



IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 17 of 2021

BETWEEN

THE REPUBLIC

Prosecution

AND

DAVID TEBOUWA

Defendant

Before:

Khan, ACJ

Date of Hearing:

27, 28 & 29 March 2023 and 5 & 6 April 2023

Date of Judgement:

14 April 2023

Case to be referred to as: *Republic v Tebouwa*

CATCHWORDS: Rape – Section 118 of the Crimes Act 2016 – Where the defendant concedes that sexual intercourse took place with the consent of the complainant – Whether it took place with or without the complainant's consent.

Exculpatory statement by the defendant – Whether it is admissible – Whether the court can rely on it in making the determination.

APPEARANCES:

Counsel for the Prosecution:

F Puleiwai and K Itsimaera

Counsel for the Defendant:

A Lekenaua and T Tannang

JUDGEMENT

INTRODUCTION

1. The defendant is charged with one count of rape. The charge states as follows:

STATEMENT OF OFFENCE

Rape contrary to Sections 105(1)(a), (b)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

David Tebouwa on 7 August 2021 at Denig District, in Nauru, intentionally engaged in sexual intercourse with Taake Kaitaake without her consent and David Tebouwa knows that fact.

RELEVANT LAW

2. S.105(1)(a), (b)(i) of the Crimes Act 2016 (the Act) provides:

“1) A person (‘the defendant’) commits an offence if:

- a) The defendant intentionally engages in intercourse with another person;
and
- b) The other person does not consent to the sexual intercourse and the defendant:
 - i) Knows that fact; or
 - ii) Is recklessly indifferent to consent of other person.”

PENALTY

3. The penalty for the offence of rape is life imprisonment of which at least 15 years is to be served without any parole or probation.

SEXUAL INTERCOURSE

4. Sexual intercourse is defined in s.8 of the Act 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.”

CONSENT

5. Consent is defined in s.9 of the Act as follows:

“1) ‘**Consent**’ means free and voluntary agreement by a person with the cognitive capacity to give that agreement.

- 2) Without limiting subsection (1), a person's consent to do an act is not freely and voluntarily given if the consent is obtained by any of the following:
 - a) Force;
 - b) Threat or intimidation;
 - c) Fear of harm;
 - d) Exercise of authority;
 - e) False, misleading or fraudulent representation about the nature or purpose of that to which the person consents; or
 - f) Mistaken belief induced by another person.
- 3) Without limiting subsection (1), a person does not have the cognitive capacity to give consent to an act if one of the following applies:
 - a) The act occurs while the person is asleep or unconscious;
 - b) The act occurs while the person is intoxicated to the extent that the person cannot choose to consent or not to consent; or
 - c) The person is unable to understand the nature of the act.
- 4) Without limiting subsection (1), (2) or (3), a person who does not protest or offer actual physical resistant to an act is not, by reason only of that fact, to be regarded as consenting to the act."

BURDEN OF PROOF

6. Under s.25 of the Act the prosecution bears the burden of proof which is beyond all reasonable doubt.

FACTS NOT IN DISPUTE

7. It is not in dispute that on 7 August 2021 the defendant had sexual intercourse with Taake Kaitaake (complainant) in her uncle's flat in Location at Denig District; it is also not in dispute that the defendant had penetrated the complainant's vagina.

WHAT IS IN DISPUTE

8. The issue of consent is in dispute. The complainant's version is that she only consented to the defendant having sexual intercourse with her after the defendant threatened to kill

her, whilst the defendant's version is that sexual intercourse took place voluntarily and with the consent of the complainant.

PLACE WHERE THE INCIDENT TOOK PLACE

9. The complainant lived with her husband and children in Location in Block No. 61, Room 2, which is a 3 bedroom flat. She shared the flat with her uncle, Eneasi. The complainant used 1 bedroom whilst Eneasi used the second bedroom and the third bedroom was used as storage. The complainant and her uncle shared the bathroom and kitchen. The shower and toilet has only one entrance. If someone is in the shower and the door is locked then another person cannot use the toilet. Eneasi's bedroom door can only be locked by a key and does not have a padlock or a latch.
10. At the time of the incident the defendant lived in Uaboe and worked as a mechanic. He had been visiting Eneasi for a couple of months prior to the incident to repair his and his relatives motor cycles. On the day in question the defendant came to Eneasi's house in the early hours of the morning who let him in. He was very intoxicated and Eneasi allowed him to sleep in his room on the floor. Eneasi later left for work and he closed the bedroom door but did not lock it.
11. The sexual intercourse took place in Eneasi's room and at the material time the complainant's husband was sleeping in their bedroom. Their children had gone to visit their aunt.

