



IN THE DISTRICT COURT OF NAURU

CRIMINAL JURISDICTION

Criminal Case No. 28 of 2020

THE REPUBLIC

-v-

TEBWEEBWEE AROMAN

JUDGMENT

Before: RM P. R. Lomaloma
For the Prosecution: DPP Ronald Talasasa
For the Defendant: Ravunimasei Tagivakatini
Hearing: 15-17 September 2020
Judgment: 20 October 2020

Catchwords: *Indecent assault – squeezing the breast of the victim without consent is indecent; Indecent assault – touching of the victim’s genitalia through clothing is indecent; Identification – visual identification supported by aural recognition of accused; Identification – recognition of the accused by the back of his head without further evidence is insufficient.*

Introduction

1. The accused stands charged with 2 counts of indecent acts contrary to section 106(a)(b)(c)(i) and (i) and 2 counts of being found in certain places without lawful authority contrary to section 164(1)(i) and (b) of the Crimes Act 2016. It is alleged that on the 11th of May 2020, the accused entered the house of Sarai Depoudu at Boe District in the early hours of the morning and indecently touched the body of Maggie Mae Depoudu and Sarai Depoudu. These constitute the facts for counts 1-3. In count 4, the accused is alleged to have entered the house of Sarai Depoudu without her consent on 15th May 2020.
2. The prosecution called Maggie Mae Depoudu, Sarai Depoudu and Women’s Police Constable Livana Satto. I found at the end of the prosecution case that there was a case to answer and put the accused to his defence. He elected not to give evidence or call any witnesses on his behalf.

The Law

3. The elements of the offence of indecent assault which the prosecution have to prove beyond reasonable doubt are that:-
 - a. The accused;
 - b. On 11 May 2020;
 - c. Intentionally touched Maggie Mae Depoudu;
 - d. The touching was indecent and the accused was reckless about the fact that it was indecent;
 - e. Maggie Mae Depoudu did not consent to the touching; and
 - f. The accused knew that Maggie Mae Depoudu did not consent to the touching.

THE EVIDENCE

Prosecution Witness 1 (PW1) – Marie Mae Depoudu

4. The evidence of Maggie Mae Depoudu is that she was asleep on 11th May 2020 in her room at their home in Boe District. She is 22 years old, going on 23. Her mum is Nauruan but her father is an I Kiribati. She speaks iKiribati and testified in that language in court.
5. She was sleeping in her room with her boyfriend on 11th May 2020 when someone touched her breast at about 5:00 a.m. She thought it was her boyfriend but when she felt that the pressure was too great, she shouted and called her mum. She said it was the accused who had touched her breast. Her boyfriend woke up and told the accused to go but he did not go. When he touched her breast, she said she was not wearing a bra but was wearing a lavalava. She said when he came, he pulled the blanket and grabbed her "boob" and squeezed it. She said she did not get up but she pulled the blanket up and turned to the side. He asked her for cigarettes. When she kept calling for her mum, her boyfriend beside her got angry and told him to go. PW1 said her boyfriend is a refugee and did not wish to come and give evidence as he is afraid because he is not from Nauru.
6. PW1 said she knows the accused and she recognized him when she opened her eyes. She said:

"I knew the person when I opened my eyes. I knew him when I saw him. I knew his name at the time. He used to live with his wife but that morning I saw him there. He lives beside our house... about 10 steps away. His wife is my auntie—my mother's sister. His name is Tabweebwee. I don't know his other name. He has been staying at that house next to us since 2018. Can see him in court.

7. The witness identified the accused as Tabweebwee, the person who touched her on 11th May. The witness continued:

His wife is Eidinegeow. There was one light outside and one inside my room. My room is near my mother's room. The house is a wooden house on the ground. Partition between my room and my mom's room is wood. I knew it was 5:00 am in the morning because when I went to my mother's room, I saw the time on her phone. It was 5:00 am.

