IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 23 of 2020

BETWEEN

REPUBLIC

AND

ERJ

Defendant

Before :	Fatiaki CJ.
Date of Hearing :	15, 16, 17, 22 March, 29 April, 3 , 4 & 6 May, 2021
Date of Verdict :	25 June, 2021
CITATION :	*Republic v ERJ*
CATCHWORDS :	Rape of child under 16 years ; meaning of "*...wished to consent to the relevant conduct*"
LEGISLATION :	ss. 25, 105, 116 & 126 Crimes Act 2016 ; s. 127(2)&(3) and 27(1)(b) Crimes Act 2016 (defence) ; s.135 Penal Code (Kiribati) ; s 176 Criminal Procedure (Amendment) Act 2020
CASES REFERRED TO :	Republic v Bwaibwa (2018) KIHC 32 ; Naulumosi v The State (2018) FJSC 27 ; DPP v Sugden (2018) EWHC 544 ; Kalo v Public Prosecutor (2020) VUCA 39 ; A-G's Reference No.3 (1979) 69 Cr.App.R 411 ; Raymond Langford v R (1974) 20 FLR 11 ; Mohini Lata v The State (2000) FJHC 108 ; R v Britton (1987) 2 All ER 412; R v Virgo (1978) 67 Cr. App R 323
APPEARANCES:	
Counsel for the Prosecution :	R.Talasasa DPP
Counsel for the Defendant :	R.Tagivakatini, PLD

VERDICT

INTRODUCTION

1. In this case the defendant (**ERJ**) a minor under 16 years of age, is charged with allegedly raping the complainant (**ART**) a girl under 16 years of age, on the night of 16 November 2020 in an old abandoned Clubhouse situated at the Oval playing field in Aiwo District.

THE CHARGE AND ELEMENTS

2. The Information filed by the DPP charged ERJ with an offence of Rape of Child under 16 years old. The particulars averred :

   "*ERJ on the 16th of November 2020 at Nauru, intentionally engaged in sexual intercourse with a girl namely (ART) a child under 16 years old.*"

3. Notable by its absence in s.116, is any mention that the offence occurred without the complainant's "*consent*" as required in an offence of Rape contrary to s.105, neither is the term used in the "*particulars of offence*" provided under s.116(1)(a)&(b) of the Crimes Act 2016. This omission is reinforced by s.126 which expressly states :

   "***consent is not a defence to an offence under this Division***".

4. The ingredients of the offence under s.116 (1)(a)&(b) are :

   (1) The defendant ERJ ;
   (2) Intentionally engaged in sexual intercourse with ART ;
   (3) ART is a child under 16 years of age.

   Subsection (3) of s.116 of the Crimes Act 2016 provides that :

   "*Absolute liability applies to subsection 1(b)...*"

   and the Note for subsection(3) relevantly states (consistent with s. 24 of the Crimes Act 2016) that :

   "*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 the section: see section 127*"

5. For completeness, s.127 which interalia applies to an offence against s.116, recognizes two (2) specific defences to a charge under the section, in the following terms :

   "***127 Defences for certain offences under Division 7.3***

   (1) This section applies to an offence against section 116, ... if:

   (a) the person in relation to whom the offence was committed was at least 13 years old; and
   (b) none of the aggravating circumstances mentioned in section 102(1) apply to the offence.

(2) It is a defence to a prosecution for the offence if the defendant proves that:

(a) the defendant:

(i) took reasonable steps to determine the age of the other person; and

(ii) honestly believed on reasonable grounds that the other person was 16 years old or older; and

(b) the other person wished to consent to the relevant conduct.

(3) ***It is also a defence to a prosecution for the offence if the defendant proves that at the time of the alleged offence:***

(a) the defendant was within 2 years of age of the other person; and
(b) the other person wished to consent to the relevant conduct.

(4) In this section:

'relevant conduct', in relation to an offence, means the conduct making up the physical elements of the offence."

