



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 5 of 2017

BETWEEN

The Republic

AND

Brent Buramen

Before: Khan, J
Date of hearing: 6, 7, 8 and 9 February 2018
Date of judgement: 16 February 2018

Case may be cited as: *The Republic v Buramen*

CATCHWORDS:

Where both complainant and defendant were intoxicated- Where it is alleged that complainant was asleep- charge of rape contrary to s.105(1) of the Crimes Act 2016 – whether sexual intercourse took place – whether the complainant was asleep at the material time-whether it was consensual -whether the complainant had the capacity to give consent despite being intoxicated.

Held: The complainant was awake and consented to sexual intercourse and had the capacity to give consent despite being intoxicated.

APPEARANCES:

Counsel for the Republic: F Lacnivalu
Counsel for defendant: S Valenitabua

JUDGEMENT

INTRODUCTION

1. Brent Buramen (Brent) is charged with an offence of rape contrary to s.105(1)(a), (b) and (ii) of the Crimes Act 2016 (the Act). It is alleged that he had sexual intercourse with a girl, whom I shall refer to as the complainant, without her consent. At the time of the alleged offence the complainant was 16½ years old and Brent was 35 years old.

2. The prosecution's case is that when the alleged sexual offence took place the complainant was asleep and therefore was unable to give consent to the alleged sexual intercourse.

RELEVANT LAW

3. Under s.8 of the Act, sexual intercourse means:
- a) the penetration, to any extent, of or by any part of the person's genitals with any part of the body of another person; or
 - b) the penetration, to any extent, to the anus of a person by any part of the body of another person; or
 - c) the penetration, to any extent, of or by any part of a person's genitals by an object, carried out by another person; or
 - d) the penetration, to any extent, of the anus of a person by an object carried out by another person; or
 - e) oral sex; or
 - f) The continuation of an activity covered by paragraph a) to e).
4. 'Consent' is defined in s.9 of the Act where it is stated that:
- (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 representations about the nature or purpose of that to which the person consents;
 - 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 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;

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.

5. 'Oral sex' is defined as:

Means to bringing into contact of any part of the genitals or anus of a person with any part of the mouth (including the lips or tongue) of another person.

PROSECUTION'S CASE

Complainant's version

6. The complainant lives at Uaboe and she does not attend school. On 25 March 2017 the complainant received a call from a boy called Tadem at around 1am. He came to pick her up on his motorbike and took her to Aiwo where there is a gym and where she met a group of people who were drinking vodka. At around 3am the complainant went to pick her girlfriend, whom I shall refer to as 'BS' on a motorbike. After she returned with BS she again started to drink vodka with Reggae, Jeihu and others whose names she does not recall.
7. At around 7am Reggae went away on his motorbike and came back to the drinking party with Brent. Brent came in his red Pajero 4-wheel drive (car). Reggae asked the complainant to get into the car to go with them together with BS, Fiona, Feb-Rose and Faustina. They drove around the island whilst still drinking and dancing. The car was driven by Brent. They went around the island once and dropped Fiona, Feb-Rose and Faustina at Bauda district. After that they returned to Aiwo (gym).
8. From Aiwo the complainant and others went to Location to Baby Kakiouea's home where they spent 1½ hours drinking and thereafter the complainant, Brent, Tadem, Jeihu and Reggae went to Aiwo in the car. At Aiwo Reggae was very drunk and became a nuisance so everyone went to drop him at Meneng district and again returned to Aiwo district in the car. Having arrived at Aiwo Jeihu and Tadem went to buy more liquor whilst, and according to the complainant she remained in the back seat with BS. The complainant wanted to sleep and moved to the front passenger seat, reclined it and went off to sleep, and BS remained in the back seat and was awake. The complainant stated that she sent to sleep after 2pm and the next thing she remembered was that she was awoken by the police who told her that her undies and pants (denim shorts) were off and she was naked. The police took her to the police station and later to the Ron Hospital where she was medically examined. She stated that she did not remember being touched by Brent as she was asleep.
9. In her cross-examination she changed her version and stated that Brent was with them from 1am. She agreed that from Aiwo she and Jeihu went on motorbikes to Moqua for a swim and she swam with her clothes on and when she returned to Brent's car her clothes were wet. She stated that she got into the back seat with BS and later moved to the front passenger seat and reclined it. She said she does not recall if Brent invited her to sit in the front seat. She said that she did not remember if Brent touched her

