



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 16 of 2019

BETWEEN

Republic

V

Alwyn Hartman

Before: Khan, J
Date of Hearing: 26 and 27 February 2020
Date of Judgement: 4 March 2020

Case may be cited as: *Republic v Hartman*

CATCHWORDS: Criminal law – Charge indecent act – Whether something is indecent is a question of fact to be determined by the decider of the facts applying the standards of an ordinary person.

APPEARANCES:

Counsel for the Prosecution: R Talasasa Jr (DPP)
Counsel for the Accused: E Soriano

JUDGEMENT

INTRODUCTION

1. The accused is charged with the following offences:

Count One

Statement of Offence

Indecent acts in relation to a child under 16 years old; contrary to s.117(3)(a), (b), (c) and (i) of the Crimes Act 2016.

Particulars of Offence

Alwyn Hartman on 17 May 2019 intentionally did an act towards RH and the act was indecent and that Alwyn Hartman was reckless about that fact that RH was a child under 13 years old.

Count Two

Statement of Offence

Indecent acts in relation to a child under 16 years old; contrary to s.117(1)(a), (b), (c) and (i) of the Crimes Act 2016.

Particulars of Offence

Alwyn Hartman on an unknown date did between 1 January 2019 and 31 December 2019 intentionally touched another, namely, RH and the touching was indecent and Alwyn Hartman was reckless about that fact and that RH was a child under 13 years old.

Count Three

Statement of Offence

Indecent acts in relation to a child under 16 years old; contrary to s.117(1)(a), (b), (c) and (i) of the Crimes Act 2016.

Particulars of Offence

Alwyn Hartman on an unknown date did between 1 January 2019 and 31 December 2019 intentionally touched another, namely, RH and the touching was indecent and Alwyn Hartman was reckless about that fact and that RH was a child under 13 years old.

Count Four

Statement of Offence

Indecent acts in relation to a child under 16 years old; contrary to s.117(1)(a), (b), (c) and (i) of the Crimes Act 2016.

Particulars of Offence

Alwyn Hartman on an unknown date did between 1 January 2019 and 31 December 2019 intentionally touched another, namely, RH and the touching was indecent and Alwyn Hartman was reckless about that fact and that RH was a child under 13 years old.

2. In count one the charge states that the accused intentionally did an act ‘towards’ RH which was indecent; whereas counts two, three and four states that the accused intentionally ‘touched’ RH and the touching was indecent.

RELEVANT LAW

3. S.117 of the Crimes Act 2016 (the Act) states:

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) Not relevant
 - 3) A person (the defendant) commits an offence if:
 - a) the defendant intentionally does an act towards another person; and
 - b) the act is indecent and the person is reckless about that fact; and
 - c) the other person is a child under 16 years old.

Penalty:

- 1) if the child is under 13 years old or aggravating circumstances apply – 15 years imprisonment; or
 - 2) in any other case – 12 years imprisonment.
- 4) Absolute liability applies to subsections 1(c), 2(c) and 3(c).

Note for subsection (4)

Although absolute liability applies to the circumstances 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 another 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.

4. In all counts the word ‘reckless’ is used which is defined in s.19 of the Act as follows:

1) A person is ‘reckless’ about a matter if:

a) the person is aware of a substantial risk that:

- i) in the case of a circumstance – the circumstance exists or will exist; and
- ii) in the case of a result, the result will occur; and

b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.

2) The question whether taking a risk is unjustifiable is one of fact.

3) If recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that fault element for the offence.

FAULT ELEMENT

5. Fault element as mention in s.19(3) of the Act means as defined in s.16 of the Act as:

a) ‘fault element’ for a particular physical element may be:

- i) intention; or
- ii) knowledge; or
- iii) recklessness; or
- iv) recklessness indifference to consent; or
- v) negligence; or
- vi) another fault element specified in the written law that creates that offence.

6. The Minister for Justice Honourable David Adeang MP in the second reading of the Crimes Bill 2016 stated as follows on ‘recklessness’:

“Clause 19 explains that a person is reckless in relation to a result if the person is aware that there is a substantial risk that the result will happen, and having regard to the known circumstances, it is unjustifiable to take the risk. A person is reckless is relation to a circumstance if the person is aware that there is a substantial risk that the circumstance

exists or will exist, and having regard to the known circumstances, it is unjustifiable to take the risk.