My boyfriend was sleeping beside my son and me on the same bed. My son will be 2 in October. The lighting was off in the room at the time. The light was able to get through from the outside through the windows and the door. The window is made from a type of net. Its bright from the window and the door. Light from the outside... it's the morning brightness in the morning.

With all lights off, I recognize him from his talk, he asked for a smoke. His voice. When he spoke to my boyfriend, he spoke in English. When he spoke to me, he spoke in I Kiribati.

8. In cross-examination, Maggie Mae Depoudu said:-
9. At 5:00 a.m. it was dark but a bit light. It was almost daylight. It was not that bright. It was put to her that it was still dark in Nauru as it does not get light till 6:00 a.m. She replied, "**when I saw it, it was a bit bright and I could see the person.**" It was dark—difficult to see in my room but at the time, I noticed the person." PW1 asserted again that the accused touched her breasts before asking for cigarettes. PW1 said that her auntie's children can enter their house but that the accused is not on good terms with her mother since last year (2019). She denied that the complaint was lodged because of the bad relationship and said her mother complained because it was repeated.

Prosecution Witness 2(PW2)—Sarai Depoudu

10. The evidence of Sarai Depoudu on this charge is undisputed. The accused did not give evidence or all any witnesses to dispute the version of events given by PW2, Sarai Depoudu.
11. Sarai Depoudu works at Canstruct. She has 5 children, including Mary Mae Dipoudu, PW1. Sarai said:

On 11th May 2020, I was asleep outside our place and my child was sleeping inside and he came and pulled my blanket. I woke up and saw that it was Tabweebwee and then I asked him why he is here and he asked, "Do you have any cigarettes?" This was in English. My child inside—all my children. Maggie was sleeping in a room with her boyfriend. While he was talking, his

hands were rubbing on my stomach and his hands were going to the lower part of my body. I asked him, "What are you up to?" He kept on asking for smokes. Then he sat at the chair near me. I talked to him again and he kept asking for smokes. He got up and opened the fridge and looked back at me again and asked again if I had smokes. I thought he already left. I am not sure how long after that I heard my daughter scream. She was calling for me. She kept calling me to come tell him to go. Then I went to him and saw him leave the room. This was at dawn. I can see people's faces. Inside it was not dark. The lights from our main house was on and shines to our place. You can see well. There are lights where we sleep but it was off. Where I was at, it's not really dark there. I can see where I am going when I go to the toilet. The toilet is located behind my daughter's room. I have to leave my room to go to the toilet. Go through the house and outside where the toilet is. I always go through the house because it is not dark.

My fridge was on at the time. I saw Tabweebwee when he opened the fridge from its light. I was very very close to the fridge. From my bed, if I stand on the side, I can touch the fridge.

I know Tabweebwee as he is sister's husband. My sister is Christina. This was on a Wednesday and one on Friday of the same week. On Wednesday, I could not sleep because of what happened on 11th. On Wednesday, he came around 2:00-2:30 and people were sleeping. I know and I can feel that someone is coming to my place and my place is not closed. Someone walked past my light and I could see a shadow. I got up and it was him. In an angry tone, I said to him, "What?" In Nauruan, that means, "what, why are you here?" He said something and I could not hear him properly and I just told him to leave. He left. It was Tabweebwee. **My place is not closed. It means my place is a hut—we have posts but we do not have walls.**

There is a light in my kitchen area. Fluorescent lights. The lights were on on Wed 13th because of what happened on 11th May.

On Friday 15th, I was asleep and I was shocked that I was sleeping, sitting on my bed. When I sleep, I roll on my blanket which was under me. When the blanket was pulled from me, I woke up. I saw the back of the person running. I recognized him as Tabweebwee. I know the person, I recognized him. I recognized the back of his head. The thing he did to me, no one does that to me except him. The lights were on like the brightness of this court.

