be enumerated, because the practice is so well established as to have, as was said of the analogous case of accomplices, "almost the reverence of a rule of law".*"[7] (emphasis mine).

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[5] *R v Graham* (1910) 4 Cr App R 218, at 220
[6] Ibid.
[7] *Hargan v The King* (1919) 27 CLR 13, at 24

14. The class of cases referred to above are those in which women or girls are the complainants in cases of sexual offences. This reason for the corroboration warning is founded on the belief at the time that in these sorts of cases the female complainants are by nature unreliable. Salmon LJ (as he was then) stated in *R v Henry and Manning* [1968] that the court should:

> *"...use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I don't need now to enumerate, and sometimes for no reasons at all."*[8]

15. This outdated and outmoded view has been the subject of much discussion in legal and academic circles. In *Longman v The Queen* (1989)[9] the failure to give a warning regarding the complainant's evidence was held to be unsafe in the circumstances where there was a long delay, the length of which placed the accused at a disadvantage to base his defence. The court however have much to say about general application of the rule to cases of sexual offences Dean J stating:

> *There remains a serious problem about any general rule requiring that, in a case of sexual assault, an unqualified warning be given to the effect that it is dangerous or unsafe to convict on the uncorroborated testimony of the complainant. The main problem is that the universal proposition embodied in such a rule is simply unjustified. Particularly in cases of sexual assault within a family unit where there are likely to be powerful influences favouring concealment rather than complaint, neither wisdom nor experience - be it judicial or otherwise - justifies the unqualified proposition that, in any case where the evidence of the complainant is uncorroborated about any element of the offence, it would be dangerous to convict on that uncorroborated evidence. In fact, the*

[8] *R v Henry and Manning* [1968) 53 Cr App R 150, at 153
[9] *Longman v The Queen* (1989) 168 CLR 79

circumstances of the particular case may be such that it is not dangerous to convict on such uncorroborated evidence at all. And the law itself recognizes that that is so in that, were it otherwise, any conviction founded on uncorroborated evidence should, regardless of warning, be set aside as unsafe and unsatisfactory. Indeed, in cases where a conviction would not be unsafe and unsatisfactory notwithstanding that the evidence of the complainant is uncorroborated in relation to one or more of the elements of the offence, an unqualified warning that it would be dangerous to convict on such evidence arguably constitutes an encouragement of a miscarriage of justice.

Another problem about a general rule of practice requiring the giving of such an unqualified warning is that it inevitably involves an element of disparagement of the complainant in that it places the complainant in a special category of suspect witness."[10]

16. The submissions of the *amicus curiae* outline how other countries have abolished, amended or repealed legislation in relation to corroboration:

> "(1) The International Criminal Court and the International Criminal Tribunals for the former Yugoslavia and Rwanda: The Rules of Procedure and Evidence exclude the requirement for the corroboration direction in relation to crimes of sexual assault;
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> (2) Canada – the requirement for corroboration was abolished through s.8 of Chapter 93 of the *Criminal Law Amendment Act*;
>
> (3) New Zealand – under the *Evidence Amendment Act* (No.2) of 1985 judges are prevented from commenting on the unreliability of uncorroborated sexual assault evidence;
>
> (4) Australia – s.164 of the *Uniform Evidence Act* removed the need to warn juries that it was dangerous to act on uncorroborated evidence. Similar provisions have been enacted in other States of Australia not subject to the *Uniform Act*;
>
> (5) United Kingdom – the need for corroboration was removed by s.32 of the *Criminal Justice and Public Order Act 1994*;

[10] Ibid. at 92 and 93

(6) The Bangladesh High Court in the case of *Al Amin v The State* 9 BLD (HCD) 1991;

(7) The Namibia Supreme Court in *S V D* (19192) ISACR; and

(8) The United States US Supreme Court in *Carmell v Texas* (200) 963 S.W. 2n 833."[11]

17. The approach in relation to the rule on corroboration has been considered in the neighbouring country's courts including that of Fiji and the Solomon Islands.

18. This court cites with approval the case of *Balelala v The State*[12]. In that matter Court of Appeal in Fiji held in relation to the abrogation of the rule requiring corroboration:

> *"As such it is open for this Court to follow the guidance which has been given at the highest level in other jurisdictions, to hold that the Rule is counterproductive, confusing and both discriminatory and demeaning of women; and, as a result to adopt the approach which was approved in Regina v. Gilbert and in Longman v. The Queen.*
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> *Upon that basis it would henceforth be a matter for discretion, in accordance with the general law, for a Judge to give a warning or caution, wherever there was some particular aspect of the evidence giving rise to a question as to its reliability. That might arise, for example, where the complainant had been previously found to be unreliable, or was shown to have had a grudge against the accused, or where there had been a substantial delay in the making of the complaint, or where the complainant was shown by reason of age or mental disability to be questionable as to her veracity, or where she had given inconsistent accounts.*
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> ...
>
> *To adopt such an approach would be to bring the practice in the Islands of Fiji into conformity with that now adopted in many other,*

[11] Submissions *by amicus curiae*, pages 6 and 7
[12] *Balelala v The State* [2004] FJCA 49

if not most, common law, as well as international criminal jurisdictions, and civil code jurisdictions. It would place victim evidence in rape cases on the same basis, not only with the evidence of victims in other cases of criminality, but generally, that is subject to a caution where some aspect of unreliability arises justifying a caution particular to that case.