Sub-clause (2) makes it clear that the question whether taking a risk is unjustifiable is a question to be determined by the decider of the fact on the evidence.

If 'recklessness' is a fault element for physical element of an offence, proof of 'intention', 'knowledge' or 'recklessness' will satisfy that fault element."

BACKGROUND

7. The complainant in this matter RH was born on 23 August 2008.
8. At the time of the incident on 17 May 2019 she was 10 years and 8 months old. I will refer to her parents as BH and DH to ensure that her identity is not revealed. Her parents married in 2005 and have 5 children and RH is the second eldest child and her 4 other siblings are boys.
9. At the time of the incident on 17 May 2019 RH and her parents were living in a 4-bedroom house together with RH's maternal grandmother who is the accused's sister. The house belongs to their mother Regina Douno. Two other families live in that house, namely, Donson and Donny family and there about 15 children altogether living in that house.
10. The house had an internal shower which is broken. All the occupants of the house now have their shower outside next to the water tank which is about 5 metres away from the house. The shower was built by BH and has a shower curtain which is closed when anyone takes a shower. The tap to the water tank is almost opposite to the entrance of the shower. BH and his family occupy one bedroom and they have built an extension, so they have two bedrooms.
11. The accused continued to live in the house until 20 September 2019 when he was charged for this matter and produced to the District Court and was remanded in custody. On 23 September 2019 the accused was released on bail and one of the bail conditions was that he resides in Anibare District.

PROSECUTION'S VERSION

12. On 17 May 2019 BH asked RH to fetch some water from the tank at around 5.20pm after he returned from work as he wanted to make some juice.
13. RH went to get the water in a container and she took rather long so BH went to check on her. He saw her facing the entrance to the shower and felt that she was peeping in the shower. He grabbed her by her hair and dragged her to the bedroom and wanted to smack her but his wife stopped him from doing so.
14. Later that evening BH and his family went to his mother's house which is also situated in Aiwo District behind the Orro Church to attend a family party.

15. BH spoke to RH at his mother's house and asked her as to what happened when she went to fetch the water. At first, she was reluctant to tell him and he assured her that he will not smack her. So, she told him that when she went to get the water the accused was in the shower. He opened the shower curtain and exposed himself and he was masturbating.
16. He asked her whether any other incident took place previously and she related some incidents to him.
17. The matter was reported to the police and the accused was initially charged with one count of indecent act on 17 May 2019. When the trial commenced the DPP filed three additional counts in relation to the earlier incidents in which prosecution alleged that the accused intentionally touched RH which was indecent. In the particulars of these offences it is alleged that the touching took place between 1 January 2019 and 31 December 2019 but as mentioned about the accused has not lived in the house since 20 September 2019 when he was charged for this offence.

RH'S VERSION

18. She states that she went to fetch water upon her father's request from the water tank. As she was filling the water, the accused opened the shower curtain and was facing her. He was naked and was masturbating (she demonstrated that he was moving his hand back and forth on his penis). He asked her where had she been and she told him that she had been to the Centennial Hall.
19. She also stated that he stuck his tongue out and flicked soap and water on her.
20. As she was watching him her father came and grabbed her by her hair and took her to their bedroom.
21. She also stated that while she was playing marbles with other children her marble rolled to the accused's door and she went to retrieve it and saw that the accused was facing her and the other children and was masturbating. She said he did not say anything to her.
22. She stated that whilst she and other children were playing hide and seek, she felt someone touch her genitals (vagina area) over her pants and she ran to the other children. She said that it was the accused who touched her on her genitals.
23. She stated that one day while she was playing games on her mobile phone the accused came and pulled her into his room and she screamed and yelled out and he released her when he heard the sound of a motor bike.
24. On another day she stated that he touched her buttocks as he walked past her.

CROSS EXAMINATION

25. In relation to the incident in the shower she was cross examined as follows:

Question: So, if someone is having a shower it will not be right to open it?

Answer: Yes.
Question: Will it be fair to say that when Alwyn opened the curtain as you say, the curtain would fall back?
Answer: Yes.
Question: You demonstrated in Court Alwyn's hand action?
Answer: Yes.
Question: Were you sure that Alwyn was doing that when all he was doing was cleaning himself?
Answer: No he was moving his hand on his penis.
Question: How do you know Alwyn was masturbating?
Answer: Because he was looking at me whilst he was doing it.