when she was in the front passenger's seat whilst Brent was on the driver's seat; nor does she remember pulling her t-shirt to bare her chest and stomach; nor does she remember being awake and responding to Brent's touching. She also stated that she does not remember if Brent asked her whether he could go further or that she said that the place was too open to the public and that they should go to somewhere else. She said that she did not remember that BS left her upon seeing her and Brent getting intimate; nor does she remember that the car was moved closer to Jeihu's place as she was very drunk. She also could not remember if at Jeihu's place they got intimate again; nor does she remember assisting Brent in removing her pants which were wet and clinging to her body; nor does she remember being touched on her stomach up to her vagina. She stated that she did not remember that she was moaning and enjoying it as she was sleeping right through.

BS'S VERSION

10. BS is a 15-year-old student. She stated that she was picked up by the complainant on a motorbike and went to Aiwo. She stated that the complainant wanted her to be with her whilst she was drinking. She said that she was not drinking and was just sitting and watching others drink Vodka. She remembered Brent coming in the car with another person whose name she did not know, and she also remembered getting into the car with Brent, Feb-Rose, Fiona and Faustina and the complainant to go to Meneng district to drop the girls Feb-Rose, Fiona and Faustina and then they went to Meneng district to drop Reggae. From there they drove to Location to Baby Kakiouea's place and they stayed there until the sun came up.
11. From Location they drove to O'Riti's and Orijo's place with Brent driving with the complainant and the two males whose names she did not know. At O'Riti's place she stated that the complainant was knocked out and went to sleep and the car ran out of fuel and two male companions went on a motorbike to fetch fuel. She said that this was around 2pm or later and the complainant went to sleep in the back seat with her. Brent asked the complainant to come to the front passenger's seat and she moved to the front passenger's seat and reclined it and went off to sleep.
12. She stated that Brent moved the car under a big tree and took off the complainant's jeans to her ankle level and start fiddling with the complainant. She said that she was scared and pretended as if she was asleep. She questioned him as to what he was doing to the complainant. After he took off the jeans he also took off her undies and was touching her vagina and the complainant was knocked out and asleep as she was up all night and was drunk. She again questioned Brent as to whether this is how he would look after them and Brent threatened her and told her that he would break her arse; and she ran out of the car and hid under the tree where the car was parked at a distance of about 4 meters. BS then saw Brent take off his pants and put his penis in the complainant's mouth and the complainant was not doing anything as she was sleeping. She described that Brent was treating the complainant like a play-thing – like a toy. She said that she saw Brent licked the complainant's vagina; and that he put his penis in her vagina when the complainant was still asleep. He then got on top of her and she ran to her grandfather's house in Aiwo district. She said that she was scared and did not tell anyone. She said that when all this took place, the complainant was asleep and did not make any sound. In cross-examination, she was adamant that the complainant upon arriving at Aiwo where the alleged incident took place did not

leave the car with Jeihu to fetch fuel; she also denied that Jeihu and the complainant went for a swim at Moqua. She stated that the complainant's clothes were dry. She agreed that at the USP area she left the car and went to her grandfather's place to eat and come back again. Later she admitted that she saw the complainant's clothes were wet and the complainant told her that she had splashed herself with water. She agreed that the first time Brent started touching her was at the USP area and she saw him touch her breast, stomach and pube area and all along she was asleep; and she tried to slap her to wake her up (she agreed that she did not tell the police about slapping her face). She said she did not know if the complainant was liking what Brent was doing to her. She agreed that she got out of the car before Brent drove it to another spot and she stated that she saw Brent put his penis in her mouth and this lasted for around 5-10 minutes.

