



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 36 of 2018

THE REPUBLIC OF NAURU

-v-

SUZUKI TAUMEA

JUDGMENT

Coram: Penijamini R. Lomaloma

Prosecution: Filimone Lacanivalu

Defence: Sevuloni Valenitabua

Hearing: 9,18, April & 1st May 2019

Submissions: 20 May 2019

Judgment: 22 May 2019

CATCHWORDS: *Being Found in Places without lawful authority; Indecent Acts; section 106(3)(a)(b)(c)(ii) of the Crimes Act 2016; Credibility of Witnesses.*

Introduction

1. The defendant pleaded guilty to one count of "Being Found in certain places without lawful authority" contrary to section 164(a)(i) and (b) of the Crimes Act 2016; and pleaded not guilty to one count of Indecent Acts contrary to section 106(3)(a)(b)(c)(ii) of the Crimes Act 2016. He pleaded guilty on 9th April to the first count and the matter proceeded to trial on the second count of indecent assault.
2. There is considerable delay in this judgment due to the late submissions for the prosecutor due in part to the upheaval in the office of the DPP as a result of the non-renewal of a prosecutor's contract and the resignation of the DPP.

3. The prosecution relied on the evidence of Ruth Dowiyogo, the complainant, and the defendant testified on oath but did not call any witnesses either. The defendant denied the allegations and the Court will have to decide which one of the two is telling the truth.

THE PROSECUTION EVIDENCE

Prosecution Witness 1(PW1) – RUTH DOWIYOGO

4. Ruth Dowiyogo swore on the Holy Bible and testified that she is 31 years old and works now for the public service. At the time of the allegations, she was working at NRC and had been there for 3 years. She is married and had 2 children at the time of this incident.
5. She remembers the 9th of July 2016. At about 11:00 pm, she was drinking with her husband, the defendant and his wife, her uncle Robbie and about 3 other people. They were awaiting the results of the elections. Ruth said that they were drinking about 50-60 meters in front of her house. Sometime that night, Ruth's Uncle Robbie asked her if she could lie down in the sitting room as he was tired and under the influence of alcohol and didn't want to drive to his home.
6. PW1 said that at about 4:00 a.m. on 10th July, she went to sleep in her room. She was woken up at 10:00 a.m. by the sound of something being dragged across the floor. She said she was sleeping on her couch in her room when she saw the defendant in front of the door pulling the chest freezer towards him. She explained that the door was closed but it could not lock as the tongue or latch was missing. When she saw the accused, she started screaming, "Who gave you permission to enter my room, my house?"
7. She said he was standing right close to the couch where she was lying down. He was about 3-4 meters from the door and the freezer had been moved about half way from where it was to the door to "sort of block the door." According to Ruth, the freezer was blocking the doorway. Ruth said she did not give him permission to enter her room.
8. Ruth said the defendant was wearing blue and orange NRC overalls with long sleeves. She said the defendant came towards her on the couch and asked her in Nauruan for sex. She refused and he kept on asking her for sex. At the time, he was about an arm's length from her on the couch and he unbuttoned his overalls and it fell to the floor. She said he kept on asking for sex and looked desperate and she thought, "He's not getting it at home." Ruth said she was disgusted with him and told him to get out. The defendant then asked her in Nauruan, "Can I at least give you oral sex?" but she refused. She said he was wearing a black or brown or blue "old man's underpants," but she could not tell what top he was wearing as she was focussed on his underwear.

