IN THE SUPREME COURT
REPUBLIC OF NAURU

Criminal Case No.1 of 2011

REPUBLIC OF NAURU

v.

DONNY OLSSON

JUDGE:	EAMES, C J.
DATE OF HEARING:	17 November 2011
DATE OF JUDGMENT	22 November 2011
CASE MAY BE CITED AS:	Republic v Donny Olsson
MEDIUM NEUTRAL CITATION:	[2011] NRSC 18

CATCHWORDS:
Judgment -Criminal law – Rape – Criminal Code of Queensland 1899 (!st Schedule), s.348 - Whether case proved beyond reasonable doubt.

APPEARANCES:

For the Prosecution	Mr W Kurisaqila DPP
For the Accused	Mr V Clodumar (Pleader)

CHIEF JUSTICE:

1. The accused is charged with rape, contrary to s. 348 Queensland Criminal Code 1899.

2. The prosecution alleges that on 9 January 2011 Donny Olsson raped the 20-year-old complainant, who was the sister of his de facto wife, and with whom they, among other family members, shared a house

3. On the evening in question the complainant had been to a party and had consumed a lot of alcohol. She returned to her home in the early hours of the morning. There were many people still awake inside the house and outside the house but she did not speak to other people and went straight to her bedroom, closed the door and went to bed, whereupon she fell asleep.

4. A few hours later the accused opened the door and entered the room. He saw the complainant asleep in the bed and, as he agreed in his evidence, he then decided that he wanted to have sex with her. He agrees that he did have sexual intercourse with the complainant, but says that it was with her consent.

5. The prosecution case is that the accused commenced to have sexual intercourse when he knew that the complainant was in a drunken sleep and was not consenting.

6. The issue of the case, therefore, is whether the prosecution has established the absence of consent, beyond reasonable doubt.

7. The evidence may be shortly summarised.

8. The complainant says that when she went to her bedroom she fell asleep and woke to the accused being on top of her. He was having sex with her. He had not asked to have sex and he did not speak at all. She said she told him to move away so that she can go to lock the door. She said that she was lying about wanting to lock the door, so that she could get away. Instead of her going to the door, the accused got out of bed, went to the door and locked it.

9. She said she then went to the window to open it and when she did so her uncle was outside and saw both her and the accused together in her bedroom. She then left the room. As she left, she said, the accused was hiding in the room, she did not know where.

10. The complainant said her uncle asked the accused what he was doing there. She could not recall the accused making any reply. She was wearing a bed sheet wrapped around her, but she did not know what the accused was wearing.

11. She left the room and went outside to the lounge room where she met her sister. She asked her sister to tell the accused to move out of her room, but he was gone when the sister went into her bedroom.

12. The complainant then went to her mother's house which was about 50 m away. She told her mother, she said, what had just happened.

13. In cross-examination, she agreed that around that time she sometimes had drink sessions with the accused. She denied the suggestion that was put to her by defence counsel that "on one or two occasions" she previously had sexual intercourse with the accused, after drinking with him.

14. The complainant said when she came home from the party there were other people in the lounge room and the kitchen. When she opened the window her uncle was only about 5 to 6 metres away, in his garden.

15. She denied that the accused had come into the room and woke her up by removing the pillow from under her head. She denied he then asked for sex. She agreed that when the accused was having sex with her she was naked. She did not know how her clothes had come off, although she had removed her T shirt when she went to bed. She said that when the accused was having sex with her she pushed him away and told him she was going to lock the door. She was asleep when he started having sex with her.

16. She did not scream out to the people in the house although, she agreed, they would have heard had she done so.

17. She could not recall that she did anything that would have indicated to the accused that she

did not agree to sex, but she recalled that she pushed him away. She denied that the only reason she laid a complaint was because she had been seen with the accused in her room.

18. She agreed that she said nothing to her uncle when he saw her and the accused in her room. She agreed that she did not tell her sister that he had raped her. She denied that she had been embarrassed by the fact that she had been seen with the accused in her room.

19. The complainant's sister gave evidence that when the complainant asked her to tell the accused to leave her room she was then wearing a bed sheet wrapped around her. The complainant was angry.