COMPLAINANT'S VERSION OF EVENTS

12. On the night of 6 August 2021 at about 11.30pm the complainant and her friend Taasha went to Moonlight to drink kava. The complainant's husband Tarora Kaitaake (husband) was at work and she called him to join them for the kava drinking session.
13. Her husband later joined them and they drank kava. He went back home at around 4am on 7 August 2021. The complainant and her friend Taasha continued drinking kava and left Moonlight at around 6am. She went to her house and her uncle Eneasi was ready to leave for work. He opened the door for her. He did not speak to her nor did he tell her if anybody else was sleeping in his bedroom.
14. She went in her bedroom and her husband was fast asleep and was snoring. She continued drinking kava which she had brought from Moonlight and was playing music.
15. At around 7am her friend Taasha came to her house to borrow a bucket and she gave it to her through the main door and locked the door once again and went back to her bedroom and continued drinking kava.
16. Between 8-9am she went to the toilet to "pee" and later went into the shower. She did not lock the door to the bathroom. Whilst she was in the shower she said that the bathroom door opened and she saw the defendant (at the time she did not know his name was David).

17. As he opened the door she tried to cover herself, as she was naked, by putting one hand on her breasts and the other on her private parts. She stated that the defendant apologized to her and said "*I did not mean to do this*" and walked out. She got hold of her towel and the door opened again and she said that the defendant came in and grabbed her hand and pushed her to the wall of the bathroom.
18. She stated that his breath smelt of liquor and he appeared to be drunk. The defendant told her that he wanted to hug her and his hands were on her breasts and "*private parts*".
19. She told him to move his hands or else she will tell her husband and the defendant said "*have pity on me*" and he went back to Eneasi's room and she went into her room. She stated that her husband was still asleep and she did not tell him as she did not "*want to make a big issue*".
20. After she went back into her room she could hear the sound of coughing coming from Eneasi's room and she continued drinking her kava. Later she heard footsteps but she was not able to see as her bedroom door was closed and she continued drinking the kava.
21. The complainant only had the towel wrapped around her with no undergarments. She again went to the toilet to "*pee*" and use the bathroom to wash herself. At the time Eneasi's room's door was closed.
22. As she was returning to her bedroom she saw Eneasi's room's door open and saw the defendant. He called her and pulled her into Eneasi's room and a struggle ensued and she ended up in Eneasi's room. Her body was wet and she slipped and she fell face down on the floor; she tried to push the defendant away, whilst he tried to turn her over and managed to do so and she ended up lying on her back.
23. She was unable to scream as she was coughing and is also asthmatic. He came on top of her. He asked her if he could have sex with her and she said that she did not want to have sex and was afraid of her husband. She stated that he bit his lips and told her to have sex with her or else he will kill her and then she agreed to have sex with him and all along she had a plan to escape.
24. He came on top of her and penetrated his penis into her vagina and it went in a few inches. He had both his hands on the floor and there was a gap and she kicked him and escaped to her room. She stated that when she entered her room she was breathless and her husband woke up and asked her as to what happened. She initially told him that the defendant tried to touch her and later told him that he raped her.
25. She did not know the name of the defendant and she explained that it was a guy visiting Eneasi and her husband said it was David. She said her husband went into Eneasi's room to look for him and he had left by then.

HUSBAND'S EVIDENCE

26. He stated that he did not hear any music being played in his room on the day of the incident. He felt that there was someone in his room and when he woke up he saw that it was his wife.
27. When asked to explain as to how she appeared to him, his response was that she looked like someone who was tired, shocked and her hair was in a mess - so he asked her what happened and she replied "*David wanted to rape me*".
28. He asked his wife as to where David was and she told him that he had already left and he said that David came back a few minutes later.
29. He stated that although David was not a frequent visitor to Eneasi and that day was the first time that he had slept over in Eneasi's room.

ARREST OF THE DEFENDANT

30. Sgt Goodman Gioura arrested the defendant on 7 August 2021. He does not recall the time of the arrest but he stated that it was in the night. After the arrest he brought him over to the Nauru Police Station.