9. After she refused him oral sex, she stood up and went looking for her children and calling for her husband. She said that the defendant then told her that her husband was not there and that he had dropped off her children at the babysitter's house.
10. Ruth said she called out to her Uncle Robbie who was asleep in another bedroom but he did not wake up even after she screamed his name. Ruth said she was worried about her children because her mother had come at about 7:00 a.m. that day and said she was taking the children and for her to rest. When the defendant told her that he and her husband had taken the children to the babysitter's, she thought he had done something to her children.
11. Ruth said that when he came to her room, the defendant didn't look drunk, was not slurring his speech or staggering. According to her, he looked okay but his eyes were red and he smelt of alcohol.
12. Ruth said that the defendant told her where he had taken her husband and he promised to take her there provided she promised not to tell anyone what he had done. She said she agreed and promised she will tell no one only because she wanted to see her husband about the children and she did not have a car or access to one. She did not have her phone when she woke up.
13. Ruth said the defendant then took her to her husband but on the way there, he told her what to say to her husband. The defendant took her to Jordan Kepae's house where her husband was drinking. Her husband was furious with her for coming to see him but she told him she needed to speak to him urgently. When they got in the car, the defendant told her husband that Ruth wanted to see him so she hitched a ride with him. The defendant then drove Ruth and her husband to her home. Ruth said that as soon as she got out of the car at their home, she told her husband what the defendant had done to her that morning in her room. Ruth said that her husband then confronted the defendant who denied it. Ruth then said that the defendant left and her husband Berrick left after that but she did not know where he went. When they returned, her husband punched the defendant and thereafter they got into a fight.
14. The fight was stopped by Jojo Agege, a policeman who lives at the back of Ruth's house.
15. On 11th July, Ruth said that the defendant came to her home and apologized to her and her husband about what he had done in her room the day before. She didn't accept the apology as she said he was lying about what happened in her bedroom and that he had to pay for the consequences of his action.
16. In cross-examination, Ruth was not shaken from her story. She denied the defence theory of the case that was put to her—namely that the defendant was drinking at Kepae's place when he decided to come and see Robbie to loan some money; that he went to her room looking for Robbie; that he was wearing his overalls with its sleeves tied around his waist; and that the sleeves became loose and the overalls fell to the floor, exposing the defendant's white shorts.

17. In re-examination, Ruth explained that she had told the Police everything in her statement to them including the offer by the defendant to perform oral sex on her; that the Nauruan words she used can be interpreted to mean sex or oral sex. She also explained that the house belonged to her that and her Uncle Robbie had a room which was always open when he sleeps; that when she got out of her room after the incident with the defendant on the morning of the 10th, she went to Robbie's room which was open and tried to wake him up but he was "full drunk," and couldn't be woken. She explained that the house was hers and that a lot of people came to see Robbie but no one was allowed in the house. Her Uncle Robbie respected her privacy and met the people at a table outside the house.

THE DEFENCE

Defence Witness1(DW1)—SUZUKI TAUMEA

18. The defendant testified on oath that he lives in Meneng in his wife's home. He has his family home in Yaren. He has 4 children.
19. In 2016, the elections took place on 9th July and he was the campaign manager for Robbie Eoe. He said he went to Robbie's place to prepare a BBQ for the electors and he was doing this all day. He said he did not drink the whole day. The election results came out at about midnight or 1:00 am after which time he started drinking with Robbie and the others. At about 5:00 a.m on 10th July, he said he went to drink at a friend's place in Baitisi and left at about 6:00 a.m. for Jordan Kepae's place in Yaren to continue drinking.
20. Suzuki said that at about 09:30 to 10:00 a.m. he went to Bobbie's place to ask him for some money; that he was wearing a work wear shirt and short footy-type pants under a pair of overalls. He said he was not wearing Y-front underwear inside the shorts. The overall had buttons and not click ons. He said he had been wearing this from the night before.
21. When he reached Robbie's place, the defendant got out of his car and whilst still outside, started calling out for Robbie. He had borrowed money from Robbie before and said he knew it was easy to get money from him. When he did not get a response he entered the house and got into the lounge. He did not know where Robbie's bedroom was so he went into the passage and tried the rooms. The first 2 rooms he could not open but the third was closed but not locked. He opened the door and saw a lady on the couch asleep. He said he was still calling out for Robbie but the lady did not wake up. He then walked towards her.
22. Suzuki said he moved a fridge which was blocking the way. He dragged it aside and pushed it sideways. He said he was going to her when she started yelling at him, swearing at him and asked him what he was doing there. He said she kept swearing at him. He said he tried to tell her why he was there but she was yelling.