20. The sister agreed that the complainant had said nothing to her about being raped.

21. The complainant's mother gave evidence that the complainant had come to her about 9 AM that morning and told what had happened. She told her mother that the accused came into the room while she was sleeping. She said that the accused was on top of her and she was pushing him away, for him to get off. She told her mother that she could not scream because she was too embarrassed about the people outside the bedroom hearing her.

22. The mother said that the complainant told her that when she woke up the accused was engaged in a sexual act of cunnilingus, although that is not the word that the witness used in English. With the assistance of an interpreter, I am satisfied that this sexual conduct that her daughter reported to her was cunnilingus. Her daughter told that after the accused engaged in cunnilingus he then got on top of her and it was then she tried to get away.

23. The mother said that she had not mentioned the cunnilingus incident to police in her statement, because she forgot. After refreshing her memory from her police statement, she said that when her daughter described the accused being on top of her she was telling her mother that he was having sex with her.

24. Mr Kurisaqila submitted that the mother's account of being told about cunnilingus was a mistake; that her daughter had only told her about being subjected to sexual intercourse. That was not, however, what the mother said. I consider that she was describing two separate sexual incidents, as having been reported by her daughter, one of cunnilingus and one of sexual intercourse.

25. The Complainant's uncle gave evidence that he had been in his garden outside the house at about 9 AM when the window was opened quickly. He looked inside and saw the complainant and the accused standing together. The complainant was wearing a bed sheet but the accused was completely naked. He asked what they were doing. There was no reply. He told the accused to wait for him as he was going inside to speak to him, but the accused jumped out of the window and ran away. The uncle said he did not recall the complainant saying anything to him.

26. Dr Takela Qaranivalu gave evidence that she examined the complainant at the Nauru hospital that morning. The complainant gave her a history of having woken up after a night of drinking and awoke to her brother in law raping her. The doctor did a thorough examination of her external body and genitalia. There were no obvious lacerations, bruises, bleeding or other signs of injury. The complainant appeared calm and collected. She said there was no evidence consistent with forcible rape, and no obvious signs consistent with rape. The absence of injuries might possibly be explained if the person was raped while remaining asleep, she said.

27. In cross examination the doctor agreed that if the complainant's vagina had not been lubricated when intercourse took place, there should have been injuries consistent with rape. She agreed with defence counsel that upon her examination, the signs suggested she had been lubricated.

28. The prosecutor tendered the record of interview of the accused. The prosecution relied upon certain answers in which he admitted that the complainant was asleep when he entered the room, that he knew she was under the influence of liquor, and that he ran away when the uncle was going to confront him.

29. As to the last matter, although he did not say so explicitly, Mr Kurisaqila was suggesting that the hurried departure of the accused suggested he had a consciousness of his guilt of rape. In my opinion, however, it would be impossible to exclude other possible explanations, such as fear or embarrassment at having been discovered in compromising circumstances after consensual sex had occurred.

30. It is to be noted, that the accused said in his record of interview that the complainant had consented to sex, and had told him to hurry up in case anyone saw them.

31. That was the prosecution case.

32. The accused gave sworn evidence. He said that the complainant was a friend of his and they sometimes drank together. On the day in question he had entered the complainant's room looking for his partner. He saw the complainant sleeping and he removed the pillow from under her head. Then he lay down. The complainant woke up when he moved the pillow. He asked if he could have sex. She said nothing, but pulled his head towards her and kissed him. As they were kissing he lay upon the complainant but then moved so she could remove her clothes. After she had removed her clothes he bent over her and performed a sexual act which he described. That was cunnilingus. He agreed to that term, as describing what had occurred.

33. After that, he said he got on top of the complainant and they had sexual intercourse. The complainant told him to hurry up in case anyone saw them. He denied that she had pushed him off.

34. He said that the complainant had asked him to lock the door, which he did. They then continued having sex. He said that when they had finished he stood up but did not want to leave the room by the door in case someone saw him. So he opened the window and then when her uncle saw him he closed it again. The uncle asked what he was doing and he replied "I don't know".

35. The accused said that the complainant's attitude towards him then changed; she was blaming him for what happened. The complainant opened the door and walked out.

36. The accused was afraid to confront the uncle so he jumped out the window. He said that the uncle saw them together and knew that something was going on that should not be. He fled through the window to avoid the uncle, not because he had committed rape, he said.

