



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 18 of 2018

BETWEEN

The Republic

AND:

RD

Before: Khan, J
Date of Hearing: 13 and 23 June 2019
Date of Judgement: 28 June 2019

Case may be cited as: *Republic v RD*

CATCHWORDS:

Criminal law- doli incapax- children between ages of 10 to 14-section 41 of the Crimes Act 2106 provides that a child is only is criminally responsible for an offence if prosecution prove that his conduct is wrong.

APPEARANCES:

Counsel for the Republic: R Talasasa (DPP)
Counsel for the Defendant: R Tagivakatini

JUDGEMENT

INTRODUCTION

1. The defendant, RD, is a juvenile. He was born on 26 September 2011 and he will be referred to as the juvenile.
2. The date of the offence is 6 December 2017. The juvenile is charged with the offence of rape contrary to s.116(1)(a), (b)(i) of the Crimes Act 2016 (Crimes Act).
3. The particulars of the offence are that on 6 December 2017 at Nauru he intentionally engaged in sexual intercourse with the victim who is a child under 13 years of age.

4. The victim in this case was born on 15 March 2011 and she will be referred to as the victim to suppress her identity. At the time of the offence she was 6 years and 9 months old.

REVELANT LEGISLATION

5. Sexual intercourse as contained in the charge is defined on s.8 of the Crimes Act as follows:
 - “(a) The penetration, to any extent, of or by any part of a person’s genitals with any part of the body of another person; or
 - (b) The penetration, to any extent, of the anus of a person by any part of the body of another person; or
 - (c) The penetration, to any extent, of or any other 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 any activity covered by paragraph (a) to (e).

ONUS OF PROOF

6. The onus of proof is on the prosecution to prove each and every element of the offence charge beyond all reasonable doubt.

DOLI INCAPAX

7. At the time of the offence the juvenile was 10 years 2 months and 10 days old.
8. Under the Crimes Act a child under 10 years old is not criminally responsible for an offence¹.

CRIMINAL RESPONSIBILTY

9. For children aged 10 to 14 years old s.41 of the Crimes Act provides:
 - (1) A child aged 10 years or more but under 14 years can only be criminally responsible for an offence if the child knows that the child’s conduct is wrong.
 - (2) The question whether a child knows that the child’s conduct is wrong is one of fact.

¹ S.40 of Crimes Act 2016

- (3) The prosecution has the burden of proving that a child knows that the child's conduct is wrong.
10. Under s.41 of the Crimes Act a child can only 'be criminally responsible for an offence if the child knows that his conduct is wrong'. The prosecution bears the burden of proof which is beyond all reasonable doubt to prove that a child knew that his conduct was wrong. Under s.41 there is a presumption of innocence in favour of the child and if the prosecution is unable to prove that his conduct was wrong then he is entitled to be acquitted of the charge, notwithstanding the fact that he may have committed the offence.
11. In *C v DPP*² the House of Lords stated as follows at page 43:
- "The presumption that a child between the ages of 10 and 14 was *doli incapax* and the rules of the presumption could only be rebutted by clear positive evidence that the child knew that his act was seriously wrong, and that the evidence of the acts amounting to the offence itself was not sufficient to rebut the presumption, were still part of English Law."
12. Further, at page 62 of *C v DPP* Lord Lawry stated:
- "A long and uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that when doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has been variously expressed, as in *Blackstone*, 'a strong and clear beyond all doubt or contradiction' or in *R v Gorrie (1919) 83 JP 136*, 'very clear and complete evidence' or in *B v R (1958) 44 CrAppR 1 at 3* per Lord Parker CJ, 'It has often been put in this way, that "guilty no less must be proved and the evidence to that effect must be clear and beyond all reasonable doubt" '....
- The second clearly established proposition is evidence to prove the defendant's guilty knowledge, as defined above must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be. As Erle J said in *R v Smith (1845) 1 Cox CC 260*:
- "... A guilty knowledge that he was doing wrong – must be proved by the evidence, and cannot be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it is satisfactorily proved that at the time he fired the rick (if you should be of the opinion he did fire it) he had guilty knowledge that he was committing a crime."
13. So, I shall first consider whether the juvenile 'did the act charged' and once I am satisfied beyond all reasonable doubt that he 'did the act charged', then I shall consider whether the prosecution has adduced sufficient evidence to prove that he knew that his conduct was wrong.