LABRUSCO NAMADUK (LABRUSCO)

13. Labrusco is the police officer. On 25 March 2017 he was off duty. He saw Brent's car was parked sideways towards his house with the driver's side closer to his house. He saw Brent and the complainant. He saw Brent get out of driver's seat and went off to the passenger's seat on which the complainant was seated and was sleeping. He saw Brent get on top of the complainant and he saw him crouching and then he took off his pants. He saw that the girl was half naked –she had no pants and had a top on. He lifted her legs with his hands and wrapped it around his waist and started 'humping' (his word) her back and forth.
14. He then phoned the police at Central Police Station. He was at a distance of some 30-40 meters away. After he called the police Brent had finished having sex with the complaint and moved to the driver's seat and he took a picture of the car with his mobile phone. He said that he called the police as from what he could see the girl was asleep and he was raping her.
15. In cross-examination he agreed that he did not see Brent's penis entering complainant's vagina and all he saw was the movement back and forth; nor did he see anything prior to Brent leaving the driver's seat. He said that he saw Brent lift her legs. It was suggested to him that the 'humping' did not take place but he maintained that it did, and he saw that. He said that he saw that she was naked from the waist down when Brent lifted her legs. He did not see whether the pants were removed. Having seen exhibit D1 which shows that the pants were up to the knee level he said that he was not sure as to how the pants and undies were at the knee level. He could not remember if she had the pants on when the police arrived.

POLICE ARRIVAL

16. The police responded to Labrusco's call at around 3-4 pm. The police team comprised of Iris Agege (ex-police officer), Probation Constable Itsimaera, and Probation Constable Panit Namaduk. The police noticed that the complainant's pants and undies were up to the knee level and at the time they arrived the complainant was asleep in the front passenger's seat and Brent was in the driver's seat. The complainant was taken to Ron Hospital where she was medically examined. Brent was arrested and taken to the Central Police Station.

REASONS FOR ARREST

17. The police officers were not sure as to the reason for the arrest and as to what offence was alleged to have been committed by Brent. Itsimaera said that Brent was arrested for sitting next to the complainant who was half naked and for him consuming alcohol.

RECORD OF INTERVIEW

18. Brent was detained overnight at the Central Police Station. The following day he was interviewed by Sergeant Dan Botelanga in the presence of PC Itsimaera. The interview commenced at around 3.12pm and concluded at 3.56pm. Mr Valenitabua raised the issue that Brent was never formally arrested, and he questioned PC Itsimaera, who was unable to state the reasons as to why he was arrested. The record of interview is as follows from questions 9 to 54:

Q 9: Brent it is alleged on the date 25 March 2017, you allegedly raped a person by the name of Lucy-anna Detabouw who is 16 years old in Aiwo district?

A9: Understand.

Q 10: Before I ask you further questions I must warn you that you are not obliged to say anything unless you wish to do so but anything you say may be put in writing and given in evidence. Do you understand?

A 10: Understand.

Q 11: Brent you have the right to a legal representative do you wish to exercise this right?

A 11: No I don't want a lawyer.

Q 12: Where were you on 25 March 2017 at 600 hours onwards?

A12: I was drinking alcohol.

Q 13: It is alleged that you were consuming alcohol at that time, is that correct?

A13: Correct.

Q 14: What kind of alcohol were you consuming?

A14: Wine, later on during the day I drank vodka.

Q 15: Tell me, who was with you on the day and time mentioned above?