Tabweebwee is from Tarawa, an iKiribati. I never spoke to him before those incidents. As to my relationship with my sister and Tabweebwee, we really don't talk to each other. We just mind our own business. This started when

my sister had the same job as me. Before that, we were a happy family, meaning we talked to each other and we ate [together] and helped each other. I spoke to Christina then. I spoke to Tabweebwee a little bit, sometimes. We ate together at my place.

I reported the incident on Friday 15th. I didn't report the 11th May incident because he is my sister's husband. I wanted my sister to handle it. I didn't tell her but my kids told her. Didn't report the Wednesday incident because I just chased him away. I reported the incident on Friday because I can't let it continue. I can't sleep properly.

This witness identified the accused in court as Tabweebwee.

My partner knew what happened on the 11th May. He didn't do anything. He didn't do anything. I talked to him. He was sleeping on the couch in the sitting room. When my daughter screamed, he just got up to go towards the room. I swore at him because he didn't do anything. He is Nauruan. He told me, if he gets involved, he might get arrested as well.

12. PW2 was shown several photographs taken of her home by police that show clearly the position of the "main house," the house occupied by Christina and the accused, and the Sarai's home where the offences took place. Sarai's house does not have floor to ceiling walls and therefore the light from neighbouring houses and the sky would get into the house without being blocked, reflected or dissipated. Several photographs of the inside of the house were also tendered and they helped clarify her evidence.
13. PW2 said, **"His hands were on my stomach, end it was going downwards towards my genital area. He stopped when I spoke to him again. He reached at the top of my private part. He didn't go right inside. He was touching on top of the clothing.**
14. In cross-examination PW2 said that on 11th May, the lights were coming from the main house which she could see from her room. PW2 said she spoke in English to the accused; denied that the accused only asked for cigarettes, denied that the accused only touched her blankets; affirmed that he touched her; and she denied that she made up this report because of the bad relations between her, her sister and the accused. PW2 said her house and her sister's house are on family land and family members can have access to the land. The children have access to all 3 houses.
15. **In re-examination, PW2 said while her sister and the accused might have access to her house because it is on family land but that there is no permission to enter at 2 or 4 in the morning.**

Prosecution Witness 3 (PW3)— Women’s Police Constable Livanna Satto

16. PW3 was the interviewing officer. The questions were written in English and translated by her into Nauruan. The iKiribati interpreter then translated the questions. The answer in Kiribati was translated to PW3 in Nauruan and she translated this into English. She recorded the answers in English. This is obviously hearsay and is not admissible: *R v Benjamin*
17. PW3 said she received the complaint from PW2 in the early morning of Friday 15th May 2020 at between 5-6:00 am. She said that Mary Mae’s boyfriend did not want to give a statement and that PW2’s boyfriend did not want to get involved.

Discussion

18. The evidence of PW1 is not disputed because the accused did not give evidence or call any witnesses. Her evidence was not destroyed by cross-examination. I find her to be a truthful witness. Her demeanour was consistent with someone telling the truth. I believe her evidence that someone touched and squeezed her breasts without her consent. I have no doubt that the touching was indecent according to the standards of an ordinary person in Nauru or elsewhere for that matter and that the whoever touched her, knew that Maggie Mae Depoudu did not consent to the touching. The only issue is whether it was the accused who squeezed her breasts.
19. The evidence of PW2 was neither disputed not discredited in cross-examination. She initially tried to let the matter be handled by her sister but when it was not, she reported it to police. This is logically consistent with the behaviour of a lot of people in this kinds of situations. Her demeanour was good and I find her evidence on the whole to be truthful. Her evidence of the events of 11th May corroborate the evidence of PW1—in certain areas namely: (1) the accused was present in her house; (2) PW2 saw the accused leave the room of PW1; and (3)PW1 did not consent to the touching because she screamed and PW2 heard her scream.

