



IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No.3 of 2020

BETWEEN

Republic

V

Angaion Amwano

Before: Chief Justice F.Jitoko

APPEARANCES:

Counsel for the Prosecution: R Jrn.Talasasa DPP
Counsel for the Accused: F.Akubor, Public Legal Defender's Office

Date of Hearing: 17, 18 June and 8 July 2020
Date of Submissions: 08 July 2020
Date of Judgment: 16 July 2020

Case may be cited as: Republic v Amwano

Catchwords: *Criminal law – Rape of child under 16 years old – section 116 Crimes Act – guilty plea – Indecent act in relation to a child under 16 years old- section 117 of the Crimes Act,- Indecent assault on a female- Section 350 of Criminal Code 1899- Filing of nolle prosequi- Circumstances- Whether prejudice to the defence.*

JUDGMENT

Introduction

1. The accused was initially charged with two counts of offences. The charge under count 1 is for rape contrary to section 116(a)(b)(ii) of the Crimes Act 2016 and the charge under count 2 is for indecent acts in relation to child under 16 years old. The accused was

produced before District Court on 28th February 2020 and Resident Magistrate transferred the matter to the Supreme Court on the same day.

2. The accused was granted bail by Khan, J on 3rd March 2020.
3. The complainant in this case was born on 2nd June 2006 and she is a child under 16 years old and in order to protect the identity of victim as per s.55(1)(b) of the Child Protection and Welfare Act 2016, the name of victim is hereby suppressed. She shall henceforth be referred to as MI or the complainant. At the time of offence MI was 14 year 8 months old.

Factual Background:

4. The matter was listed before Vaai, J. for hearing on 6th May 2020. However, the Director of Public Prosecutions on 6th May 2020 withdrew the charges for two counts as alleged in the information dated 16th April 2020. The DPP simultaneously on the same day filed fresh information alleging three counts against the accused person and he also filed a *nolle prosequi*. The DPP informed the court that the 3rd count alleged criminal offending that took place somewhere between 2010 and 2011 which was not in the information that was filed earlier. The particulars of charges in the fresh information filed by the DPP on 6th May 2020 are as follows:

Count 1

Statement of Offence

Rape: Contrary to section 116(a)(b)(ii) of Crimes Act 2016

Particular of Offence

Angaion Amwano on the 17th day of February 2020 at Nauru, intentionally engaged in sexual intercourse with one namely M.I a child under 16 years old, by inserting his finger in the vagina of the child M.I.

Count 2

Indecent Acts in relation to a child under 16 years old: Contrary to section 117(1)(a)(b)(c) of the Crimes Act 2016

Particular of Offence

Angaion Amwano on the 17th day of February 2020 at Nauru, intentionally touched one namely, M.I. a child under 16 years old, on her thigh and the touching was indecent and that he was reckless about the fact.

Count 3

Indecent Assault on Females: Contrary to section 350 of the Criminal Code 1899

Particulars of Offence

Angaion Amwano between the 1st January 2010 and the 31st December 2011 indecently assaulted one, namely, M.I. a girl by putting or rubbing his penis on her buttock or back area.

Relevant Law:

5. Charge under count 1 is for rape of a child under 16 years old which is defined under s.116 of the Crimes Act 2016 as follows;

“116 Rape of child under 16 years old

(1) A person commits an offence if:

(a) the person intentionally engages in sexual intercourse with another person; and

(b) the other person is a child under 16 years old.

Penalty:

*(i) if the child is under 13 years old or aggravating circumstances apply—
life imprisonment; or*

(ii) in any other case—25 years imprisonment.

(2)(inapplicable)

(3) Absolute liability applies to subsections (1)(b) and (2)(b).

Note for subsection (3)

Although absolute liability applies to the circumstance that the other person is under 16 years old (which means the defence of mistake of fact under section 45 is not available), other defences apply to an offence against this section: see section 127.”

6. Charge under count 2 is for Indecent acts in relation to child under 16 years old which is defined under S.117 of the Crimes Act 2016 as follows;

“117 Indecent acts in relation to child under 16 years old

- (1) A person commits an offence if:
 - (a) the person intentionally touches another person; and
 - (b) the touching is indecent and the person is reckless about that fact; and
 - (c) the other person is a child under 16 years old.

Penalty:

(i) if the child is under 13 years old or aggravating circumstances apply—15 years imprisonment; or

(ii) in any other case—12 years imprisonment.