23. He denied asking her for sex or for other sexual activity called "anu." Anu is cunnilingus.
24. The defendant said he had tied the overall with one knot and when he was walking towards her, the overall slipped down so he quickly pulled it up and tied it again around his waist. She was screaming for her husband. He told her that there was no need to call for her husband as he knew where he was and offered to take her there. The defendant said that she told him, "Let's go right now."
25. He then left the room and Ruth followed him. They went to Jordan Kepae's place to see her husband. At Jordan Kepae's place, Ruth got out of the car and went to see her husband. They spoke and then they asked the defendant to drop them at Robbie's place. The defendant said he dropped them there and went to his place in Yaren. He spent an hour there and then went to his wife's place in Meneng where his mother in law and his sister in law told him that a man was looking for him.
26. Suzuki said he went to check at Jordan Kepae's house thinking that the boys from there were looking for him but no one answered his queries. Suddenly, he said, he was attacked by Ruth's husband, who started throwing punches at him. The defendant said Ruth's husband did not tell him why he was punching him. The defendant said that Ruth's husband just told him to go with him to Robbie's place.
27. Suzuki said he went with Ruth's husband to Robbie's place and they got off there. Ruth and Robbie's wife were there. Ruth's husband assaulted him there again and when he asked the women why he was being punched, they did not answer. The neighbours stopped the fight. Jojo Agege, a Police officer told him to leave. He didn't report the matter to Police.
28. The defendant said at Ruth's room earlier in the morning, he did not unbutton and remove the shirt he was wearing; he did not remove the overalls intentionally; he did not ask for sex from Ruth; he did not say any Nauruan sexual words to her; he did not use the word "Anu" or "iminbaka;" he was wearing short pants inside the overall; that the overall fell unintentionally; and that the Police arrested him the same day and he was locked up for 24 hours.
29. In cross-examination, the defendant said he was the campaign manager for Robbie in 2016; that he went to visit him in his house in 2016 as campaign manager; that he went there more than 5 times but less than 10 times; that when he went there, he knew that Ruth was staying at the same house; that he knew Ruth was married to Berrick Dowiyogo; that he knew the house belonged to Robbie.
30. The Defendant denied that the house belonged to Ruth and he said he didn't know that Ruth worked for the NRC at the time of the incident, 10th July 2016.

ANALYSIS OF THE EVIDENCE

31. When 2 witnesses say completely different things, the Court will have to determine who is telling the truth. It will involve the Court having to weigh the evidence of the

witnesses and determine their credibility. In *Excelerate Technology Ltd v Cumberbatch & Anor* [2015]¹, His Honour Judge Simon Brown QC quoted from 3 leading cases regarding credibility:

“The most compendious judicial statement on this is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at p 431:

“‘Credibility’ involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them?And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.”

Lord Goff in *Armagas Ltd v. Mundogas S.A. (The Ocean Frost)*, [1985] 1 Lloyd’s Rep. 1, p. 57:

Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.” [emphases added].

¹ EWHC B1 (Mercantile) (16 January 2015)

The absence of evidence can be as significant as the presence of it. Arden LJ in Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] EWCA Civ 61 stated:

11. *By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.*

12. *There are many situations in which the court is asked to assess the credibility of witnesses from their oral evidence, that is to say, to weigh up their evidence to see whether it is reliable. Witness choice is an essential part of the function of a trial judge and he or she has to decide whose evidence, and how much evidence, to accept. This task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not solely a matter of body language or the tone of voice or other factors that might generally be called the 'demeanour' of a witness. The judge should consider what other independent evidence would be available to support the witness. Such evidence would generally be documentary but it could be other oral evidence, for example, if the issue was whether a defendant was an employee, the judge would naturally consider whether there were any PAYE records or evidence, such as evidence in texts or e-mails, in which the defendant seeks or is given instructions as to how he should carry out work. This may be particularly important in cases where the witness is from a culture or way of life with which the judge may not be familiar. These situations can present particular dangers and difficulties to a judge.*

14. *In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence. [emphasis added].*