(my highlighting)

6. It is clear from the wording of subsections (2) & (3) that the defendant has an evidential burden to establish the requirements in both subsections. In the present case the defendant (ERJ) relies on subsection (3) which requires him to prove two (2) elements:

(a) That he is "*within 2 years of age*" of the complainant (ART) ; and
(b) "*the other person* (ART) *wished to consent to the relevant conduct.*"

7. As to the first element, that is established beyond any doubt in my view, by a comparison of the defendant's and complainant's birth dates namely : **7 June 2004** (ERJ) and **5 December 2004** (ART) which means there is a mere age difference of 6 months between them. Furthermore, subsection (3) in contrast to subsection (2), refers to "*...the alleged offence*". Whatsmore, the defence in subsection (3) is only available to a child such as ERJ.

8. The second element which is rather "*curiously worded*" in the past tense, is not easily understood or proved. In so far as the italicised phrase refers to the complainant's mental state or "*wish*" it can only be a matter of inference from her actions and utterances before, during, and after the physical act to which she "*wished to consent...*" (**not** had consented).

9. My researches in the **Paclii** website has uncovered an identical provision in s.135 of the Penal Code of Kiribati which was considered in the case of Republic v Bwaibwa [2018] KIHC 32 where Lambourne J said in dealing with the phrase "*wished to consent*" (at para 35) :

"*The complainant cannot, in law, consent to sexual intercourse– the question is whether I can be satisfied, on the balance of probabilities, that she was a willing participant.*"

10. Then in considering the complainant's credibility he said (at paras 36 to 38):

> *The complainant's version of events was consistent throughout her evidence. However, I found it odd that she made no effort to wake her parents at the point when she was dragged from the hut. Ordinarily, one might expect a person in such circumstances to cry out, even from surprise. The complainant's parents and siblings were sleeping so close by that they could not have failed to hear her.*
>
> *There is nothing to corroborate her testimony. While I acknowledge that there is no legal requirement for corroboration, none of the indicators that might support an absence of consent (such as defensive injuries) are present. When* .....(an eye witness saw the accused with the complainant), *saw no signs that the complainant was being led away against her will. The recent complaint to her mother* (was)..... *only made in response to threats from the complainant's father. I cannot accept that as being of any assistance to the prosecution.*
>
> *Furthermore, I accept the evidence of the accused's sister that there had been prior occasions where the accused and the complainant were intimate, despite the complainant's denials. Given the complainant's admitted fear of receiving a beating at the hands of her father, it is perhaps unsurprising that she would claim that she had not gone with the accused willingly. Of the competing versions given by the complainant and the accused as to the encounter on the beach, I prefer the evidence of the accused. On balance, I am satisfied that the complainant was a willing participant in the sexual intercourse."*

11. In construing this uncommon phrase "*....wished to consent....*", I am also assisted by the Cambridge Dictionary of English which explains one use of "*wish*" as a verb can mean a sense of regret or to feel sorry about a particular action in the past. In this latter regard, if one is regretting in the present what has happened in the past then one would say : "*I wish...*" for **eg**., "*I wish he had told me he wasn't coming today because I wouldn't have come if I'd known.*" Conversely, if one has regretted something in the past then one would say: "*I wished....*(I had said and done differently)."

12. In the present context using the statutory phrase, ERJ would have to establish on a balance of probabilities that ART "*wished to consent*" to sexual intercourse with him at the relevant time even though consent is not a defence to the charge. In other words, ERJ need not prove actual consent as defined in s.9 of the Crimes Act 2016, besides, ART does not have the legal capacity to give such "*consent*" to sexual intercourse even if she wished to. I also construe this second element subjectively according to ERJ's perspective and burden.

13. In my view given that the term used in s.127(3)(b) is not "*consented*", but, "*...wished to consent*" , in order to establish the defence on a balance of probabilities, the defendant would need to establish not actual consent on the complainants part, but, an honest and reasonably held belief, that the complainant (ART) wanted to have sexual intercourse with him, or at the very least, ERJ must raise a reasonable doubt as to the existence or presence of the "*wish*" or willingness on the complainant's part to participate in the relevant act.

THE PROSECUTION CASE

14. Begins with the complainant (ART) returning home at about 7 pm after playing basketball at the Aiwo Courts. She was greeted by the defendant (ERJ) and his friend Myson Adeang (MA) on the Aiwo bridge. They invited her to accompany them to an old abandoned Clubhouse nearby to talk. She agreed and the three(3) went to the Clubhouse to an open entrance doorway facing towards the unlit Oval playing field where they started conversing.