It would also conform with the provisions of s.38(1) of the Constitution (Amendment) Act 1997 which provides, as part of chapter 4, Bill of Rights:

"(1) Every person has the right to equality before the law.
(2) a person must not be unfairly discriminated against directly or indirectly, on the ground of his or her

(a) actual or supposed personal characteristics or circumstances, including ..... gender....."

...

All major human rights instruments establish standards for the protection of women, including a prohibition on any form of discrimination against them: e.g. the Convention on the Elimination of All Forms of Discrimination against Women.

These considerations add weight to the conclusion that the rule of practice should be abrogated, not only by reason of the fact that it represents an outmoded and fundamentally flawed view, but also by reason of the need to give full force and effect to the Constitutional principle of equality before the law. By reason of the Constitutional Provisions, s.3(3) of the Criminal Procedure Code would not require continued adherence to the former corroboration rule, even though it represented the practice in force in England at the time of the Code's commencement in 1944."[13]

19. *Balelala*[14] was mentioned as being of assistance by the Court of Appeal in the Solomon Islands in *Teikamata v R* [2007][15]. There the Court

[13] Ibid.
[14] Ibid.
[15] *Teikamata v R* [2007] SBCA 3

dismissed the appeal so did not make a finding as to whether the rule of practice should continue, stating that:

> *"Obviously in any criminal trial where the Court must decide the issue of guilt on an assessment of the credibility of the two principal witnesses, it will wish to look for corroboration of the complainant's evidence. If such corroboration does not exist then, as counsel for the appellant said, the court must be satisfied that the victim has told the truth to the court and must be satisfied beyond reasonable doubt of the guilt of the accused. Provided this approach is taken there seems to be a certain artificiality about requiring a Judge to give him or herself the warning presently required in the Solomon Islands particularly when, as here, criminal matters are tried before a Judge alone rather than before a Judge and Jury. Because we have in any case dismissed this appeal, it is not necessary for us to make a finding on whether the rule of practice should continue. If it is to be abolished it would be preferable that this be done by statute as has been the case in many other Commonwealth countries. If the issue is not dealt with in this way, then it may be necessary for this Court on a future occasion to directly address the question as to whether the rule should be abolished."*[16]

20. A rule of practice comes into being according to what is apposite and relevant at the time, often reflecting the social mores of the period. These rules of practice, however, are not cast in stone nor are they creatures of statute. This Court has the inherent authority to adjust, revoke or abolish the rules at its discretion as appropriate. A rule of practice that by its very nature is discriminatory and degrades a significant section of society has no a place in this Court.

21. The Court notes that there are a number of offences defined by the *Criminal Code* 1899 that have not benefitted from the revision and reform of our Pacific Neighbours and it would be helpful for the legislature to address those, and other matters, in relation to evidential requirements as outlined in the submissions by the *amicus curiae* and referred to in this judgment.

[16] Ibid.

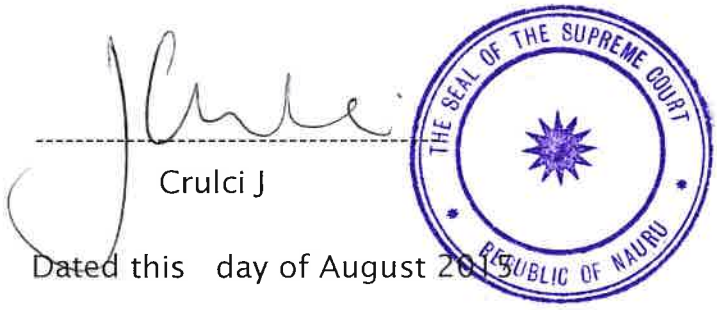
22. The Court has inherent powers to issue, amend and discard rules governing the Courts' practice and procedure as time and circumstance dictate. The matter to be determined by way of case stated is that of a rule of practice by this Court and not a law or statute, as such no repeal of the rule by the legislature is required.

23. The rule of practice requiring the giving of a corroboration warning relates to cases in this jurisdiction in which only a woman or girl can be the complainant. Thus to require a corroboration warning to be given in relation to these complainants only, is to discriminate against them on the basis of their sex. This offends against the tenet of section 3 of the Constitution.

24. Unless prescribed by statute (for example in matters of perjury or when dealing with accomplice evidence), the discretion remains with the judge seized of the matter to take notice that a warning is needed in relation to the question of the reliability of the evidence, if the circumstances of the particular case require it, to ensure a fair trial.

25. Accordingly the Court exercises its inherent powers to hold that henceforth 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.

26. This matter is returned to the District Court for determination under section 39 *Courts Act* 1972.



Crulci J

Dated this day of August 2015