26. She was asked what does 'kema' mean and her response was peeping and she was asked that whatever the accused was doing she was peeping and she disagreed.
27. In relation to the touching on her genitals, she felt someone touched her and she immediately ran to the other children. She did not look back to see who touched her.
28. In relation to the incident of pulling her into his room while she was playing games on her mobile phone, RH said that she saw it was the accused. It was late in the afternoon early evening. She said her parents' room is air-conditioned and she screamed in the lounge area and no one responded to her screaming.
29. In relation to the touching on her buttocks, RH said that the accused touched her buttocks as he walked from his bedroom to go outside.
30. She said that she was not aware if her parents and the accused had ever had any quarrel.

BH'S EVIDENCE AND CROSS EXAMINATION

31. I stated BH's version at paragraph 15 and in his cross examination he was asked to describe the words that RH had said to him at his mother's house and he stated:

'She said that when she went to fetch the water the curtain then opened she turned around to look and there was Alwyn masturbating. I asked her how and she showed her hand motion to demonstrated (back and forth).

RECORD OF INTERVIEW

32. The accused was interviewed by the police on 21 May 2019 and the allegation of 17 May 2019 was put to him first. He was asked whether he wanted to consult a lawyer and he said he did, so the interview was suspended. After he consulted his lawyer the interview recommenced and the allegation of 17 May 2019 was put to him once again in question and answer form. The interview proceeded as follows:

Question 21: It is alleged that you masturbated your penis in front of RH several times. What can you say?

Answer: No comment.

Question 22: It is alleged that you repeatedly masturbated your penis and moved your tongue in and out of your mouth. What can you say?

Answer: No comment.

Question 23: It is alleged that one time (couldn't recall the exact date) you are standing outside your room only wearing underwear and you were watching RH and then you pulled out your penis and masturbated. Do you agree or what can you say?

Answer: No comment.

Question 24: It is alleged that at another time in the evening 5pm or 6pm onwards, RH was alone in the lounge area playing games on her phone, where you grabbed her from her side and dragged her into your room, and when she screamed you let her go. Do you agree or what can you say?

Answer: No comment.

Question 25: It is alleged that when you were dragging RH towards your room you heard a motorcycle arrived, where you let her go. Do you agree or what can you say?

Answer: No comment.

Question 26: It is alleged that one other time, RH was playing hide and seek with other kids where she stood beside the door next to your room, and then you touched her on the front of her vagina, do you agree or what can you say?

Answer: No comment.

Question 27: It is alleged that what your intentions when you were touching on front of her vagina, what can you say?

Answer: I don't touch her vagina.

Question 28: It is alleged there is another time at evening 5 or 6pm RH was standing next to the wall near to your room, and you walk out from your room and then you quickly grabbed her buttock and you continue your way. Do you agree or what can you say?

Answer: No comment.

ACCUSED'S EVIDENCE

33. The accused elected to give sworn evidence and he stated that in relation to the incident on 17 May 2019 RH opened the shower curtain while he was in the shower. He asked her to close the shower curtain and after some time she opened it again.

34. He said that after she closed the shower curtain her father came and took her away.
35. In relation to other incidents he was asked:

Question: In relation to the incidents did anything take place?
Answer: Not that I remember.

36. He admitted that he was questioned about the other incidents and his response was 'no comment'. He was asked by his counsel as to why did he give the answer 'no comment' and he said that he did so as he did not do anything.

CROSS EXAMINATION

37. In his cross examination he was asked whether he told RH's parents about her opening the shower curtain whilst he was in the shower and his response was the he did not tell anyone right then but he had a confrontation with her parents and that's when he asked her as to why did she open the shower curtain.

38. The cross examination continued as follows:

Question: What did he say to you?
Answer: He told me about the things his daughter told him and I told him I've never done anything. I told him his daughter opened the shower curtain whilst I was in the shower and then the girl said she never opened the curtain.

39. He denied that he masturbated in the presence of RH and also denied the splashing the soap on her and also denied all other incidents.