15. During the course of the conversation ERJ, who was "*an ex-boyfriend*" of ART, asked her (in Nauruan) :

"***Q:*** "*When can we meet up again?*"

and she replied :

"***A*** : *Next year*" ;

to which ERJ retorted :

"***Q:*** *Why wait for next year, why not tonight?*"

Although not doubted in cross examination or addressed in counsels' closing submissions, the use of the word "*again*" in the above exchange is confirmed by the defendant ERJ (at para 47) and by the complainant's aunt to whom she made her initial complaint.

16. Feeling uncomfortable, the complainant ran to a larger second entrance doorway facing towards the Oval playing field and continued out onto a side lane heading towards the main road, where she was pursued and restrained by ERJ who pulled her by the hair and brought her back into the bathroom area of the Clubhouse.

17. At the bathroom area, after several attempts, including a threat of destroying the complainant's clothing so she would "*...go home naked* ", ERJ slammed her onto the dirt floor, and managed to remove the complainant's short jeans and underpants. At this point, MA entered the bathroom and ERJ chased him out. He then lifted the complainant onto the sink area and penetrated his penis into ART's vagina "*until he finished*". Then ERJ got dressed and left the bathroom.

18. The complainant quickly dressed herself and as she was leaving the bathroom area, MA pulled her by the hair and asked her to forgive ERJ. Then MA asked ART to kiss him. She declined and he persisted asking her several times for sex but she refused and told him she wanted to go home. To his credit, MA let ART go after telling her not to tell anyone about what happened.

19. ART made her way home dishevelled, dirty and crying. On the way she changed her mind and went instead, to her aunt's house because she "*..was scared of* (her) *father*" who has a "*short temper*". On meeting her aunt, ART tearfully told her that she had been raped. Although she did not want to report it to the police, her aunt insisted and ART eventually agreed. The matter was then reported to the police who later came and took ART to the hospital where she was medically examined and then taken to the Police Station to have her statement recorded. It was all finished by about 6am the following morning.

20. During her examination-in-chief, the complainant (ART) was able to point out various features on a sketch plan of the abandoned Clubhouse where the incident took place as well as mark with a blue 'X' on the sketch plan, the place on the lane beside the Clubhouse where she claims ERJ caught up with her while she was running away, before the alleged incident occurred.

21. On at least two(2) occasions during ART's evidence-in-chief she had to be reminded to hold her head up and speak clearly to the interpreter and, at one stage the DPP was constrained to ask the complainant ;

*"**Q**: I notice you smile and laugh during questioning at times or facing down, why did you do that?"*

to which she retorted :

*"**A**: Because I don't understand your question sometime and words you talk about and some of the things you ask are not correct so I need an interpreter."*

and then :

*"**Q**: Is it normal for Nauruan young person to smile when asked serious questions?*

A : I don't know."

22. Be that as it may, ART confirmed that her female friends talk explicitly about male genitalia and she knows that *"rape"* means forcing someone to have sex with you. In cross-examination ART frankly admitted to ERJ asking to have sex with her while they were chatting at the abandoned Clubhouse and her reply : *"next year"* could be interpreted as a *"deferred yes"*. That was certainly how ERJ understood ART's reply and may be contrasted with her clear negative replies to MA's advances as she was leaving the bathroom area after the alleged incident with ERJ had occurred.

23. In cross-examination, she maintained that she had not agreed to ERJ having sexual intercourse with her and that she had unsuccessfully resisted his initial attempts at undressing her. She also maintained that it was ERJ (**not** MA) who had chased and caught her in the lane outside the Clubhouse as she was running away. She also confirmed what MA had said and asked her as she was leaving the bathroom area inside the Clubhouse after the incident. She also admitted that fear of her father caused her to divert to her aunt's place.