- A 15: I only know Reggae and others I don't know. Reggae's friends we met at Denig Location.
- Q 16: How much did you consume?
- A 16: I don't recall.
- Q 17: Tell me, do you know the girl by the name of Lucy-Anena Detapouw?
- A 17: Personally I don't know, it's my first time meeting her drinking at Location Denig.
- Q 19: How long have you known Lucy-anna Detapouw?
- A 19: This is my first time meeting with her at drinking.
- Q 20: Tell me, where did you meet up with Lucy on the day and time mentioned above?
- A 20: On Saturday around 7 or 8 in the morning yesterday from this day.
- Q 21: Who were with Lucy-anna when you met her?
- A21: There were a lot of them, I don't know them. As I said they were Reggae's friends.
- Q 22: Tell me, where did you go after picking up Lucy-anna and her friends?
- A 22: One of the people drinking, suggested to go to Old Fisheries Building at Aiwo district.
- Q 23: Put it to you that you went around the island once and then headed to the location compound to consume alcohol at Baby Kakiouea's residence, do you agree or what can you say to this?
- A 23: It was just me and Reggae when we went and consumed at Baby's place.
- Q 24: Tell me, where did you go after leaving the location compound?
- A24: We went to the Fisheries old building.
- Q 25: It is alleged that you went to Jeihu's residence in Aiwo. What can you say?
- A 25: Yes.
- Q26: Why did you made a stop at Jeihu's residence?

- A 26: Jeihu told me to go to his place.
- Q 27: Put it to you that your vehicle was out of petrol, what can you say to this?
- A 27: Yes it was low on gas.
- Q 28: Tell me who left to look for petrol?
- A 28: Jeihu and his friend not know his name.
- Q29: Who stayed behind to wait for the petrol to be brought?
- A 29: Me and Lucy-anna.
- Q30: It is alleged that Lucy-anna and her friend were left behind in your vehicle. Do you agree or what can you say to this?
- A30: Lucy-anna's friend left.
- Q 31: Tell me what did you ask Lucy-anna's friend, while the three of you were in the vehicle?
- A 31: I don't recall.
- Q 32: Put to you that you asked Lucy-anna's friend if Lucy-anna was sleeping, do you agree or what can you say to this?
- A 32: I don't recall.
- Q 33: Tell me did you ask Lucy-anna to shift to the front seat that day?
- A 33: Yes I told her because she was standing outside of my vehicle.
- Q 34: It is alleged that you asked Lucy-anna to move to the front seat. What can you say?
- A 34: Yes because she was standing at the front side outside the passenger's seat.
- Q35: It is alleged that you got off the vehicle and took off Lucy-anna's pants and underwear whilst she was sleeping in the passenger's seat on your vehicle. What can you say?
- A35: After she sat the front side of my vehicle, we chat for a while we flirted with each other, I asked to have sex with her. She laughed, she said to me she will give me if there is no one passing by, because we were in a public area.

- Q36: Tell me who were on the vehicle when you took off Lucy-anna's pants and underwear?
- A 36: It was just me and her.
- Q 37: What was Lucy-anna doing when you took off her pants and underwear?
- A 37: She was laying on the front seat and she was helping me with the task of removing her pants.
- Q 38: It is alleged that she was fast asleep when you took off her pants and underwear. What can you say?
- A 38: She was not asleep.
- Q 39: Tell me, when you were touching Lucy-anna's vagina, did anyone stop you?
- A 39: No there was no one there but us.
- Q 40: Put to you that her friend stopped you, do you agree or what can you say to this?
- A 40: Her friend was not there she had already left.
- Q 41: What did you do when Lucy-anna's friend intervened?
- A 41: Her friend was not there. She already left.
- Q 42: Put to you that you threatened her friend and told her to leave or you would break her arse, do you agree or what can you say to this?
- A 42: I did not threaten anyone.
- Q43: What happened next when Lucy-anna's friend left?
- A 43: That's when we started to flirt with each other.
- Q44: It is alleged that you started licking her breasts, what can you say?
- A 44: Yes.
- Q 45: What did you do next?
- A 45: I kissed her all over as I was to put her in the mood.
- Q 46: It is alleged that you went down to her vagina and started licking her vagina. What can you say?