CONSIDERATION

40. This is a very unusual case, in that, the defence failed to put its case to RH and her father which is a clear breach of the rule in *Browne v Dunn*¹.
41. It was never suggested to RH that she opened the shower curtain in her cross examination nor was it suggested to her that all other incidents that she related ever took place.
42. It was not suggested to BH that the accused had a confrontation with him about RH opening the shower curtain immediately after he finished his shower. BH's evidence was that he left with his entire family for his mother's house immediately after the incident and he asked RH at his mother's house as to what happened in the shower.
43. In relation to rule in *Browne v Dunn* it is stated in Victorian Trial Manual at page 981, paragraph 18.305 as follows:

¹ (1893) 6 R 57

“The rule of natural justice, now known as rule in *Browne v Dunn* (1893) 6 R 67, antedated that case but derives its most authoritative statement from the speech of Lord Herschell who said at [70] – [71]:

Now, My Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it as another matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that this is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross examination of witnesses, it has been complained of as undue; but it seems to me that a cross examination of a witness which errs in the direction of excess may far more fair to him than to leave him without cross examination, and afterwards to suggest that he is not a witness of truth. I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there being no suggestion whatever in the cause of the case that his story is not accepted.”

In Victoria a convenient starting point for any discussion of the rule in *Browne v Dunn* is the judgement of Newton J in *Bullstrodt v Trimble* [1970] VR840. His Honour said at [864]:

... In the cross examination of a witness “any matter upon which it is proposed to contradict the evidence-in-chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence-in-chief”.

INDECENT TOUCHING OR ACT

44. The word ‘indecent’ has not been defined in s.117 of the Act and it is stated in s.117(6) that:

“The question whether touching or an act is indecent is one of fact to be determined by applying the standards of an ordinary person.”

The Minister for Justice the Honourable Adeang stated in the second reading of the Crimes Bill as follows:

“Whether something is indecent is a question of fact to be determined by the decider of fact applying the standards of an ordinary person.”

45. In cases where the Court sits with jury – the jury decides the facts applying the standards of an ordinary person. In Nauru criminal trials in the Supreme Court is by a judge alone - see s.188 of the Criminal Procedure Act 1972.

46. In *Peters v The Queen*² a case which dealt with dishonesty it was stated by the High Court as follows:

“Where it is necessary to decide whether an act is dishonest, the judge should identify the knowledge, belief or intent said to render it dishonest and instruct the jury to decide whether the accused had that knowledge, belief or intent, unless the word ‘dishonest’ is used in a special sense in the legislation creating the offence, instruct them that, if they decide that he did, they have to determine whether, on that account, the act was dishonest based on the standards of ordinary, decent people.”

47. The elements of this offence are set out at page 2 of the written submissions filed by the Director of Public Prosecution where it is stated as follows at [6]:

“What the prosecution has to prove beyond reasonable doubt are:

1) Counts two, three and four:

- a) a person;
- b) intentionally touching a child;
- c) the touching is indecent;
- d) the person is reckless about the indecent touching;
- e) the child is under 16 years.

2) Count one:

- a) Person;
- b) Intentionally does an act towards a child;
- c) The act is indecent;
- d) The person is reckless about the indecent act;
- e) The child is under 16 years old.

48. The identity of the accused is not in issue and RH is under 16 years of age. What is in issue is whether the accused ‘intentionally’ touched or did the ‘act’ towards RH.

49. In *R v Court*³ it was stated by the House of Lords at page 228 as follows:

“It cannot, in my judgement, have been the intention of Parliament that an assault can, by a mere mistake or mischance, be converted into an indecent assault, with all the opprobrium which a conviction for such an offence carries. To take one of the less imaginative

² [1998] 192 CLR 493

³ [1988] 2 ALL ER 221

examples discussed in the course of the arguments, it may be a common occurrence during travel on London Tube during rush hours for a person to suddenly realise belatedly that the train has stopped at the very station where he wishes to alight, without his having taken the wise precaution of getting closer to its doors. Such a person may well in his anxiety to get out, rather than be carried on to the next stop, use unnecessary force in pushing his way through his fellow passengers. If he thus came into contact with a woman, then he would be guilty of having assaulted her. If something that he was carrying, such an umbrella, became caught up, as it might well do, in her dress as he pushed past, thus tearing away her upper clothing, he would in my judgement be guilty only of an assault. He would not be guilty of an indecent assault. The contrary result would appear to be possible if the Court of Appeal's test was applied. It would certainly follow, if the submission made in their cases by counsel both for the appellant and prosecution were right, that to establish the mental element in the offence of indecent assault no more need to be established than for common assault."