24. To the Court's questions, ART agreed that she wasn't forced or threatened to go with ERJ and MA to chat at the abandoned Clubhouse which was a short distance away from the Aiwo bridge where they first met. She agreed a *"boy-friend"* was special from other boys and she understood ERJ's question about *"meeting-up"* meant : *"when can we have sex?"* and her answer to ERJ : *"next year"* meant: *"lets have sex next year"*.

25. She also maintained that she struggled and resisted in the bathroom when ERJ was trying to undress her and that ERJ had : *"pushed her against a concrete wall and slammed her onto the dirt floor and lifted her up onto a sink."* However, she was unable to explain why it was,

that she had no "*bruises, cuts or scratches*" to her "*back, buttocks, elbows and arms*". In this latter regard, even ART's aunt to whom she first reported the incident and who is a trained health worker confirmed that she saw no bruises on ART despite "*...looking for it*".

THE MEDICAL REPORT

26. This is a convenient juncture to deal with the prosecution's medical evidence which is comprised of the oral testimony of Dr. Alali Omaranger Alali who testified with the assistance of an "*aide-memoire*" which was the contemporaneous Medical Report he prepared after examining ART at the RON Hospital on 16 November 2020 from 11.30 pm until 12.30 am on 17 November 2020.

27. The doctor testified on initial examination that ART was crying in distress but no abnormalities were seen. He did a vaginal examination of ART and his findings were :

"*Normal vulva, vagina.*
Nil laceration, tear or bleeding.
Hymen not seen.
Cream-coloured seromucoid secretion seen in the labia minora and vaginal vault".

28. He also took a high vaginal swab for microscopic examination and testing and the results were:

"*largely negative for HIV, Hep B&C and Chlamydia, however microscopic examination of the high vaginal swab showed motile* (active) *sperm cells which he had observed himself. (ART) also had trichomonas vaginalis*".

29. Although ART's prognosis was "*favourable*" he recommended emotional support and post trauma counselling as well as a follow-up pregnancy test to verify the negative result at the time of examination.

30. The doctor's summary and conclusions based on his examination and laboratory findings is:

"*...suggestive of recent vaginal penetration with background bacterial vaginosis*"

based upon the existence of active sperm cells which had a short life-span of "*6 to 8 hours*". On refreshing himself from the vaginal drawing at p11 of the report, the Doctor indicated where the cream coloured seromucoid secretion was noted. He also described how the absence of the hymen :

"*...depicts that was not her first sexual experience otherwise we would see ragged edges of the membrane. In other-words the patient (ART) had sexual experience prior to the current penetration.*"

31. After the doctor's examination-in-chief the DPP sought to tender his Medical Report as an exhibit, however at defence counsel's request, the report was marked for identification [**MFI-P(1)**]. In cross-examination, the doctor reconfirmed that he "*saw no laceration or bleeding*" in the complainant's vagina.

32. At the close of the prosecution case, the DPP again sought to mark the doctor's Medical Report as an exhibit. As this was a long-standing "*practice*" that was being doubted, the Court ordered written submissions on the question:

"***Whether the prosecution can tender the Medical Report after the Doctor's oral testimony***?"

I am grateful for counsels' submissions.

33. The DPP referred to the provisions of s.25 of the Crimes Act 2016 which imposes the "*legal burden of proof*" on the prosecution to establish each element of the offence to the standard of proof "*beyond reasonable doubt*" and submits that:

> "*It is incumbent upon the prosecution to adduce evidence that is relevant and admissible to support its case. That includes the tendering of documentary evidence as per section 25 of the Crimes Act of 2016.*
>
> *We respectfully submit that the Medical Report is a document that contains information relative to the examination findings of the Doctor and it is crucial that we tender the report in order for the prosecution to prove its case beyond reasonable doubt. It has been identified and confirmed by the Doctor as his report when he gave evidence in court, thus it should, with respect be tendered as part of the prosecution exhibit.*"

34. Defence counsel for his part, refers to the provisions of s.176 of the Criminal Procedure (Amendment) Act 2020 and the decision in Kalo v Public Prosecutor [2020] VUCA 39 where the Vanuatu Court of Appeal dismissed a ground of appeal relating to the admissibility of a medical certificate as having : "*...**no substance as the Doctor in fact attended at the Supreme Court hearing and gave oral evidence**. In any event the point would be covered by section 86 of the Criminal Procedure Code*" which permits the use of a Medical Report as evidence in any trial.