DEFENDANT ESCORTED TO WATCH HOUSE CELL

31. On 7 August 2021 Sgt Christopher Amwano stated that the defendant was brought to the police station at around 9.27pm. He later escorted him to the watch house cell, and before that he searched him, and also spoke to him and gave him his rights to remain silent. He stated that the defendant told him that he was resting in Denig Location inside a friend's house and when he went to use the bathroom he then said that: "*she was inside the shower and she told me I can use the toilet*", "*after I was finished using the toilet she called me to have sex with her and so I did*".
32. After speaking to the defendant, Sgt Amwano spoke to Sgt Drusky the investigating officer, and he told him to write down the defendant's response in a statement, which he did on 7 August 2021.

RECORD OF INTERVIEW

33. On 11 August 2021 the defendant took part in a record of interview. The allegation of rape was put to him and he said that he understood the allegation and refused to answer further questions by saying that he did not wish to make any comments.

MEDICAL EXAMINATION

34. The complainant was medically examined by Dr Chua at RON Hospital on 7 August 2021. The medical report was tendered by the prosecution as an exhibit. At page 2 of the medical report the background information given by Snr Const Biang is as follows:

“The victim arrive home at around 6am onwards after drinking kava. Victim arrive home and continued drinking kava inside her room. Victim visited the bathroom and later take a shower. Victim was taking the shower when she heard someone coming inside the shower and she thought it was the husband. Victim identified the person to be David from Uaboe. Victim stated that the accused pushed her inside her uncle’s room and started sexually assaulted her.”

35. The doctor did not find any evidence of sexual penetration nor did he find any evidence of injuries to the complainant.

DEFENDANT’S VERSION

36. The defendant stated that he had consumed a considerable amount of alcohol at Ronphos, later at Uaboe and at Anabar. He does not recall as to the time when he arrived at Eneasi’s house in Location, nor does he recall whether it was still night time or day break.
37. He stated that Eneasi had let him in the house and went to his room and slept on the floor. He does not recall as to when Eneasi left for work that day. He stated that prior to that day he had slept over at Eneasi’s house more than 4 or 5 times.
38. He stated that when he woke up in the morning on the 7th of August he wanted to use the toilet so he went to the bathroom and opened the door and saw that the complainant was in the shower. He immediately closed the door and the complainant said to him that he could use the toilet if he wanted to. After the complainant gave her permission to use the toilet he went into the toilet and he stayed there for quite some time as his *“bladder was very full”*.
39. The complainant was still in the shower and he walked to her and asked her if he could have sex with her and she agreed and asked him to wait in Eneasi’s room and she will first check on her husband.
40. He waited in Eneasi’s room and stood up to check whether the complainant would come or not. He looked into the complainant’s room and saw that she was seated next to her husband who was still asleep. The complainant saw him and signaled to him to go back in Eneasi’s room and he went back.
41. Not long thereafter the complainant followed him into Eneasi’s room and lay on the floor and took off her towel. He came on top of her and they had sexual intercourse. Whilst they were having sexual intercourse the complainant asked him to lock the bedroom door. He told her he could not do so as he did not have the keys to the lock. She stood up to check on her husband and did not return.

42. He later got dressed and left the house and went and bought more alcohol, which he drank on the seawall in Location. Later in the afternoon he went back to see Eneasi, but he was not at home. He met the complainant's husband who told him that he was going to call the police.

CONSIDERATION

43. I have two different versions of the events that took place on the day in question. As stated earlier, sexual intercourse took place and I have to determine as to whether it took place without the complainant's consent or whether it was consensual.
44. There are discrepancies in the complainant's evidence and the statement that she gave to Snr Const Biang on 7 August 2021. In her evidence the complainant stated that the defendant grabbed her by the hand and pushed her to the bathroom wall whereas in her statement to the police, Exhibit D(1), she stated at [8] as follows:

“[8] I walk toward the door and close it and take my towel that I hung from the nail inside the bathroom to cover myself. And when I open the door just about time he pushed the door tried to get in and attack me and I panicked and immediately push him inside the bathroom and walked away and into my room. Whilst in my room I sat just above my husband head where he was sleeping and continued drinking my kava and was still thinking about what just happened but didn't think it was that serious.”

45. Before the complainant was medically examined she told Snr Const Biang as to what took place and she stated:

“Victim stated that the accused pushed her inside her uncle's room and started sexually assaulted her.”

