



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 23 OF 2017

BETWEEN

THE REPUBLIC

AND

RIZZAL TIMOTHY

Defendant

Before: Khan, ACJ
Date of Hearing: 14 January 2021
Date of Ruling: 27 January 2021

Case to be referred to as: Republic v Rizzal Timothy

CATCHWORDS: Section 146 of the Criminal Procedure Act 1972 – Application to tender the statement of a prosecution witness – Whether it complies with section 146.

APPEARANCES:

Counsel for the Republic: R Talasasa (DPP)
Counsel for the defendant: R Tagaivakatini (Public Defender)

RULING

INTRODUCTION

1. The accused is charged with the following:

Count 1

Statement of Offence

Indecent treatment of girls under 17; Contrary to section 216 of the Criminal Code 1899.

Particulars of Offence

Rizzal Timothy between 1 January 2014 to 11 May 2016 at Nauru unlawfully and indecently deals with FK, a girl under the age of 17 years.

Count 2

Statement of Offence

Indecent act in relation to a child under 16 years old; Contrary to section 117(1)(a), (b) and (c)(ii) of the Crimes Act 2016.

Particulars of Offence

Rizzal Timothy between 12 May 2016 to 22 September 2017 at Nauru, intentionally and indecently touched FK, a girl under the age of 16 years and the said acts were indecent and he was reckless about the fact that the acts were indecent.

BACKGROUND

2. On 13 September 2019 a voir dire was held as to the admissibility of a confession made by the accused and on 18 September 2019 a ruling was delivered that the confession was inadmissible as the conversation between the accused and the interviewing officer was in Nauruan language and only English translation was recorded and not the Nauruan language. This was held to be in breach of the judge's rule IV(d) and following the decision of *Benjamin v Republic*¹ - it was held that the record of interview was inadmissible.
3. After the ruling on 18 September 2019 the matter was set down for trial on 10 and 11 March 2020. On 10 March 2020 prosecution was unable to proceed with the trial as the complainant FK was not prepared to give evidence and the matter was adjourned to 11 March 2020 for continuation of trial. On 11 March 2020 the prosecutor, Mr Lacinivalu, filed a motion pursuant to section 146 of the Criminal Procedure Act 1972 seeking an order that the witness statement of FK be admitted and read into evidence for the purposes of the trial. In support of the motion an affidavit of Sgt Lady Jane Hilo was filed and at [7] and [8] she states:

[7] I met her and noticed that she was a child. I went to her and spoke with her about her statement and took her through it. During our meeting, she cried and told me that she doesn't want to proceed with the case anymore.

¹[1975] NRSC 9; [1969-1982] NLR (D) No. 44 (25 November 1975)

[8] She refused to continue with her statement and said that she wanted to forget about it. She said she cares about her mother and siblings and that she didn't know it will end up in court. I explained that due to the nature of the case, it would not be possible to drop the case.

4. In between the adjournments, I enquired as to what language the statement was recorded in and I was advised that it was recorded in English and what was spoken between FK and the police officer who recorded the statement. Sgt PT Biang in her affidavit filed on 20 January 2021 states that she recorded the statement of FK and they spoke in Nauruan language and she recorded the statement in English.

5. Section 146 states as follows:

146 Proof by written statement

(1) In any criminal proceedings, other than a preliminary inquiry, a written statement by any person shall, if such are the conditions mentioned in the next following subsection as are applicable are satisfied, be admissible to the evidence to the like extent as oral evidence to the like effect of that person.

(2) Conditions referred to in the last preceding subsection are:

a) The statement purports to be signed by the person who made it;

b) The person who made it cannot conveniently attend before the Court at the time when the Court will take evidence in those proceedings;

c) The statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true;

d) Before the trial at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

e) None of the parties, or their barristers and solicitors or pleaders if any, within seven days from the service of the copy of the statement, serves on the party so proposing a notice objecting to the statement being tendered in evidence under this section;

Provided that the conditions mentioned in paragraph (b), (c), (d) and (e) of this subsection shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

(3) The following provisions shall also have effect in relation to any written statement tendered in evidence under this section, that is to say:

- a) If the statement is made by a person under the age of twenty-one, it shall give his age;
 - b) If it is made by a person who cannot read it, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who read the statement to the effect that it was so read;
 - c) If it refers to any other document as an exhibit, the copy served on any other party to the proceedings under paragraph (d) of the last preceding subsection shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof;
 - d) If it is in any language other than the language of the Court, it shall have annexed to it a translation into that language made and certified by an officer of either of the Courts or by some other person authorised in writing in that behalf by the Chief Justice; and
 - e) If it is in a language which is not the mother tongue of the accused and that person does not understand the English language and is not represented by a barrister and solicitor or pleader, there shall be annexed to the copy served on that accused a translation into the language which is his mother tongue, or another language which he understands, made and certified by an officer of either of the Courts or by some other person authorised in writing in that behalf by the Chief Justice.
6. I expressed concern that the voir dire was held to be inadmissible as the conversation was in Nauruan language but only English version was recorded and not the Nauruan version and this application potentially breaches section 146(3)(b) in that the Nauruan version was not recorded or tendered.
 7. The Director of Public Prosecution's submission is that the statement of FK is authenticated and also contains a declaration for the purposes of section 146(2) and should be admissible. The Public Defender's submission is that the statement does not satisfy the conditions set out in section 146(2)(b) and (e) and therefore it should not be admissible.

CONSIDERATION

8. Section 146(1) very clearly states that the statement by any person shall be admissible as evidence to the like extent as oral evidence of that person provided the conditions mentioned in the subsections are satisfied.
9. Section 146(2)(b) provides that the person "who cannot conveniently attend" court. There is no question of suiting the convenience of FK. She simply does not want to come to court to give evidence.
10. Section 146(3)(b) provides that if a person cannot read then the statement should be read back to him or her before he or she signs it and that shall be accompanied by a declaration by the person who read the statement. FK could not read and there is nothing in the

statement to say that it was read back to her nor does it contain a declaration that it was read back to her.

11. The statement does not satisfy all the requirements of section 146 and is inadmissible as evidence and therefore the prosecution's application is refused.

DATED this 28 day of January 2021

Mohammed Shafiullah Khan
Acting Chief Justice