(my highlighting)

35. Reference was also made to the case of Naulumosi v The State (2018) FJSC 27 where the Supreme Court of Fiji referred inter alia to the provisions of s.133 of the Criminal Procedure Act which is in similar terms to our s.176 in that it permits Medical Reports to be produced in evidence without the maker of the report being called as a witness provided certain notification pre-conditions are satisfied.

36. Despite recognising that one of the pre-conditions under s.176 to the tendering of a Medical Report is that : "*...the maker can be excused from attending court*" (which was not what occurred in the present case) counsel nevertheless concluded : "*.....the medical report can be tendered in as an exhibit.*" I disagree.

37. Firstly, the DPP has neither referred to nor invoked the provisions of s.176 which is undoubtedly an exception to the hearsay rule enacted for the benefit of the "*prosecution*", and which provides for the "*tender as exhibits in a trial*" of a medical report "*....without requiring the maker....to personally appear in court to testify.*" Clearly, the section has no

application where the doctor is in fact called and has personally appeared and testified in Court.

38. Secondly and here both counsels appear to have ignored the purpose and use of the Medical Report during the course of the doctor's evidence and that is as an "*aide-memoire*" or a memory refreshing document to which well-settled rules and principles apply.

39. In this latter regard, in DPP v Sugden (2018) EWHC 544 Mr. Justice Kerr in discussing the law on "*refreshing memory*" said at paras 5ff:

"*at common law, refreshing the memory by a witness of his or her memory from a document has long been permitted :.....*

The evidential status of documents used to refresh a witnesses' memory varies from case to case, depending on the scope of cross-examination on the document, if the opposing party calls for it and inspects it ;..... ***A document does not become evidence in the case merely by being relied on by the witness during evidence in chief , ... for purpose of refreshing the witness memory.***"

(my highlighting)

and later at para 9, his Lordship sets out Lord Widgery CJ's approval of the formulation of the rule in A-G's Reference No.3 (1979) 69 Cr.App.R 411 when the Lord Chief Justice said at p 414 :

"*The rule may be stated as follows : a witness may refresh his memory by reference to any writing made or verified by himself construing and contemporaneously with the facts to which he testifies. Contemporaneously is a somewhat misleading word in the context of the memory refreshing rule.* ***It is sufficient, for the purposes of the rule, if the writing was made or verified at a time when the facts were still fresh in the witness's memory***".

(my highlighting)

40. More directly to the point is the decision of Grant CJ in Langford v R (1974) 20 FLR 11 where he observed of a Medical Report prepared at the request of police which dealt with the defendant's capacity to drive a motor vehicle:

"*This doctor was called as a witness by the prosecution and was permitted by the trial Magistrate to put in evidence his written medical report in which he gave as his opinion that the appellant was so affected".* ***This report if contemporaneous could certainly have been used by the doctor to refresh his memory but it should not have been produced in evidence unless, as a statutory exception to the best evidence rule*** *section 184A of the Criminal Procedure Code applied, under the provisions of which certain document may be produced in evidence* ***in lieu of, but not in addition to, the oral evidence of a witness....***"

(my highlighting)

41. More recently, in Mohini Lata v The State (2000) FJHC 108 the High Court referred to Langford (*op.cit*) and said :

"*....as a matter of evidence, a medical report read by a doctor in the witness-box, is a memory-refreshing document* ***which is not admissible except in the unlikely event that a fabrication is alleged*****.....** *(See R -v- Sekhon 85 Cr. App. R.19.)*

The effect of exhibiting a memory-refreshing document is simply to show consistency in the witness producing it. ***Such a document is not evidence of the truth of the facts stated in it.*** *R -v- Britton (1987) 85 Cr. App. R. 14)*

(my highlighting)

and later:

"*As a general rule therefore,* ***medical reports are not admissible, if they are used as memory-refreshing documents.***"

(my highlighting)

42. In R v Britton [1987] 2 All ER 412, Lord Lane CJ in affirming the long-standing rule of the common law regulating the admissibility of an "*aide-memoire*" where cross-examination had extended or strayed beyond the entries referred to by the witness to refresh his/her memory , also noted the decision of the Court in R v Virgo [1978] 67 Cr. App R 323 which:

"***state that their effect is solely to show consistency in the witness producing them, and that they are not to be used as evidence of the truth of facts stated in the aide-memoire***".