32. These judgments referred to are from civil cases but the assessment of the credibility of witnesses is the same in criminal and civil matters. It involves an assessment of what was said by each witness on a particular issue and deciding whose story is more probable. At the end, these conclusions should convince the Court that the evidence of one is more probable than the other's.
33. Ruth said she was woken by the sound of the defendant moving the freezer. The freezer had been moved about half way from where it was to the door to "sort of

block the door.” According to Ruth, the freezer was blocking the doorway. Suzuki said he moved a fridge which was blocking the way. He dragged it aside and pushed it sideways. Ruth is the owner of the room and she said the freezer is a box freezer with the lid opening upwards. She said the defendant moved it about half way from where it normally is to the door. We can infer from the fact that the defendant could move the freezer on his own that it was not a very big freezer and that it was unlikely to be blocking the way to her room. It would be common sense for Ruth to position the fridge where it would not block access and egress from her room so that she does not have to move it every time she wants to go in or out. It follows from this explanation that the defendant could have moved around the room without having to move the freezer.

34. Ruth said it was a freezer and the defendant called it a fridge. I find the explanation by Ruth who lived with the freezer months or years as more probable than the defendant. Having preferred Ruth’s version, we can infer that the only reason the defendant was moving the freezer to the door was to block the door so it could not be opened from outside.
35. Ruth said although her door had a latch, it could not be locked. The defendant was able to open the door by twisting the latch. Taking this fact together with the moving of the freezer, I find the explanation by Ruth about the moving of the freezer more probable than that of the defendant.
36. Several anomalies occurred in the defendant’s account of events. Firstly, if he went looking for Robbie for a loan, why did he suddenly abandon that quest to take Ruth to her husband? And why, after Ruth’s husband had suddenly assaulted him at Jordan Kepae’s house, did the defendant drive Ruth’s husband in his vehicle to Ruth/Robbie’s house? Why did the defendant not report the assaults to Police? The only explanation for these is that Ruth is telling the truth about what happened in her room that morning and that the defendant was trying to stop Ruth and/or her husband from reporting the matter to Police. This conclusion is reinforced by his apology on 11th of July 2016, one day after he entered Ruth’s bedroom. An apology is an admission of wrongdoing. If, as the defendant claims, his coveralls dropped to the ground unintentionally and he never asked Ruth to have sex with her or for him to perform cunnilingus on her, why go and apologize? From this fact and inference, I find the evidence of Ruth more probable than that of the defendant.
37. Another fact is the ownership of the house where the incident occurred. In her examination in chief, Ruth said the house belonged to her. She said that sometimes that night, her uncle Robbie asked her if he could lie down on the couch as he was tired and under the influence of alcohol and didn’t want to drive to his home. In re-examination, Ruth said a lot of people came to see her uncle but her uncle respected her and only met the people outside at a table. Ruth was not challenged in cross-examination about her claim to ownership of the house at all as required by the Rule in *Browne v Dunne*. In any case, she lived in the house and would more likely know

about its ownership than the defendant who said in evidence that he visited the compound of the house for between 5-10 times during the election campaign in 2016. There is no evidence that he was closely related to either Ruth or her Uncle Robbie or that he had special knowledge about who owned the house.

38. Arden LJ in Wetton (as Liquidator of Mumtaz Properties) v. Ahmed and others [2011] EWCA Civ 61 stated:

By the end of the judgment, it is clear that what has impressed the judge most in his task of fact-finding was the absence, rather than the presence, of contemporary documentation or other independent oral evidence to confirm the oral evidence of the respondents to the proceedings.

39. The defendant did not provide any evidence that the house did not belong to Ruth and a bare assertion does not support his credibility especially after this issue was not raised in the cross-examination of Ruth as required by the Rule in *Browne v Dunn*. I must make it clear that I am not here reversing the onus of proof but discussing credibility of the evidence of the defendant and the complainant.

40. I turn now to the issue of motives as Lord Goff emphasized in Armagas Ltd v. Mundogas S.A. (The Ocean Frost)²:

*and also to pay particular **regard to their motives and to the overall probabilities.** It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."*

41. The defendant has very strong reasons to lie—the risk of imprisonment and loss of his reputation are but two good motives for him to lie. The complainant however, has got nothing to gain by lying. There is no evidence of any previous enmity between her and the defendant; or between her family and the defendant. There is no evidence of any past dealings between the complainant and the defendant that might be taken as a motive for her to lie to get a conviction. I find therefore that there is a greater probability that the defendant, and not the complainant is lying.