FACTS

² 1999 2 All ER 43

14. The victim attends Anetan Infant School and her school teacher (Mrs D) is the mother of the juvenile.
15. On 16 December 2017 the teacher arranged for a sleepover at the school and about 20 students were at the sleepover with 3 adults one of whom was the victim's aunt who will be referred to as VB to again suppress the identity of the victim.

VICTIM AS A CHILD WITNESS

16. Because the victim was a child witness, I had to ask her a series of questions to ascertain her competency to give evidence. Having been satisfied that she understood the duty to speak the truth the victim was sworn to give evidence.

VICTIM'S EVIDENCE

17. Her evidence was that she was at the school for the sleepover and she was accompanied by her aunt VB. She pointed to the juvenile and said:

“That boy over there poked my bum.”

She said she knew him before that night as he was a student at Kayser College. She also identified him by his name. She said that while she was sleeping the juvenile came over to her and touched her bottom. She also stated that there was nothing inside her bottom but her bottom was very painful. She later said that when she said the bottom but in fact, she meant the 'front'.

18. She described that she was fully dressed wearing dress and underpants and the juvenile took off her underpants and inserted his finger into her private parts. She was unable to give any time as to when this happened but said it was night. She said that the lights were off in the classroom and the lights were on outside in the verandah and the reflection was coming through the windows. She stated that when he inserted his finger in her private parts, she did not stop him. After he did that to her, he went outside to go to the toilet and that's when she saw him.
19. She said that she felt the pain because of the penetration until the next day and on 8 December 2017 she attended the RON Hospital where she was medically examined.
20. In her cross examination she was unable to say what year this was, nor to say what year was last year or 2 years ago or what day is it today. Neither was she able to say what this month was?
21. She said that she was sleeping next to her aunt VB and her sister. She said she did not see his face when he touched her but saw him when he went outside.
22. She said that when the juvenile did this to her everyone was asleep. In a question to the counsel for the juvenile it was stated:

Question: Further the juvenile only checked to see if you had wet the bed?

Answer: He inserted his finger to check my urine.

VB'S EVIDENCE

23. She accompanied the victim to the sleepover and they all slept on the floor on mattresses. There was a total of about 20 people which included 3 adults, the teacher, another female and herself.
24. She said the children went off to sleep around 11pm after watching TV. She said that she and her 2-year-old son slept next to her on her left side and the victim slept next to her son and then next to the victim was a neighbour's child.
25. She said that she went off to sleep at around midnight and the lights in the room were switched off. She stated that all of the lights were on outside, it was still very dark in the classroom, so much so that she had to turn the torch on her mobile phone to see her 2-year-old son which she did from time to time.
26. She stated that the reflection from outside was not sufficient to see people in the classroom.
27. She stated that it was at around 6 am (the next day) she felt that someone was sucking one of her breasts and squeezing the other one. She opened her eyes and noticed that it was the juvenile. She felt very disgusted and walked out of the classroom.
28. When she met the victim at the breakfast that morning and she did not know that anything had happened to her, and at breakfast, the victim told her that the juvenile had inserted his finger into her private parts. And that he also closed her mouth and slapped her on her face.
29. In her cross examination she confirmed that she did not report this matter to the police.
30. She said that her son was sleeping on her left and the victim was next to him. She stated that the victim's sister was not present at the sleepover.
31. She said that she went off to sleep at midnight and by then nothing had happened to the victim.

MEDICAL REPORT

32. The victim was medically examined at the RON Hospital by Dr Vangana on 8 December 2017. In the medical report Dr Vangana stated as follows:

“In summary in conclusion, there was no evidence of vaginal or anal penetration. There was no bruise or scratch marks nor abrasions, no lacerations and no fractures to suggest severe violence used. However, this does not rule out superficial touching and kissing.”