50. It was stated in *R v Court* at page 225 as follows:

"The judge having heard submissions by counsel directed the jury that the prosecution had to prove firstly that the appellant's conduct was such that 'it would appear to an ordinary observer as an affront to modesty'; 'conduct which contravened right-thinking people's ideas of standards of decent behaviour' and secondly that the appellant had 'an indecent intention in doing what he did'."

STANDARDS OF ORDINARY PERSON

51. In *R v Court* it was stated at page 230:

"The assault which the prosecution seeks to establish may be of a kind which is inherently indecent. The accused removes, against her will, a woman's clothing. Such a case, to my mind raises no problem. Those very fact, devoid of any explanation, would give rise to the irresistible inference that the accused intended to assault his victim in a manner which a right-minded person would clearly think was indecent. Whether he did so for his own personal sexual gratification or because, being a misogynist, or for some other reason, he wished to embarrass or humiliate his victim seems to me to be irrelevant. He has failed, ex hypothesi, to show any lawful justification for his indecent conduct. This, of course, was not such a case. The conduct of the appellant in assaulting the girl by spanking her was only capable of being an indecent assault. To decide whether or not right-minded person might think that the assault was indecent, the following factors were clearly relevant: the relationship of the accused to his victim (were they relative, friends or virtually complete strangers?), how had the accused come to embark on this conduct and why was he behaving in this way? Aided by such material, a jury would be helped to determine the quality of the act, the true nature of the assault and to answer the vital question; were they sure that the accused not only intended to commit an assault on the girl, but an assault which was indecent; was such an inference irresistible?"

52. According to RH she hardly spoke to the accused and never played with him, although they lived under the same roof. There were times when accused will tell stories to RH and other kids when they were together. She said he is a kind man but on some days he is angry.

WHETHER THE CHARGE IS DEFECTIVE

53. Mr Soriano submitted the charge refers to the date 1 January 2019 to 31 December 2019 and that the accused was interviewed by the police on 18 May 2019. He further submitted that it was not possible for the accused to have committed the offence after 18 May 2019. It is true that the accused was interviewed on 18 May 2019 but remained in the house until he was produced before the District Court on 20 September 2019.
54. Although counts three and four states that the touching was between 1 January 2019 to 31 December 2019 the evidence in this case is very clear right from the time when the accused was interviewed by the police as well as the evidence of RH that those incidents took place before 17 May 2019 and thus the accused cannot be prejudiced by the dates stated in the charge. Having said that, the Director of Public Prosecutions should have been more careful in drafting the charge in regards to the dates.
55. There was some confusion as to what incidents did counts two, three and four relate to and the DPP in his submission clarified that count two referred to the touching of the genitals, count three related to the grabbing of RH and taking her to the room and count four about touching the buttocks. In my view the DPP should have been more careful in the description of the incident and in that regard, I refer to s.93, ss(f) of the Criminal Procedure Act 1972 where it is stated:

“General Rule as to the description:

Subject to any other provisions of this section, it shall be sufficient to describe any place, time, thing, matter, act or omission whatsoever to which it is necessary to refer in any charge or information in ordinary language in such a manner as to indicate with reasonable clarity the place, time, thing, matter, act or omission referred to (emphasis added).

CONCLUSION

56. There is no dispute as to the identity of the accused in relation to count one, three and four. RH in her evidence-in-chief stated that the accused touched her genitals (count two) but later in her cross examination she stated that she did not see the person who touched her, therefore, there is no identity of the person and I acquit the accused on count two.
57. In relation to count one there is undisputed evidence that the accused opened the shower curtain and exposed himself while he was masturbating, he was reckless as to the consequences of doing that. Doing this trial alone, as a judge but in my capacity as the decider of the fact and applying the standards of an ordinary person I am satisfied that the act of masturbating was indecent. I am therefore satisfied that the prosecution has proved its case beyond all reasonable doubt and I find the accused guilty of count one.
58. In relation to counts three and four carrying RH into his room and also touching her buttocks (respectively) I am satisfied that the prosecution has proved that it was the accused who touched RH and he was reckless as to the consequences of his acts. In my capacity as the decider of the fact and applying the standards of an ordinary person I am satisfied that the act of carrying RH into his room and touching her buttocks was indecent.

I am therefore satisfied that the prosecution has proved its case beyond all reasonable doubt on counts Three and Four and I find the accused guilty of those counts.

DATED this 4 day of March 2020



Mohammed Shafiullah Khan
Judge