42. Finally, I turn to the demeanour of the witnesses. Demeanour was defined in Onassis v Vergottis [1968] 2 Lloyd's Rep 403 at p 431:

"Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be

² [1985] 1 Lloyd's Rep. 1, p. 57

43. I heard the complainant and the defendant give evidence. I observed their body language, the pauses, the emotions or lack thereof, the confidence or lack thereof and all the other matters that are grouped together in demeanour and it appeared to me that the complainant Ruth was telling the truth about what happened in her room on the day in question. The defendant's demeanour on the other hand did not look so impressive.
44. Ruth's description of what took place has internal logical consistency. Looking at all the conclusions I have come to in the analysis of the evidence above, I find the evidence of the complainant was more credible than the defendant's. I am satisfied therefore that the complainant was telling the truth about the events of 10th July 2016 which is the subject of the second count.

The Elements of the Offence

45. In the Second Count, the defendant is charged with one count of Indecent Acts contrary to section 106(3)(a)(b)(c)(ii) of the Crimes Act 2016. The section provides:-

106 Indecent acts

(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 defendant is reckless about that fact; and

(c) the other person does not consent to the act and the defendant:

(i) knows that fact; or

(ii) is recklessly indifferent to consent of the other person.

Penalty:

(i) if aggravating circumstances apply—8 years imprisonment; or

(ii) in any other case—5 years imprisonment.

(4) In this section:

'touching' includes the following:

(a) touching with any part of the body;

(b) touching a person through clothing or other material;

(c) using an object to touch a person.

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

46. The elements of the offence which the prosecution must prove beyond reasonable doubt are that:-

- a. The Defendant;
- b. On the 10th of July 2016;
- c. Intentionally did an act towards Ruth Dowiyogo;
- d. The act is indecent and the defendant is reckless about that fact;
- e. Ruth Dowiyogo did not consent to the act and;
 - i. The defendant knows that fact; or
 - ii. Is recklessly indifferent to Ruth's consent.

47. I have concluded from my analysis of the evidence in the foregoing paragraphs that the complainant Ruth Dowiyogo was telling the truth and I therefore find that elements a & b have been proved beyond reasonable doubt.

48. The act complained of constituted the defendant pulling down his overalls and with only his underpants showing, asked Ruth to have sex with him and/or for him to perform cunnilingus on her. Whether an act is indecent or not is defined in subsection (5) of section 106 as:

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

49. The word indecent was discussed by Va'ai J in Republic of *Nauru v Thoma [2017] NRSC 86*. His honour said:-

There is no fixed legal definition of indecency. Indecency is that which offends against currently accepted standards of decency: A-G v. Hunter (1971)2 SASR 42. If what was done is something that the community generally regard as indecent then the act is indecent.

50. I find that by applying the standards of an ordinary person, the act of the defendant was indecent.

51. I further find that the defendant knew that Ruth did not consent to the act and the defendant knew that she did not consent because she chased him out of her room when he was doing it but he continued to do so.

52. I find that the prosecution has proved all the elements of the offence of Indecent Acts and I find the defendant guilty as charged.

Count 1—Being Found in Certain Places Without Lawful Authority

53. The defendant had pleaded guilty to the first count of "Being Found in Certain Places without lawful authority. He agreed to the summary of facts. The summary

of facts state that on the 10th of July 2016, the defendant entered the bedroom of Ruth Dowiyogo where she was sleeping without her consent. I had concluded in relation to the second count of Indecent Acts that I preferred the version of facts as related by Ruth. She said the house belonged to her. Even if it did not belong to her, she was occupying the bedroom and had a better right than the defendant to it. Having told him to leave and having refused to leave, he became a trespasser.

54. On 14th of May, I had found him guilty in Court after the summary of facts were read out to him and he agreed to it. The reasoning above merely confirms it if required.

Conclusions

55. For the reasons given, I find the defendant guilty of both counts charged.


.....
Penijamini R Lomaloma
Resident Magistrate

The seal of the District Court of Nauru is circular, featuring a central emblem with a bird and a person's face. The text "DISTRICT COURT OF NAURU" is inscribed around the perimeter of the seal.