37. In cross examination, the accused said that he looked for his partner in the complainant's room because she had been in that room earlier. On finding the complainant asleep in the room he wanted to have intercourse with her. He claimed they had had intercourse before, but he gave no details and only the barest details of any such occasion were suggested to the complainant in her cross examination. I consider the allegation of previous sexual encounters unconvincing, but my reservations in that regard, whilst important to take into account in my overall assessment of the prosecution case, is not determinative.

38. The accused said he knew it was wrong to have intercourse with his sister in law, but he thought his partner would not have known about it.

39. He said the complainant told him to lock the door.

40. He at first denied that he knew the complainant was drunk, but agreed that he had told police that he knew she was under the influence, as she slurred her speech.

41. The conflict in the evidence is very stark.

42. The provisions of the Criminal Code of Queensland which apply in Nauru do not incorporate any of the very substantial reforms to the criminal law concerning the elements, evidence and procedure for sexual offence trials which were introduced in Queensland in 1997 and in all other states of Australia at different times.

43. Instead trials for such offences in Nauru are governed by the common law.

44. The common law as described in R v Flannery [1969] VR 31 at 33 (And see Worsnop v R [2010] VSCA 188 at [27]-[28] requires that the prosecution prove beyond reasonable doubt either that the accused was aware that the woman was not consenting, or else, that he realised that she might not be, but decided to have intercourse with her whether she was consenting or not. Were I to conclude that the complainant was not, in fact, consenting then the accused would still not be guilty if, pursuant to s.24 of the Criminal Code, he held an honest and reasonable belief, although mistaken in fact, that the woman was consenting. That issue having been raised in this case, the prosecution must prove beyond reasonable doubt that the accused did not have such a belief.

45. The Director of Public Prosecutions submitted that the evidence was sufficient to prove the case beyond reasonable doubt. It was improbable that the complainant would have consented to sex with what amounted to her brother in law, he submitted, and even more so, when his partner and another sister were in the house.

46. He submitted that there were inconsistencies in the accounts given by the accused.

47. Mr Kurisaqila submitted that the complainant had been in a drunken stupor and could not have given consent. The accused had admitted that he knew she was under the influence, and the Director submitted that I should conclude that the accused simply took advantage of her condition, knowing she was not consenting.

48. As to inconsistencies, in his record of interview the accused agreed to the proposition that the complainant was fast asleep, under the influence of alcohol. He said to police he could tell that because her speech was slurred, which, if true, might suggest she was speaking when he made that observation. Mr Kurisaqila noted however, that in his evidence the accused said he could tell she was under the influence because he could smell the alcohol on her.

49. Mr Kurisaqila said there was a conflict in the evidence as to who was going to lock the door. The accused claims the complainant asked him to lock the door, and he did so, returning to bed to have sex. She says that she got up pretending she wanted to lock the door but the accused got to the door first and locked it. She then opened the window. The accused said that it was he who opened the window. Mr Kurisaqila submitted that the version of the complainant made more sense and should be accepted.

50. Mr Kurisaqila submitted that the complainant made a complaint of rape at the first reasonable opportunity, namely, when she told her mother. He submitted that it was the first reasonable opportunity to do so, because although she might have said something about rape to her uncle or sister, at that time she was just concerned with her own safety, and it was only when she got to her mother's house that she could discuss freely what had happened. I will return to that argument later.

51. The Director submitted that the complainant showed signs of distress after she left the

bedroom. At common law, evidence that a woman was in a distressed condition soon after the occurrence of an alleged rape, was circumstantial evidence consistent with guilt: see R v McDougall [1983] 1 Qd R 89. Mr Kurisaqila submitted that anger was consistent with a distressed reaction that might follow a rape.

52. Because this case is to be decided on common law principles, I must direct myself that it is dangerous to act on the uncorroborated evidence of a complainant in a sexual assault case. The only corroboration that Mr Kurisaqila pointed to was the complaint made to the mother, but words of a complainant, even if they constitute recent complaint at the first reasonable opportunity cannot as a matter of law constitute corroboration, as it is not evidence that comes from a source independent of the complainant (see Kilby v R (1973) 129 CLR 460).

53. The only other possible corroboration the Director could point to was the anger of the complainant. Having regard to the other evidence of her being calm and collected, her anger when in her sister's presence, in my view, does not amount to evidence of distress, and could not therefore constitute corroboration.