Identification

20. The leading authority on identification is ***R v Turnbull***¹, where Widgery LCJ:

“First, whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided

¹ [1977] 63 Criminal Appeal R 132

this is done in clear terms, the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as, for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? ... Finally he should remind the jury of any specific weakness which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

21. There are inherent weaknesses in the evidence of PW1 regarding identification. The only lights for her room were turned off. The photographs tendered and her evidence is that there are no floor to ceiling walls to her "room" where she was sleeping and where the offence allegedly took place. Her room consisted of partitions that went about hip high when facing the place her mother slept. The rear of the house is actually open and covered only by chain link fence. PW1 said her "window" consisted of a type of net. As described by the witnesses and as shown in the photographs, the house is an open plan house where there are hardly any walls to stop what light there is coming from inside and outside the house. **PW2, Sarai said that her house is a hut with posts but no wooden walls. PW1 said "the light was able to get through from the outside through the windows and the door. The window is made from a type of net. It's bright from the window and the door. Light from the outside... it's the morning brightness in the morning."**
22. The witness was asleep and when she opened her eyes, she immediately saw and recognized the accused as the person squeezing her breast. The accused would therefore be no more than an arm's length from the witnesses' eyes. The iris, when fully open from a position of waking up, will close to adjust to the ambient light. Before this happened, recognition had been achieved. Having warned myself of the dangers inherent in identifying the accused by visual means in the situation of 11th May, I am satisfied that PW1 recognized the accused as the person who squeezed her breast.

Audio Recognition

23. PW1's identification of the accused by visual means was supported by audio recognition. Sight is not our only sense. Audio recognition was discussed by Brennan CJ of the High Court of Australia in Bulejck v R²

8. Recognition of a speaker by the sound of the speaker's voice is a commonplace of human experience. To recognise the voice of a particular speaker some familiarity with that speaker's voice is ordinarily needed (3). A person who is not familiar with the voice of a putative speaker may be able nevertheless to recognise the speaker's voice by comparison with an established example of that voice if the speaker's voice exhibits sufficiently distinct features to permit an ordinary person to identify the speaker or if the person possesses an appropriate expertise. The problem of identification by voice recognition has been considered by courts chiefly in reference to questions of admissibility of evidence identifying a voice heard out of court on a material occasion. Admissibility of such evidence depends not only on the witness' familiarity with the speaker's voice or the distinctiveness of the voice or the witness' expertise. Other factors are material. One factor is the clarity with which the witness has been able to hear the voice of the putative speaker on the material occasion and, in a case when a comparison with a voice heard on another occasion is relied on, on that occasion. Another factor is the time which elapsed between those two occasions.

24. The accused spoke to PW1's boyfriend in English but he spoke to her in iKiribati, implying that he knew her to speak that language. He is therefore not a stranger to PW1. He spoke to PW1 from immediately after squeezing her breasts so he was very close to her. He lived next door to PW1 and had done so since 2018. He is married to PW1's aunt and they live about 10 steps away from her. From these circumstances, we can infer that the witness would have had ample opportunity to recognise the voice of the accused. The evidence showed that there were quite a lot of words spoken to the Mary Mae Depoudu and her boyfriend by the intruder at a very close distance for Mary to recognize the voice as belonging to the accused.
25. I am satisfied that Mary Mae Depoudu identified the witness as the accused from his voice. I am aware of the dangers inherent in a visual identification of the accused in the circumstances outlined above; I am aware that such identification could be mistaken though honest; and I am aware that here, recognition of the accused could very well be mistaken as people often mistake even close family members. These dangers also apply to recognition by voice and having taken all these into account, I am satisfied on the evidence of Mary Mae Depoudu that she recognized, visually and aurally, the accused, Tabweebwee Aroman as the person who squeezed her breast on the morning of 11th May 2020.

² [1996] HCA 50; (1996) 185 CLR 375 (17 April 1996)

26. PW2 said that a little while after leaving her on the 11th May 2020, she heard her daughter, PW1 scream. PW2 said she recognized the accused as the person who was in her room. This corroborates PW1's story because it puts the accused in the house of PW1 and PW2.