RECORD OF INTERVIEW

33. On 27 July 2018 the juvenile was interviewed by Sgt Sareima Aremwa. The questioning was in English which was translated into Nauruan and likewise the answers were in Nauruan and translated into English. Both versions were recorded by Sgt Sareima on the computer. The juvenile participated in the record of interview and was accompanied by Mr Harasio Cook a child support officer.
34. The allegations put to the juvenile were as follows:
- First allegation - It is alleged that you RD raped B on 6 December 2017 during the sleepover at Anetan Infant School, by means of inserting your finger into her vagina. Do you understand the allegations?
- Second allegation - It is alleged that you RD indecently assaulted Miss VB by means of sucking her breast while sleeping during the sleepover at Anetan Infant School on 6 December 2017. Do you understand the allegation?
35. After the allegations were put to the juvenile the interview was suspended to allow him to seek legal advice and a lawyer advised the juvenile in the presence of Mr Cook and the interview continued thereafter.
36. Both the allegations referred to above were put to the juvenile before he was given the opportunity to seek legal advice and in response to the allegations his response was that he understood the allegations.
37. The record of interview was suspended at question 11 at 12.20 hours and it reconvened at question 12 at 12.41 hours. After the juvenile was given legal advice the allegation of rape was not put to him again and the questioning continued and the record of interview reads as follows:
- Question 13: Do you go to school?
Answer: Yes
- Question 14: What school do you go to?
Answer: I attend Kayser College
- Question 15: What grade are you in?
Answer: I am in Grade 5
- Question 16: What is your favourite subject at school?
Answer: My favourite subject at school is English.
- Question 17: Tell me, is it right to fight at school?
Answer: No
- Question 18: Why are you not allowed to fight at school?
Answer: Because I am scared of the principal.
- Question 19: Do you know a girl by the name of B?
Answer: I know her.

- Question 20: How long did you know B?
 Answer: I knew her from Anetan Infant School for she was one of my mother's students
- Question 21: How old is B?
 Answer: Don't know.
- Question 22: Tell me is it right to touch a female's vagina?
 Answer: Not right
- Question 23: Then why did you touch B's vagina?
 Answer: Because I thought she knew she pees her pants for I was sleeping next to her then I checked all the students who came for the sleepover.
- Question 24: Where were you on 6 December 2017?
 Answer: Can't recall
- Question 25: It is alleged that you were at Anetan Infant School.
 Answer: I forgot
- Question 26: Why were you there?
 Answer: My mother organized a sleepover and I was with her.
- Question 27: It is alleged that you accompanied your mother for a sleepover at Anetan Infant School. Do you agree or what can you say?
 Answer: Yes
- Question 28: What else did you do during the sleepover?
 Answer: Nothing
- Question 29: It is alleged that you sucked someone's breast, namely VB, do you agree or what can you say to this?
 Answer: No comment
- Question 30: Tell me do you know that it is against the law to touch someone's vagina without their consent?
 Answer: I did not know.
- Question 31: Tell me where did you learn to do all these things?
 Answer: I overheard male adults from Anabar talking about sex life.
- Question 32: Why did you do it?
 Answer: Because my brain told me to do it so.
- Question 33: Was anyone else awake?
 Answer: No one was awake.
- Question 34: If anyone had been awake, would you have done what you did?
 Answer: No comment

Question 35: Did B wake up or not?

Answer: She was fast asleep

Question 36: Tell me what you did is it right or wrong?

Answer: It was wrong.

Question 56: Do you state your own version in relation to these allegations made against you?

Answer: No comment

Question 57: Do you agree that there were no threats made against you to provide these answers?

Answer: Agree

SGT SAREIMA'S EVIDENCE

38. Sgt Sareima in her evidence stated that this was the first time she had interviewed a juvenile as a suspect and she further stated that the reason for the delay in interviewing the juvenile was that she was seeking guidance from the Office of the Director of Public Prosecutions and after she was given advice she then conducted the record of interview.
39. Sgt Sareima took the complaint and in her First Information Report (FIR) she recorded:

"C & A walked into base along with the victim who was 6 years old to file a complaint against the son of ND, namely RD, for sexually assaulting the victim on 6 November 2017 at Anetan Infant School."
40. She clarified that 6 November 2017 was a typing error and it should have read 6 December 2017.
41. In the record of interview, the questions jumped from question 36 to question 56 leaving a gap of 20 questions and she said again that it was a typing error.