Later Lord Lane writes :

"...(if) *the judge takes the view that the interest of justices requires, he will have a discretion to refuse to allow the document* (to be admitted) *if this could give rise to prejudice to the defendant.*"

43. In this latter regard, it may be noted that the so-called "*history*" recorded in the Medical Report which can sometimes be very detailed and is often highly prejudicial to the defendant, is almost entirely comprised of inadmissible hearsay albeit said to have been related by the complainant. For instance, in this particular case the "**History**" reads:

"*said to have been forcefully penetrated vaginally by a guy on her way back from basketball about 3 hours ago*"

44. In light of the foregoing I rule that the Medical Report [**MFI–P(1)**] may not be produced as a prosecution exhibit in addition to the doctor's oral testimony.

THE DEFENCE CASE

45. Returning to the trial proper. Defence counsel indicated that he would not be making a "*no-case*" submission instead, the defendant (ERJ) would testify on oath in his defence which would be invoking the provisions of s.127(3) of the Crimes Act 2016.

46. The defendant (ERJ) testified in Nauruan with the assistance of an interpreter. He testified that whilst at home, MA came to invite him to play football at the nearby Aiwo Oval playground. After playing football and whilst on their way home they met the complainant (ART) on Aiwo bridge. MA asked ART for a cigarette and then they invited her to go to an old abandoned Clubhouse nearby to chat. The complainant agreed and the three (3) of them went to the Clubhouse and were conversing outside.

47. During their conversation, ERJ asked the complainant ART : " *when can we meet again?*" (have sex) and she replied: "*next year*", to which he said: "*why so long?*". At that point the complainant said she had to go home as she had school tomorrow and she ran off. The defendant and MA chased after the complainant (ART) and MA caught up with her at the main door of the Clubhouse and led her by the hair to the bathroom area of the Clubhouse.

48. ERJ followed them to the bathroom and asked the complainant again for sex and this time, she said "*yes*" because earlier she was shy of MA who had already gone outside by then. The complainant began undressing with ERJ's assistance and thereafter they had consensual sexual intercourse on the dirt floor of the bathroom area. Asked :

    Q: "*What was her (ART) reaction* (to the intercourse)?"

    ERJ replied :

    A: "*She was going with it*".

49. After ERJ finished, he got dressed and left the bathroom and waited outside for MA who was talking to the complainant in the bathroom, asking her for sex. Shortly thereafter they left for home and the complainant also left crying. He didn't know why she was crying but the complainant was shy of MA seeing them having sex.

50. In cross-examination, ERJ denied that ART had resisted or pushed him away nor had she kicked him at any time. He denied it was him that chased and caught up with her on the lane outside the Clubhouse and pulled her hair. He denied telling MA to get out of the bathroom after he brought the complainant back to the Clubhouse.

51. In cross-examination by the DPP, ERJ was asked :

    Q: "*When asked first time for sex and she said no, why ask her again for sex a second time?*"

    ERJ replied :

    A: "*I could tell she was shy of MA when I asked her the first time that's why I asked a second time in the bathroom.*"

    He agreed only he had sex with the complainant. He denied that the complainant was crying because she did not agree with what he had done to her. Asked :

    Q : "*When victim told you "next year" why didn't you just leave it and wait for next year?*"

    ERJ replied :

    A: "*Because I hadn't seen her for a while and that was the first time to catch up with her again*".

52. He denied undressing the complainant or going to get MA from his house to play football. ERJ denied knowing what "*sexual intercourse*" and "*rape*" meant or knowing how to calm down a "*crying girl*". ERJ's cross examination ended with the following exchange:

    Q: "*you had sexual intercourse with her without her consent she was not willing?*"

A: *"No I did not continue without her consent."*

Q: *"You mean she consented for you to have sex?"*

A: *"yes"*

CLOSING ADDRESSES

53. The DPP began by referring to s.25 of the Crimes Act 2016 which clearly imposes on the prosecution the legal burden of *"proving each element of the offence"* with which the defendant is charged including disproving any matter which ERJ has established in respect of a defence under s.127(3). Subsection (3) of s.25 also refers to the standard of proof which the prosecution must attain in discharging its legal burden namely proof *"beyond reasonable doubt"*. .