(2)(inapplicable).

(3)(inapplicable).

(4) Absolute liability applies to subsections (1)(c), (2)(c) and (3)(c).

Note for subsection (4)

Although absolute liability applies to the circumstance that the other person is under 16 years old (which means the defence of mistake of fact under section 45 is not available), other defences apply to an offence against this section: see section 127.

(5) In this section:

'touching' includes the following:

- (a) touching with any part of the body;
- (b) touching a person through clothing or other material;
- (c) using an object to touch a person.

(6) The question whether touching or an act is indecent is one of fact to be determined by applying the standards of an ordinary person."

7. Charge under count 3 is for indecent assault on a female or girl defined under s.350 of Criminal Code 1899 as follows:

"350 Indecent Assault on Females

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."

8. **Sexual intercourse** is defined in section 8 of the Crimes Act 2016 as follows:

'sexual intercourse means:

- (a) the penetration, to any extent, of or by any part of a person's genitals with any part of the body of another person; or
- (b) the penetration, to any extent, of the anus of a person by any part of the body of another person; or

- (c) *the penetration, to any extent, of or by any part of a person's genitals by an object, carried out by another person; or*
- (d) *the penetration, to any extent, of the anus of a person by an object, carried out by another person; or*
- (e) *oral sex; or*
- (f) *the continuation of an activity covered by paragraphs (a) to (e).*

Procedural Facts:

9. The hearing of the case was held between 17 to 24th June of 2020.
10. The court ruled on 29 June 2020 on the interlocutory issue of the filing of the nolle prosequi by the DPP. It found that there was no prejudice to the defence with the filing *nolle prosequi* even though the new charges were filed together in old Criminal Case file 03/2020 that had been discontinued.
11. During the trial, the court enquired of the defence counsel the guilty plea entered by accused. Counsel reconfirmed that the accused person understood that he has entered guilty plea for rape and not for indecent act. The court also was assured by Counsel that the accused person understood the nature of the offence when he pleaded guilty to count 1, being the offence of rape contrary to section 116 (a)(b)(ii) of Crimes Act 2016.
12. The hearing took place on 17th and 18th June. Both Counsel confined their arguments only to the two counts namely count 2 and count 3 since the accused had already pleaded guilty to count 1 before Vaai J. on 15th May 2020. The Court nevertheless set the hearing of arguments on count 1 for 8th July 2020.

Prosecution Case as to Count 1

13. The accused pleaded guilty before Vaai,J on 15th May 2020 for charge of rape under count 1. However, the DPP was advised to file written submission to enlighten the Court regarding evidence present on the record to ascertain that the elements of offence for rape was present in the statement of the complainant. Prosecution relied on the statement of the complainant, MI who deposed that, on 17th February 2020, In the morning around 6am; the accused entered her room on the second occasion that morning and proceeded to pull down her pants. He then moved his right hand inside her panties and began to fondle her and finally inserted one of his fingers into her vagina. She was afraid to wake up and

see what he was doing. While elaborating on the incident, MI stated that *“he insert his finger on my private part and it was painful”*.

14. Prosecution further relied on the medical examination record and the statement of the mother to substantiate the offending by the accused person.

Prosecution Case as to Count 2

15. Prosecution examined MI, she testified on oath, that on 17th February 2020, at around 6 am in the morning, while she was sleeping alone in her room, she felt someone touching her outside her pants and rubbing gently on her inner thigh. She peeped to see who it was and saw and recognise that it was accused person who was rubbing her inner thighs and private part area. MI was afraid to make noise as she felt the accused may cause some harm to her. When she moved and opened her eyes, he ran out of the room.
16. MI was medically examined on 19th February 2020 at the RON hospital and a medical report was prepared and provided to the police by the Hospital.

MI's Evidence

17. MI in her examination in chief stated as follows:

DPP: Do you remember 17th February 2020?

MI: Yes, I remember.

DPP: What happened?

MI: While I was sleeping, somebody came in I did not see when the person came in. When the person came in, he touched my thighs, he was caressing my thighs, when I opened my eyes I saw him, when I moved he ran outside. Not long after he came back in, when he came back in, he was pulling on my pants and I was afraid to wake up and see what he's doing, not long he insert his finger on my private part and it was painful, not long I just move around a bit and he ran away again. He came back in again when he came back in he was peeping through the wall to the other next door, to see what his sister is doing or I don't know what. Then he went out again. Then I went to sleep and in the morning when I woke up, I told my mother.