46. Both the complainant and her husband's evidence is that when complainant went back into her bedroom and her husband asked her as to what had happened; she told him that she was touched or that the defendant tried to rape her. In her statement to Snr Const Biang she stated at [16] as follows:

“[16] I went inside my room still in shock not believing what just happened, my husband was still fast asleep, I didn't even want to bother my husband because he have heart problem and I disturb him, my husband been in and out of hospital due to his heart problem so I didn't bother him.”

47. It is also the complainant's and her husband's evidence that after she went into the room and told her husband as to what the defendant did to her, both of them went out to look for him but he had already left, however, in her statement to Snr Const Biang she stated at [17] as follows:

“[17] Whilst I was in the room I was thinking of getting my brothers to deal with him David, I got out from room David was in the lounge and I saw a chopping kitchen knife on the table in the lounge, I ran toward the

knife and threatened it with David which makes him leave the house. I walked back to my room and tried calling my uncle Eneasi but no answer I tried calling again when my husband woke up, I explain everything that just happened to me earlier.”

48. The defendant’s evidence is that he went to check on Eneasi later in the afternoon of 7 August 2021. The question that I ask myself is as to why would someone who is accused of raping someone and was threatened with a chopper go back to the place where the incident took place. This in my respectful opinion defies logic.

EXCULPATORY STATEMENT

49. Further, when the defendant was escorted to the watch house cell he made an exculpatory statement to Sgt Amwano and stated that the sexual intercourse was “consensual”.
50. In *R v Callaghan*¹ Fitzgerald P stated at pages 303 and 304 as follows:

“A number of rationales have been suggested for the non-receivability of self-serving statements. One of these is the danger of manufactured evidence being put before the jury (cf. *R. v. Thompson* [1975] Criminal.L.R 34-35). Another is that “self-serving statements are inherently unreliable, and any rule which keeps them out has some justification”. (“Exculpatory statements by accused” – Elliot and Wakefield [1979] Crim.L.R. 428, 436). They certainly lacked the rationale which justifies the reception of admissions against interest as an exception to the hearsay rule. In our view there is no good reason to sanction the introduction of such evidence, even in the limited fashion urged upon us by Mr McMillan.

It may be noted that in *R. v. Coats* [1932] N.Z.L.R. 401 some views were expressed on the basis that exculpatory statements are receivable in criminal trials. Ostler J. observed:

“Exculpatory statements made to the police when making enquiries about a crime or suspected crime, if properly obtained, are always admissible both for and against the person who made them if he is subsequently charged with a crime.” (407).

Smith J. observed:

“His statements are subject simply to the rules of practice which are applied with regard to the putting in evidence of statements taken from accused persons by police officers.” (408).”

51. If the defendant had a jury trial then the trial judge would have been required to give a direction in the following terms²:

¹ [1994] 2 Qd R 300 Court of Appeal Fitzgerald P., Pinkus JA, Thomas J

“The defendant also gave answers which in my view as indicating his innocence.³ You are entitled to have regard to those answers for the purposes of deciding whether they give rise to a reasonable doubt in your mind as to the defendant’s guilt.”

52. I presided over this matter as a judge alone trial, but I exercised the dual role of being the decider of facts and the law. In my role as the decider of facts, I am required to remind myself of the direction that would have been given to the jury as stated in the above paragraph.
53. The complainant’s evidence is that a struggle between her and the defendant ensued for a period of time, and if a struggle did indeed take place as described by the complainant, then there would be some injuries on her, however, the medical report states that there were no injuries on her at all.
54. Having taken all the matters into consideration and having reminded myself of my duties as a decider of facts I am left with reasonable doubt as to the defendant’s guilt and that doubt is resolved in his favor.
55. In the circumstances, I find that the prosecution has not proved its case beyond all reasonable doubt that sexual intercourse took place without the complainant’s consent, and therefore I find that the defendant is not guilty of the charge and I acquit him of the charge of rape.

DATED this 14 day of April 2023


Mohammed Shafiullah Khan
Acting Chief Justice



² Queensland Supreme and District Courts Criminal Directions Benchbook, ‘36 *Out-of-court confessional statements*’ <link: <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook>>

³ R v Aziz [1996] AC 41; cf Callaghan v The Queen [1994] 2 Qd R 300; Griffiths v The Queen (1994) 125 ALR 545; 69 ALJR 77 at 81