54. As for the elements of the offence, the DPP identified three(3) elements as follows:

(1) ERJ had sexual intercourse with ART ;

(2) The intercourse was intentional ; and

(3) ART was under 16 years of age at the time.

55. The DPP submitted that all three (3) elements are admitted by ERJ in his own sworn testimony and the Court should accept each of the elements as proven beyond a reasonable doubt. The DPP also accepted that the only issue remaining, was whether or not the prosecution had disproved the defence under section 127(3). In this latter regard, the DPP submitted that the expression : *"...wished to consent"* meant *"consented"* or *"agreed"* to sexual intercourse with the defendant which was ERJ's legal burden in terms of s.27(1)(b).

56. In this latter regard, the DPP relies on the complainant's (ART) evidence that she never consented to sexual intercourse with ERJ as evidenced by her following actions :

- She ran away from ERJ after he had asked her for sex the first time ;
- ERJ was the person who chased and caught her outside and pulled her back by her hair to the Clubhouse bathroom ;
- She had resisted and struggled with ERJ as he was attempting to undress her in the bathroom and she had pushed him and kicked his leg at one stage ;
- She was crying throughout the incident and continued until she met her Aunt ;
- ART had complained to her Aunt shortly after the incident.

57. Defence counsel in his closing submission accepts that all elements of the offence under s.116 of Crimes Act 2016 have been established and are not disputed. He accepts that consent is not a defence but the defendant is, nevertheless, relying on the statutory defence provided in s.127(3).

58. Counsel acknowledged that the complainant (ART) had testified that she did not consent to sexual intercourse with ERJ, but equally, the defendant (ERJ) testified that she (ART) agreed to intercourse after he asked her a second time in the bathroom in the absence of MA and she had co-operated fully in the act. The case comes down to : "*she said, he said*" and depends on the credibility of the protagonist.

59. In assessing the complainant's credibility as a witness, defence counsel reminded the Court that even after the Court was cleared, the complainant's demeanour in the witness box left much to be desired - she smiled often and even laughed and giggled while testifying. She rarely looked at the Court and throughout her evidence her head rested on the witness table as she made a no eye contact and continuously faced the floor while whispering her answers to the interpreter. Indeed, so distracting was her behaviour that the DPP was forced to ask her to speak up, sit up and hold her head up.

60. Notwithstanding her demeanour, defence counsel points to several important and apparent inconsistent actions by the complainant (ART) including:

- the fact that the complainant willingly accompanied two (2) male acquaintances alone, to a relatively isolated location at night because she agreed ostensibly to have a chat with them when she should have been heading home at the time ;
- the fact that on the complainant's own admission, she and ERJ were once in a special personal relationship when he was her "*boy friend*" with whom she shared her feelings and problems ;
- the fact that during their chat at the abandoned Clubhouse ERJ asked her for sex within the hearing and presence of MA and she had replied "*next year*" which could be construed as agreeing to sex with ERJ albeit at another time ;
- the fact that despite all the struggling and resistance and being slammed against a concrete wall, and then thrown onto a dirt floor, and being forcibly undressed and forcefully penetrated, the complainant (ART) sustained no visible "*scratches, bruises or cuts*" on her body and her clothes were not torn ;
- the fact that the doctor who examined the complainant (ART) opined that this was not her first sexual experience. Indeed, he found no hymen and a vaginal examination within hours of the incident disclosed "*nil tear, laceration or bleeding*" in her vagina.

61. In light of the foregoing, defence counsel submits that there is sufficient evidence establishing the elements of the defence under s.127(3) which the prosecution has failed to disprove beyond a reasonable doubt. [***see***: s.25(2)].

62. Even if the defence evidence does not establish the s.127(3) defence on a balance of probability, nevertheless, counsel submits that it raises a reasonable doubt that the complainant agreed to have sex with ERJ.