Medical Report of MI

18. MI was examined in the emergency room around 5.20 pm. on 19 February at RON Hospital. Dr Makutu, the Paediatric Registrar, asked questions in Nauruan and was translated into English. The medical report states that MI said that the alleged incident took place on 18th February 2020 and she related the incident to her mother on same day

at 1 p.m. The mother of MI immediately reported the matter to police. After giving statement to the police around 4 p.m. they left the police station with the advice that they will be escorted to the hospital by police. They were advised to return home and wait for the police. The next day (19th February 2020), the police brought them to the Emergency Room for medical examination. Medical report of MI was produced by the prosecution and tendered as Exhibit D.

MI's Cross Examination

19. The defence counsel while cross examining MI, asked question to clarify the offending of accused to complete the chain of event. In particular, the defence counsel categorically asked in her cross examination from MI to clarify whether out of two visits that accused made to her bedroom, which visit did he touch her thigh and on which visit did he touch her private parts. MI in her cross examination stated as follows:

Defence Counsel: Ok. So again, I'll just repeat that question, or I'm, putting to you that question that this is what you told the medical examiners on the first occasion that Angaion came inside the room, he firstly went and touched your private area. You did not mention about touching your thigh?

MI: Sorry, can you, towe?

Defence Counsel: You told medical examiners that Angaion touched your private areas? You did not tell them about him touching your thighs?

MI: She just asked, so the, what I said came here as well, what I told them, because I didn't know they'll be here. The papers about what she said.

Defence Counsel: Yes they have been disclosed to us.

MI: I just make the story quick then because I wanted to go home.

20. To clarify the alleged incident, the Court put questions to complainant MI as to how many times the accused entered the room and when did he commit the alleged count 2 offences. MI responded that it was the first occasion when accused touched her inner thigh and caressed her thigh.

The court asked the following questions to MI:

Court: Thank you DPP. Ok, it's just, DPP or both counsel had asked you that there was three separate occasion right? That the accused had come into your bedroom, right?

MI: Yes

Court: Right. On the first one, he came and as the defence counsel has said, he came you were asleep but you then awoke when he started touching your thigh, correct? When you talk about your thighs, you were talking about the inside of your thighs, right?

MI: Inner thigh.

Court: Let's ask her when he pulled her pants down.

MI: That's the second time. When he was trying to pull down my pants, that's the second time.

Prosecution Case as to Count 3

21. The offending as to count 3 happened when MI was 4 or 5 years old.
22. Prosecution relied solely on the complainant, MI's evidence. MI stated in her evidence that the accused asked her to follow him away from the side of the room, to the bush near the house. After they reached the bush the accused told MI to take off her clothes. When she took off her clothes, he stood at her back and used his penis to caress her bottom. MI stated that she was not sure if her mother saw the accused however, she heard her called her name and when she went to her mother, she took her to the room. MI also stated that her mother was knocking accused father's door, but he did not open his door.
23. PW2, MI's mother, stated in her evidence that accused took her daughter to the bush, but she did not know what transpired between the accused and MI behind the bush. Prosecution also relied on record of interview conducted by interviewing Officer Senior Constable Valdon Dageago, and specifically under questions 34 through 36 where the accused did acknowledge that the incident did happen but a long time ago.

Closing Submission by Prosecution

24. DPP submitted in relation to count 1, that the victim MI's testimony was consistent with her statement recorded by the medical officer during her examination. DPP however

submitted that prosecution did not lead the evidence to prove the offence of rape since the accused had already pleaded guilty for this offending under count 1.

25. Prosecution submitted that there is no ambiguity regarding the date of offence since victim, in her evidence, deposed and gave evidence in Court that alleged offence took place on 17th February 2020. Further, the statement of the mother and as well as Senior Constable Kitty Biang's statement, also pointed out that the incident occurred on 17th February 2020. Prosecution also relied on additional documents such as First Information Report, and Motion of Remand and date and time of arrest mentioned in the Remand as confirmation that the alleged incident took place on 17th February 2020. Prosecution submitted that the entry of 18th February by the RON Hospital report as the date when the offence was committed could only have been a mistake or an error.
26. As regards count 2, prosecution submitted that MI confirmed her earlier statements when she gave oral evidence that the accused touched her inner thigh and caressed her thighs during his first visit to her bedroom, although the accused had denied it in his caution interview with the Police.
27. As to count 3, prosecution submitted that MI testified that accused used his penis to caress her backside. Prosecution also submitted that at time of incident MI would be around 4 or 5 years old which is consistent with particulars of the information. Prosecution also submitted that evidence of MI was supported by her mother that she confronted her brother (accused's father) about the incident that happened in the bush.
28. Finally, prosecution submitted for count 3 that accused acknowledged his offending in his police interview at questions 34 through 36 that such incident did take place.