CONSIDERATION

CORROBORATION

40. S.101 of the Crimes Act abolished the need for corroboration and as such the victim's evidence alone is sufficient for me to convict the juvenile. Vaai J dealt with the issue of corroboration in *R v Jan*³ and he stated at [32] as follows:

"[32] Although the rule of practice relating to corroboration has been abrogated by s.101 of the Crimes Act 2016, it is my respectful view that I must in the circumstances of this case, in order to avoid a perceptible risk of miscarriage of justice, consider the evidence of the complainant in the usual way having in mind such aspect of human nature and experience."

³ [2017] NRSC 93

41. In *R v Debao*⁴ Vaai J stated as follows at [30]:

“[30] s.101 Crimes Act provides that the law is abolished if the law provides that corroboration of the evidence of a witness is required for a conviction for an offence under this Part. Despite similar provisions in Queensland, Australia, the High Court of Australia in *Tully v R*⁵ and *Robinson v The Queen*⁶ held that there are cases where there is perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinize the evidence of a complainant with great care before arriving at a conclusion of guilt. This is not because complainants in sexual cases, as a class are to be treated as intrinsically untrustworthy. The relevant provisions of Queensland Criminal Code preclude such reasoning. And the same Code does away with the formal requirement to direct the jury that it would be unsafe to convict an accused on the uncorroborated evidence of a complainant. But those subsections do not prevent a judge from making a comment on the evidence given on the trial that it is appropriate to make in the interest of justice. It is the interest of justice that dictates whether a warning should be given.”

42. In *Longman v The Queen*⁷ the High Court stated as follows at page 87:

“Furthermore, what par. (a) abolishes is the requirement to give a warning, not a judge’s discretion to comment on the circumstances of the case. No longer may the judge tell the jury that it is dangerous to convict in the circumstances described in par. (a) because the experience of the Courts has shown it to be so, but the judge may invite the jury in sexual cases (as is done in other criminal cases) to make their own evaluation of the alleged victim’s evidence in light of common human experience. By force of par. (a) alleged victims of sexual offences no longer form a class of suspect witnesses, but neither do they form a class of especially trustworthy witnesses. Their evidence is subject to comment on credibility in the same way as evidence as alleged victims in other criminal cases but to comment only.”

43. I mentioned earlier that Sgt Sareima made mistakes in the recording of the FIR and how the questions jumped from 36 to 56. She put the 2 allegations to the juvenile, the first was the allegation of rape which took place on 6 December 2017 and the second one was of indecent assault is also on 6 December 2017. The date for the second allegation cannot be correct as VB in her evidence stated categorically that the incident took place at around 6am (on 7 December 2017) so once again Sgt Sareima got the dates wrong.

44. The victim was asked the time as to when this incident took place but was unable to place a time and understandably so as she lacks that level of comprehension. According to the evidence of VB she went to sleep after midnight by which time no incident had taken place and yet the allegation is that this incident took place on 6 December 2017. Her recollection of who was at the sleepover is different to VB. She said that her

⁴ [2019] NRSC 5; Case No. 21 of 2017 (19 March 2019)

⁵ [2007] 231 ALR 712

⁶ [1999] 197 CLR 162

⁷ 168 CLR 79

younger sister was also present and slept next to her whereas VB said that she was not there.

45. Although the juvenile was subjected to a reasonably lengthy record of interview the allegation of him inserting his finger in B's vagina was not put to again after he was given legal advice and nor was an answer sought to that allegation; and further that allegation was tone down substantially at question 23 of the record of interview when the juvenile was asked as to why did he touch the victim's vagina and his response was that he was checking to see if she pees in her pants. Sgt Sareima accepted that explanation otherwise she would have reasserted that he inserted his finger into her vagina, but she did not do so.
46. The victim was quite adamant that she experienced pain until the next day because the juvenile inserted his fingers into her private parts and yet the doctors did not find any evidence of vaginal or anal penetration. However, the doctor did not rule out the possibility of superficial touching which is consistent with the version adopted by Sgt Sareima and accepted by the juvenile.
47. Touching some vagina is not sexual intercourse as defined by s. 8 of the Crimes Act discussed above.

CONCLUSION

48. In the circumstances I find that the prosecution has failed to prove the charge against the juvenile and he is acquitted of the charge of rape.

DATED this 28 day of June 2019



Mohammed Shafiullah Khan
Judge