63. In this regard, the House of Lords in DPP v Morgan [1975] 2 All ER 347 which was a "*high water mark*" :

> "**Held**: *The crime of rape consisted in having intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential mens rea were absent.* ***Accordingly, if an accused in fact believe that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape.***"
>
> (my highlighting)

DISCUSSION AND DECISION

64. In considering the evidence in the case, I remind myself that the prosecution bears the legal burden of establishing the defendant's (ERJ) guilt beyond a reasonable doubt, and further, in light of ERJ's sworn evidence, the prosecution has the additional burden of disapproving the statutory defence under s.127(3) raised by ERJ and dispelling any reasonable doubt about ERJ's guilt that arises therefrom.

65. I can confirm the demeanour of the complainant in the witness box is accurately described by defence counsel and referred to, in the DPP's examination-in-chief. I too, was taken aback by the complainant's flippancy. She struck me as sexually knowledgeable in her answers and I have no doubt that she was attracted to ERJ her "*ex-boyfriend*" when she saw him on the Aiwo bridge and willingly accompanied him to the dark abandoned Clubhouse when she was supposed to be heading home at that late hour.

66. The complainant's (ART) and the defendant's (ERJ) evidence of the events of the evening closely mirrors each other as to their early movements and the forthright exchange they had while chatting at the abandoned Clubhouse facing the Aiwo Oval playing field. Their evidence differs dramatically after the complainant unsuccessfully attempted to run away from the defendant (ERJ) and his friend (MA) and after she returned to the Clubhouse and was taken to the bathroom.

67. The complainant (ART) asserts that ERJ forcibly undressed her and had non-consensual intercourse with her on the bathroom floor of the abandoned Clubhouse. The defendant denies it all and asserts that the complainant agreed to his second request for sex in the bathroom in the absence of MA.

68. Although parts of the complainant's evidence was corroborated by MA such as her being thrown onto the floor of the bathroom before ERJ had sex and her crying when she was alone in the bathroom after ERJ had finished and also when they all left the Clubhouse for their respective homes, MA was not asked at all about what he saw when ERJ and the complainant were having sex on the bathroom floor. Nevertheless, he attributes the complainant's crying to what ERJ had done to her namely, "*having sex with her*". Counsel submits however, that it was MA's persistent request for sex that made the complainant cry.

69. It is noteworthy that the complainant's so-called upset state did not result in her heading straight home nor did it overcome any concern she might have had at her predicament or her

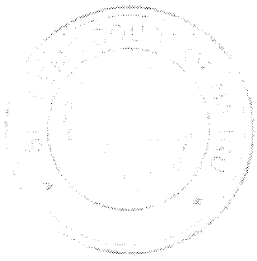
fear of her father's wrath should she arrive home dishevelled and dirty at that late hour between '***9 to 10 pm***'. Indeed, even the complainant's mother wasn't "*very sympathetic*" when told about what had happened to her daughter by the aunt to whom the complainant had gone to seek refuge after the incident.

70. In this case, despite the complainant's sworn testimony of pushing, resisting and even kicking the defendant before and during intercourse, as well as being pushed up against a concrete brick wall and being slammed onto a dirty floor, the complainant sustained no visible mark or injuries to her naked body or genitals. Her clothes although forcibly removed against her resistance also remained intact and was not torn in anyway.

71. Likewise, although, the complainant denied agreeing to sexual intercourse with the defendant in the bathroom she frankly admitted agreeing to have sex with him "*next year*" barely minutes before the alleged incident occurred.

72. In all the circumstances, mindful that the prosecution had the burden of disproving the defendant's (ERJ's) defence beyond a reasonable doubt and conscious that in order to do so the prosecution is relying almost exclusively on the evidence and credibility of the complainant (ART), I have no hesitation in saying that I prefer and accept the evidence of the defendant ERJ where it conflicts with the complainant's evidence which leaves me with a reasonable doubt about his guilt and accordingly, I find ERJ not guilty and I acquit him of the charge and order his immediate release from custody.

Dated this 25 day of June 2021.



D.V. Fatiaki
Chief Justice