Closing submission by Defence

29. Counsel for defence submitted that there is some discrepancy in the statement of MI made before the court versus her statement recorded by at RON Hospital by medical officer. Counsel submitted there is material inconsistency regarding the occasion when the offence of rape took place. The defence Counsel nevertheless conceded in agreement with the DPP that the complainant's evidence was not pursued on charge of rape since the accused had already pleaded guilty to count 1.

30. As to count 2, defence counsel again submitted that the testimony of MI is inconsistent with her statement given to the medical officer at RON Hospital. Defence counsel further submitted that MI stated in cross examination that she just made a story quickly because she wanted to leave.

31. Defence counsel also submitted that MI contradicted her story that she put before medical examiner by deviating from her previous version and produced a new story that it was her mother who gave the statement to the Hospital officials. In cross examination, when MI was questioned on it, she answered:

Defence Counsel: Just one final question. You also told the medical examiners that this was the first time that this type of incident happened to you.

MI: I think my mother was the one talking. Because she didn't know what happened before but I reminded her what happened before.

32. In relation to count 3, defence counsel submits that both PW1 (MI) and PW2 have given contradictory statements. MI testified that 9 -10 years ago after the incident happened, her mother knocked on the accused's father bedroom door but he did not open his door. However, PW2 testified that she confronted accused's father and had argument with him about the incident.

Consideration

Count 1

33. The accused has pleaded guilty to the charge of rape. The offence occurred during the accused's second visit to MI's room on the morning of 17th February, 2020 between 6am to 7am.

The accused upon arriving at MI's bedside, reached over and attempted to pull down her pants, slid his right hand inside her panties and began to fondle her. In the process the accused inserted one of his right hand fingers into her vagina. It was at this point, upon MI beginning to feel some pain from the insertion, that she stirred and moved her body, resulting in the accused bolting from the room.

34. The court accepts that under the new and expanded definition of "sexual intercourse" there is no longer any difference between penile and digital penetration for the purpose of the commission of the offence of rape under section 116. Sexual intercourse as defined under section 8 of the Crimes Act means:

"(a) the penetration to any extent, of or by any part of a person's genitals with any part of the body of another person..." [emphasis added]

What is commonly referred to nowadays is “*digital rape*” encompasses the penetration of a person’s genitals with the finger(s) of another person, that is, a part of the body of another person.

35. The clinical physical examination conducted by RON hospital’s Paediatric Registrar, Dr Angelique Makutu, and her report tended as Exhibit D, confirms that the complainant’s genitalia was undamaged, that is, the hymen remained intact; there was “no perianal tear or bleeding” ;and “no visible bruising around the labial minora and clitoris”.
- Notwithstanding the medical report, the accused is still guilty of the serious offence of rape as defined under section 116. The only mitigating factor so far under this charge is the accused’s admission of guilt on the first available opportunity, after having discussed the evidence and the law with his counsel.
36. The first of the so-called digital rape case under Nauru’s new expanded definition of “sexual intercourse” in section 8 of the Crimes Act 2016, was in ***The Republic v Olsson Crim. Case No.1 of 2017***. The court as per Khan ACJ, briefly discussed the new definition and its history and attempted to set out some sentencing guidelines for the future.

Count 2

37. Although there were some minor variations between the complainant’s statements and her evidence in court, given her age, it is almost inevitable that those variations are bound to happen. What is clear however is the consistency of her evidence on the details of what the accused did during his first of the three visits to her bedroom. In her evidence, she stated that the offence took place on 17th February 2020, when the accused touched her thigh and caressed her inner thigh during her first visit. MI is a minor, a girl of 14 years old, still she was consistent in describing her suffering of her pain and distress. Her evidence in court was consistent with her statement to the medical officials at her physical examination by Dr Makutu.
38. While the accused’s failure to give evidence cannot be held against him, the fact remains that the complainant’s story is credible and reasonable enough for the court to rely upon it to prove the essential elements of the offence by inference.