54. The complainant's evidence is therefore uncorroborated. Mr Kurisaqila submitted that the Prosecution case was nonetheless strong enough to convict the accused, even without corroboration.

55. Mr Clodumar, for the accused, submitted that I could not be satisfied beyond reasonable doubt that the complainant had not consented to sexual intercourse, or at least that the accused did not honestly and reasonably believe that she had consented.

56. He highlighted the following matters:

- The complainant had not made a complaint of rape at the first opportunity. She said nothing to the uncle, nor did she tell her sister that she had been raped, merely asking her to tell the accused to leave the room.

- She was showing no signs of distress, but was merely angry, which was consistent with her being embarrassed or annoyed about having been compromised with the accused, rather than demonstrating distress following being raped. He noted the doctor's evidence that the complainant was calm and collected when examined.

- He submitted that the evidence did not suggest that the complainant was in a stupor and incapable of giving consent. After the complainant left the room, she was capable of making rational decisions and speaking to her sister and she was able to walk to her mother's house and communicate with her.

- He said the medical evidence was not consistent with rape, but with consensual sex. The medical evidence was consistent with her having been aroused at the time they had intercourse, and that was consistent with the evidence that the accused had first engaged in cunnilingus with the complainant before he had intercourse.

57. As to that argument, I note that the complainant did not give evidence that cunnilingus had taken place, and in cross examination that allegation was not put to her. She should have been given an opportunity to respond to that allegation, although Mr Clodumar said that it had been put to her at the committal. The prosecutor did not seek to recall the complainant to have this allegation put directly to the complainant. The prosecutor asked me, however, to note the failure to put these matters to the complainant as going to the credibility of the account of the accused.

58. That is an important matter, but it remains the fact that the complainant's mother gave

evidence that her daughter had reported to her that cunnilingus had taken place, so that assertion did not just come from the accused.

59. Mr Clodumar submitted that the complainant need only have called out, in order to have prevented the continuation of the rape, if that is what was taking place, because the house was full of people.

60. He noted that the complainant could not explain how her clothes were removed.

61. Mr Clodumar submitted that the complainant had agreed that she did nothing to demonstrate to the accused that she was not consenting, apart from pushing him off. Mr Clodumar said when she pushed him off she said that she was going to lock the door, which would not convey that she was not consenting. If the complainant was in fact not consenting, then, Mr Clodumar submitted, the prosecution could not prove beyond reasonable doubt that the accused did not at least have an honest and reasonable belief that she was consenting.

62. As to the question of who locked the door and opened the window, he submitted that the version of the accused makes more sense, and is consistent with what he told police, namely, that she asked him to lock the door. He opened the window because that was the way he wanted to leave the room, in case anyone saw him, and that makes sense Mr Clodumar submitted. Police asked a question, to which the accused agreed, which assumed that it was the complainant who opened the window, but he was responding to a question which asked whether anyone saw him in the room after the window was opened. He was not asked expressly who opened the window.

63. Despite the likely stress she must have felt, the complainant gave her evidence in a clear and forthright manner. She was adamant that the accused was having sex with her when she woke up, and did so without her consent. She was in many ways an impressive witness.

64. The accused was a less impressive witness, but I take into account the likely added stress he was under in giving evidence as the accused facing a serious charge. He said some unlikely things. He did not tell the police that he had entered the room because he was looking for his de-facto partner, the complainant's sister and child. That however, was the explanation he gave in evidence. It seems an improbable explanation. However, police never asked him what made him decide to enter the complainant's bedroom. Whatever was the reason, I am satisfied that upon seeing the complainant asleep in her room he decided to have sex with her. Indeed, he does not deny that, but the question is whether it has been proved beyond reasonable doubt that he intended to and did have sex without her consent, once he was in the room.

65. I could not be satisfied beyond reasonable doubt that the fact that he ran away showed a consciousness of guilt of rape. There are other, possibly innocent, explanations for his running away, in particular embarrassment or fear about the repercussions of having consensual sex with his sister in law.

66. The onus of proof rests with the prosecution. Proof must be to the highest standard known in criminal law – proof beyond reasonable doubt. The accused acted disgracefully on this night, but the matters raised by Mr Clodumar are significant, and they raise a doubt in my mind about the guilt of the accused. He must have the benefit of a reasonable doubt.

67. I find the accused Not Guilty of rape.

Geoffrey M. Eames AM QC
Chief Justice