A 46: Yes.

Q 47: What did you do next?

A 47: I just licked her to make her wet.

Q 48: Put to you that you placed your penis in her mouth, do you agree or what can you say to this?

A 48: No.

Q 49: What did you do next?

A49: No.

Q 50: Tell me did you have sexual intercourse with Lucy-anna that day?

A50: No, as I was licking her she then slept. I then went back to my seat.

Q 51: Put to you that you did have sexual intercourse after placing your penis into her mouth, do you agree or what can you say to this?

A 51: No.

Q52: Tell me, when you were doing all this sexual assault towards Lucy-anna was she aware?

A 52: She was aware.

Q 53: Put to you that she did not give you consent to have sexual intercourse, do you agree, or what can you say to this?

A 53: There was no intercourse.

Q55: Why did you do that?

A 55: *Blank*

BRENT'S EVIDENCE

19. Brent said that he joined the drinking party with Reggae before dawn at Baby Kakiouea's house. Except for Reggae who was his friend he did not know the others including Baby Kakiouea. He agrees that during the party which included the complainant and BS were taken around in his car. His car was also used to drop off other people at various stages of drinking on 25 March 2017.
20. After dropping Reggae, he was returning to Aiwo when his car started to back fire as it was low on fuel and he drove into USP area and asked Jeihu to get the fuel. Jeihu went to his home and came back on a motorbike and left with the complainant to fetch the fuel. They returned without any fuel and both the complainant and Jeihu clothes

was wet. He questioned them as to where is the fuel and the complainant responded that it was too hot and she and Jeihu went for a swim at Moqua.

21. Later his friend Tadem arrived and he and Jeihu went to look for fuel. BS was sitting in the back seat and the complainant was standing outside as she was wet. He asked her to get into the front passenger's seat which she did, reclined the seat and he also reclined his seat and they started to whisper to each other and began flirting. He touched and caressed her over her clothes on her stomach and she lifted her t-shirt to expose her stomach, he caressed her breast and pulled her shorts and slid his hand to run his fingers over her pubic area.
22. He admitted that BS questioned him as to what he was doing. The complainant was awake and making eye contact and showing that she was enjoying it. He stopped when BS questioned her and thought that he would start again after BS was asleep. He started touching the complainant again and she was enjoying it. BS saw this and left. The car was still at the USP area.
23. He denied threatening BS and he saw her walk towards the main road. He said he did not know where she went but she did not return. After that the complainant was left with him and he asked her if they could have sex and she said that the place was too open, and they should go elsewhere.
24. Then he tried to start the car again and it started, and he moved it closer to Labrusco's house. He once again asked the complainant if they could have sex and she agreed. He again started caressing her stomach and breast and he started to kiss her and she was enjoying and moaning and giggling. Then he got out of the driver's seat and walked over to her. He opened the door and she assisted him to remove her pants and underwear which were wet, and he managed to drop them to the calf area. He ran his fingers on her pubic area and started to lick her clitoris while standing out of the car and she was awake but had her eyes closed.
25. He got on top of her in between the seat and glove area and whilst attempting to remove his trousers and fell on her. He apologized to her as he was a big man and noticed that she fell asleep. He got out of the car and went back to the driver's seat. He still wanted to have sex with her and that is why he did not pull back her undies and shorts.
26. Later the police arrived, and he was taken to the Central Police Station.
27. In cross-examination he disputed that he had sexual intercourse with her by inserting his penis in her vagina whilst she was asleep. He refuted the suggestion that he put his penis in her mouth while she was asleep.
28. Brent referred to the record of interview and wanted it to be tendered in evidence. Mr Lacinivalu objected to it being tendered and it was eventually tendered. I shall discuss Mr Lacinivalu's objections in more detail later.

CONSIDERATION

PLACE OF INCIDENT

29. It is not in dispute that when the alleged incident took place the car was moved from the USP area where it was originally parked closer to Labrusco's house. At the time of the alleged incident only the complainant and Brent were in the car and the complainant's friend BS had left the car.