39. As to count 2, the prosecution has proved its case beyond all reasonable doubt.

Count 3

40. Offending of count 3 happened when MI was, according to the prosecution, just 4 or 5 years of age. Prosecution relied on the testimony of MI and her mother.

41. The complainant tells the story of being asked by the accused to accompany her to the bush next to their house, where she was told by the accused to take her clothes off. She did, and, was made to turn away from him whereupon she felt his penis rubbing against and around her "bottomside." They were disrupted when her mother called her, and she returned to her and was taken into their room by her mother.

42. However, when court put questions to PW2, the complainant's mother, her response was that MI told her who took her MI the bush, but no details was provided by MI. If no details were provided at the time of incident than it is not easy to verify that MI would be able to recollect correctly the offending after 10 years. The court also put some questions to the PW2, which are as follows:

PW2: She tell me that that one took her to the bush (pointing to the accused)..

Court: But no details?

PW2: No details.

Court: So why did you go to confront your brother? Right, you went to complain and argue with your brother? In room five it was in room five.

PW2: Because when he took my daughter.

Court: Right. So but you did not report this to police right?

PW2: No

Court: Why, why didn't you report it to the police?

PW2: I don't know. I have no clue.

Court: You didn't think it was serious enough?

PW2: Mm(affirmation).

Court: So, so which means, from what your daughter told you, did she tell you what happened?

PW2: No. She just told me that she came from the bush.

Court: So you just had bad feelings of what may have happened, but you didn't know any details of it?

PW2: Eh(affirmation)

43. Quiet clearly, the complainant's mother does not know or is not aware of the details of the alleged offence. She took umbrage at her daughter behind detained by the accused in

the bushes behind their house, but is unable to tell the court any details of what had transpired between the complainant and the accused.

44. Prosecution also relied on the interview of accused that was recorded by Senior Constable Derrick Deduna and Senior Constable Valdon Dageago. Both the witnesses stated in their depositions that accused admitted indecently assaulting MI when she was just a little girl and that was long ago about 18 years ago when they were young. Obviously, it is not possible that such act might have taken place 18 years ago as the complainant MI is only 15 years old.in June this year.
45. Although the accused in the caution interview is reported to have said that he had molested the complainant “long ago 18 years ago,” the fact is, the date was obviously not credible, given the complainant’s age. No attempt was made by the police and the prosecution to verify or clarify the discrepancy. It does question the reliability of the evidence on the offence that was alleged to have occurred some 10 years ago.
46. In the end, all the court can rely on is the complainant’s memory of some incident that was alleged to have happened some 10 years ago, when she was barely 4 or 5 years old. The court has however to remind itself too of the need to be cautious in assessing the reliability of evidence of an event that is alleged to have occurred 10 or more years ago, especially on the recollection and the memory of a child.
47. In any event, courts have been reluctant, except in the most unusual of circumstances, to allow evidence of early childhood, especially in child sexual abuse cases, normally referred to as accommodation syndrome evidence, or false memory syndrome, because of unreliability of early memories, unless the evidence are properly led by experts: ***R v C (1993) 60 SASR 467; R v H (JR) Child Amnesia [2000]1 Cr App R 195; Regina v JH, TG (Deceased) [2005] EWCA 1828.***
48. The benefit of the doubt given the evidence before the court must favour the accused. In all the circumstances, the court finds the accused not guilty of count 3 of indecent assault against a female or girl contrary to section 350 of the Criminal Code 1899 (First Schedule).

Conclusion

49. In consideration of the evidence placed before it, the Court is satisfied and makes the following findings in respect of the offences the accused had been charged:

- (i) The accused had pleaded guilty as to count 1 and his guilty plea is accepted for the charge of rape in relation to a child under 16 years old, contrary to section 116(a)(b) and(ii) of the Crimes Act.
- (ii) The accused is guilty as to count 2 for charge of indecent acts in relation to a child under 16 years old contrary to section 117(1)(a)(b)(c) of the Crimes Act.
- (iii) The accused is not guilty and is acquitted as to count 3 for charge of indecent assault on female contrary to section 350 of Criminal Code 1899.

50. Sentencing to follow submissions by Counsel.


Filimone Jitoko
Chief Justice



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