Conclusion on Count 1

27. For the reasons given, I therefore conclude that the prosecution have proved each element of the offence of indecent assault simpliciter.

Count 2: Indecent Acts contrary to section 106(1)(a)(b)(c)(i) and (i)

28. In count 2, the victim is PW2. On identification, PW2 said there was sufficient light coming from outside her house (which is a hut with no walls) for her to identify the accused as the person in her room. The accused opened the fridge which was about an arm's length from her and she recognized the accused. I have warned myself of the dangers of identification and recognition set out in R v Turnbull above in particular, the dangers of mistakes by honest witnesses but I am satisfied that PW2's identification of the accused as the person who touched her on the day was beyond reasonable doubt correct.

29. The touching as described was indecent and the Sarai Depoudu did not give her consent to the touching. I therefore find the accused guilty of the offence of Indecent Act contrary to section 106(1)(a)(b)(c)(i) and (ii).

Aggravating Circumstances of Counts 1 & 2

30. The accused is charged with the statutory aggravating factor in counts 1 & 2. The aggravating factor for sexual offences is set out in section 101 of the Crimes Act 2016. Section 101(1)(c) is the closest aggravating factor:-

(c) the defendant intentionally breaks and enters into a building with the intention of committing the offence or any other offence punishable by imprisonment of 1 year or more;

31. There is no doubt that he entered the house of Sarai on 11th May 2020. However, all along, he was asking Sarai and Maggie May for cigarettes. He may well have gone to ask for cigarettes and formed the intention to commit the indecent acts once he saw the victims. I therefore am not satisfied that the prosecution have proved beyond reasonable doubt any aggravating factor for either count 1 or count 2.

Count 3—Being found in certain places without lawful authority or excuse on 11th May 2020

32. Count 3 charges the accused with the offence of being found in certain places without lawful authority or excuse contrary to section 164(a)(i) and (b) of the Crimes Act 2016. The evidence is clear that the accused was in the house of Sarai Depoudu

on the 11th of May 2020 and he was there without her consent. I find that the prosecution have proved beyond reasonable doubt these elements of the offence and I find the accused guilty as charged in count 3.


Count 4 – Being found in certain places without lawful authority or excuse on 15th May 2020

33. Count 4 relates to the entry of the accused into the dwelling house of Sarai Depoudu on the 15th of May 2020. PW2 said she was asleep when the blanket was pulled from under her waking her up. She saw the accused running away. The lights were good. She recognized him from the back of his head. She did not describe how long she saw him for, how far away he was from her or what was distinctive about the back of his head that made her recognize that it was the accused. This leaves doubts about the recognition. Further, in her evidence, Sarai said the accused came on 11th May and 13th May. On 15th May she was afraid that he might come again and that expectation could very well have led her to identify the accused as the person who was in her room. I am not satisfied about the conditions of the identification of the accused as the person who entered the house of Sarai Depoudu on the morning of 15th May 2020 as alleged. I therefore acquit the accused of this charge.

Conclusions

34. For the reasons given, I find the accused:-

- a. Not guilty as charged in count 1 of the aggravated charge but guilty of the indecent acts on Maggie Mae Depoudu on 11th May 2020, contrary to section 106(1)(a)(b)(c)(i) and (ii) of the Crimes Act 2016;
- b. Not guilty as charged in count 2 of the aggravated charge but guilty of the indecent acts on Sarai Depoudu on 11th May 2020, contrary to section 106(1)(a)(b)(c)(i) and (ii) of the Crimes Act 2016;
- c. Guilty of the charge in count 3 of being found in certain places without authority or excuse contrary to section 164(a)(i) and (b) of the Crimes Act 2016; and
- d. Not guilty of the fourth count of being found in certain places without authority or excuse contrary to section 164(a)(i) and (b) of the Crimes Act 2016.


Penjamini R Lomaloma
Resident Magistrate