RECORD OF INTERVIEW

30. I have set out the record of interview in detail. The prosecution did not call the interviewing officer to tender the record of interview as part of its case although it called PC Itsimaera who was present during the interview. His evidence was only in relation to attending to the report by Labrusco.
31. I stated earlier Mr Valenitabua made an application during Brent's evidence to tender his record of interview as exhibit and it was objected to by Mr Lacanivalu. His grounds for objections were that Brent was not the maker of the document; that the record of interview did not support the prosecution case; and further he did not make Sgt Dan Botelanga available to the defence as a witness.
32. When the objections were raised I was going to allow the record of interview to be tendered as an exhibit, but I adjourned the matter to the following day to enable Mr Lacanivalu to consult the Director of Public Prosecutions. When the matter resumed the following morning Mr Lacanivalu withdrew his objections and the record of interview was tendered by consent.

PROSECUTOR'S DUTIES

33. Mr Lacinivalu was not familiar with his role as a prosecutor otherwise he would not have objected to the tendering of the record of interview or would not have made submissions that it did support the prosecution case. I draw his attention to Rule 29¹.

29.1 *A prosecutor must freely assist the Court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the Court, and must seek to assist the Court with adequate submissions of law to enable the law properly to be applied to the facts.*

29.2 *A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of the case.*

29.3 *A prosecutor must not, by language or other conduct, seek to inflame or bias the Court against the accused.*

¹ Australian Solicitor's Conduct Rules 2012 in Practice

29.4 *A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe or on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.*

34. At page 92² it is stated:

29.1 DUTY OF PROSECUTORIAL FAIRNESS

Prosecutors must fairly assist the Court to arrive at the truth and to enable the law properly to be applied to the facts. They must present a full and firm case, but no more: see Rule 29.2-29.4. Deane J in *Whitehorn v R* (1983 152 CLR 657, 663 described the duty as one of 'fairness and detachment':

Prosecuting Counsel in a criminal case represents the State. The accused, the Court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and helping to ensure that the accusers trial is a fair one.

EVIDENCE

35. There is variation in the evidence of Labrusco and BS as to how the sexual intercourse took place. Labrusco admitted that he did not see Brent's penis entering the complainant's vagina apart from the movement back and forward, as he was at some 30-40 metres away. Whilst on the other hand BS's evidence is that she saw everything as she had a clear view having positioned herself under the tree at a distance of 4 meters from the car. The complainant's evidence is that she was drunk and fast asleep and did not know what happened to her and all she remembered was being awoken by the police. So, the prosecution's case is based on the evidence of BS.

36. Brent's version is that apart from touching and caressing the complaint on the breast and stomach and pubic area, kissing her he licked her clitoris and later attempted to get on top of her and fell on her and realised that she had fallen asleep.

37. BS's version of what Brent did to the complainant is as follows:

(1) He put his penis in her mouth whilst she was sleeping. She said that his penis was in her mouth for some 5-10 minutes;

(2) He licked her vagina;

(3) He inserted his penis into her vagina.

² Australian Solicitor's Conduct Rules 2012 in Practice

38. When Brent was being interviewed by the police it was put to him at questions 48 and 53 as follows:

Q48: Put to you that you placed your penis into her mouth, do you agree or what can you say?

A48: No.

Q53: Put to you that she did not consent to have sex intercourse, do you agree or what can you say to this?

A53: There was no intercourse.

39. In the record of interview, the interviewing officer did not put to Brent that he had licked the complainant's vagina whilst the version given by the BS is that he did that as well. It is quite apparent that the record of interview was based on the account given by BS to the police. If she had told them that he had licked her vagina then why it was not put to him or was she making things up as she gave evidence? She has admitted that there were things that were left out from her statement to the police including the fact that she slapped the complainant on her face to wake her up. In the record of interview at question 23 it was put to Brent that he had asked BS if the complainant was sleeping. She did not state that in her evidence to Court.

40. Brent made an admission of licking the complainant's vagina without it being put to him by the police and that admission in itself is sufficient for the prosecution to prove the charge of rape provided it is established that the complainant was asleep at the material times.

41. The defendant denied that he ever inserted his penis in the complainant's vagina, whilst BS's evidence is that he did that, so, I am faced with a denial and an assertion. When the court is faced with kind of situation it invariably looks for some independent evidence to resolve the issue. The complainant was medically examined shortly after the alleged incident by a doctor at Ron Hospital. I am certain that the examination would have revealed as to whether there was recent penetration or presence of sperm. However, for some unexplained reasons the medical evidence was not adduced nor was the medical report tendered as evidence. In the circumstances of this case and in particular in light of the prosecutor's response regarding the tendering of the record of interview I think it is reasonable to pose the question as to whether it supported the prosecution's case? The failure by the prosecution to tender the medical report suggests that there was no finding of recent penetration or presence of sperm by the doctor which supports the defendant's version that he did not have sexual intercourse with the complainant by inserting his penis into her vagina. Unfortunately, this cast doubt on BS's evidence in regards her evidence of penile penetration of the complaint's vagina.

42. BS was adamant that she saw Brent put his penis in the complaint's mouth and this lasted for up to 5-10 minutes whilst Brent denies this. I again pose the question as how it was possible for him to put his penis in the complainant's mouth who has a full set of teeth and whilst she was asleep. Mr Lacinivalu submitted that maybe he opened

her mouth and put his penis in but there is no evidence of this. If BS is to be believed that this act took place for some 5- 10 minutes, then it means that the complainant was awake and fully participating.

43. BS in her cross examination agreed that she left the car at the USP area to go to her grandfather's house to have some food. If the complainant was indeed sexually assaulted as she described, then would she be concerned about getting food or the complainant's welfare. What would be her priority? Labrusco did not see BS around the car when he called the police, and nor did she come out of her hiding place when the police arrived. This leads me to draw the irresistible conclusion that she was not around when the alleged incident took place outside Labrusco's house. I further find that nothing untoward happened in the car before she left and if did then she would not go looking for food but instead seek assistance to protect the complainant.

CONCLUSION

44. In the circumstances I am satisfied that the act of the intimacy that took place between Brent and the complainant including the oral sex was with her consent. I accept that the complainant had consumed alcohol and was intoxicated but I find that she still had the capacity to give consent which she did. I further find that as soon as the complainant felt asleep Brent stopped and returned to the driver's seat.
45. For the reasons given above I find that the prosecution has failed to prove its case against the defendant and he is acquitted of the charge of rape.

OBSERVATIONS ON ARREST

46. I draw counsel's attention to Article 5(2), (3) and (4) of the Constitution wherein it is stated as follows:

Article 5(2) A person who is arrested and detained shall be informed promptly of the reason for the arrest or detention and shall be permitted to consult in the place in which he is detained a legal representative of his own choice.


Article 5(3) A person who has been arrested or detained in the circumstances referred to in paragraph (c) of Clause 1 of this Article and has not been released shall be brought before a Judge or some other person holding judicial office within a period of 24 hours after the arrest or detention and shall not be further held in custody in connexion with that offence except by order of a Judge or some other person holding office.

Article 5(4) Where a complaint is made to the Supreme Court that a person is unlawfully detained, the Supreme Court shall enquire into the complaint and unless satisfied that the detention is lawful shall order the person to be brought before it and shall release him.

47. Brent was taken into custody on 25 March 2017 at around 3pm and was produced before the Magistrates Court on 27 March 2017, and his detention obviously was

unlawful as he was not produced before a Judge or some other person holding a judicial office within 24 hours as required by Article 5(3).

DATED this 16 day of February 2018


Mohammed Shafiullah Khan
Judge