



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Criminal Case No. 4 of 2017

BETWEEN

Republic

V

Jacob Dube

Before: Khan, J  
Date of Hearing: 14, 15, 18 and 19 February 2019  
Date of Ruling: 22 February 2019

Case may be cited as: *Republic v Dube*

**CATCHWORDS:**

Identification of accused by use of photo board- Where accused identified for one incident (original charge)- Where accused raised alibi- Where alibi was investigated by police- where neither the accused or his lawyer was informed of outcome of the investigation- Where information was amended to incorporate an earlier incident that took place some four years earlier- Where the original charge was not proceeded with- Whether the identification of the original charge can be used for the earlier incident.

**APPEARANCES:**

Counsel for the Prosecution: L Lacanivalu  
Counsel for the Defendant: V Clodumar

RULING

INTRODUCTION

1. The accused is charged with one count of rape contrary to s.347 and s.348 of the Criminal Code 1899 (amended information). The information was filed on 26 June 2018 and the particulars of the offence are that:

Jacob Dube sometime between 1 November 2013 and 28 February 2014 at Nauru, had carnal knowledge of a woman, namely, Verily Mobit, without her consent.

## ORIGINAL CHARGE

2. The accused was initially charged with rape contrary to s.105(1)(a) of the Crimes Act 2016. The information was filed on 29 May 2017 and the particulars of this charge are that:

Jacob Dube on 10 March 2017 at Nauru, intentionally engaged in sexual intercourse with a woman, namely, Verily Mobit, without her consent and Jacob Dube was recklessly indifferent to consent of Verily Mobit.

3. The matter was heard before me before between 14 to 19 February 2019 and at the close of the prosecution case the counsel for the defendant, Mr Clodumar, has made a submission of no case to answer pursuant to s.201(a) of the Criminal Procedure Act 1972 which states:

“If it considers that, after hearing, if necessary any arguments which the prosecutor or the barrister and solicitor or pleader conducting the prosecution and the accused or his barrister and solicitor or pleader if any may wish to submit, that the case is not made out against the accused, or any of the several accused, sufficiently to require him to make a defense in respect of the whole information or any court thereof, shall dismiss the case in respect of, and acquit the accused as to, the whole of the information or that count as the case may be.”

## CHRONOLOGY OF EVENTS

4. The victim in this case will be referred to as VM. She is a 29 years old, single female. She attends Able Disabled School (school). She suffers from a mild case of disability known as ‘Globally Delayed’ and has learning difficulties.
5. On 14 March 2017 whilst VM was at school, her teachers observed that something was troubling her as she had been crying and was distressed. At that time, she was living in a safe house.
6. Her coordinator, Emmaline Caleb, asked her as to what was troubling her and VM told her that she was raped on Friday, 10 March 2017, and that she had told her mother about it but she did not want to report the matter to police as she wanted to avoid public attention. She also stated that she knows the person by name and can identify him if she sees him again.
7. On 15 March 2017 Sgt Sareima Aremwa was contacted and she visited the complainant at the safe house where she met Emmaline Caleb, Alina Amwano and she spoke to VM in their presence. She noticed that she had difficulty obtaining answers from VM so she was communicating with her through Emmaline Caleb as she was more comfortable with her.
8. In her statement to Sgt Sereima VM stated that on 10 March 2017 she was taken on a motor bike by a person by the name of Jacob Dube at around 11pm. When she got on to the motor bike, she noticed that the rider was drunk and his breath smelt heavily of alcohol. She was taken to a place in Anabar in the bush where he had sexual intercourse with her. She tried to push him away but was unable to do so as he was



strong and later, they drove away and he again had sexual intercourse with her at Kayser College in Ewa District again without her consent.

9. After the statement of VM was taken, she was taken to RON Hospital for medical examination and was seen by Dr Josese who referred her to Dr Kumbia who examined her on 16 March 2017.
10. On 17 March 2017 the accused was arrested by the police from the Domestic Violence Unit and taken to the police station. At the police station, Sgt Iyo Adam took his photograph which was subsequently included in the photo board which had a total of 20 photographs.
11. Sgt Adam took the photo board to the safe house and he met VM. He showed her the photo board and asked her to point out the offender. After 10-15 seconds she pointed out to the photo No. 17 which belongs to the accused. He had a conversation with her and asked her if she was sure that it was him and her response was that she was certain and she knows where he lives.
12. On 17 March 2017 the accused was interviewed by Sgt Sereima and she put the allegation to him that on 10 March 2017 he took VM on his motor bike to Anabar where he raped her. He participated in the record of interview having consulted Mr Valenitabua, the public defender, and his response to all the questions were 'no comment'. On 18 March 2017 the accused was produced to the District Court.

#### ALIBI

13. On 29 May 2017, Mr Clodumar raised the issue of alibi in court and on 4 July 2017 he filed a written Notice of Alibi in which it is stated:

“On the evening of 10 March 2017, the accused’s partner, Miss Rachael Gadararoa, saw him enter their home at the Location Compound. She heard him take a shower. Sometime later he came out and asked her to accompany him to a bingo game at Link-Belt Oval. She did not go. He left in his car registration No. ABA010. She did not see him again until a few hours later – something to 10pm. She was at the table in the lounge working on her computer. She usually stays up late – up to 2am or later. He entered the bedroom and she can hear the TV on. He was asleep when I entered the bedroom between 2am and 3am the next morning.

She had been in a defacto relationship with Jacob since 2008. Jacob used to consume alcohol regularly in the years 2008-2014. Since then he has stopped and has not drunk alcohol for the last 3 years. She did not smell any alcohol on him when he returned home something to 10pm on 10 March 2017.”

14. On 30 April 2018 Mr Lacanivalu informed the Court that the police were still checking on the alibi and did not give a definite response as to outcome of the police investigations. On 12 June 2018 he sought leave to file an amended information in which it was stated that the accused raped VM between 1 November 2013 to 28 February 2014.

15. Neither the police or the DPP's office provided a response to the alibi raised by the accused. However, by the filing of the amended information stating that the incident of rape took place between 1 November 2013 to 28 February 2014, the only inference that I can draw from this is that there was truth in the alibi.

#### AMENDED INFORMATION

16. Although the prosecution amended the information to allege that the rape took place some 4 years earlier (November 2013-February 2014) neither the complainant or her mother or anybody else on her behalf lodged a formal complaint to the police to investigate this incident.

#### IDENTIFICATION OF THE ACCUSED

17. Since no formal complaint was lodged to the police in respect of the incident contained in the amended information, naturally no investigation was carried out by the police including the identification of the accused. Mr Lacanivalu has maintained right through the trial that there was no need for a fresh identification of the accused and that the identification by the use of a photo board on 17 March 2017 will be sufficient to prove his identity for the matter alleged in the amended information.

#### ADDITIONAL STATEMENTS

18. After the amended information was filed, Mr Lacinivalu advised Sgt Sereima to take additional statements from VM, her mother and her cousins about the incident in November 2013-February 2014.

#### EVIDENCE IN THE TRIAL

19. VM's evidence on identification of the accused by way of a photo board ID was that she pointed to the accused in the presence of Sgt Adam. In her evidence, she stated that she was told by her cousin as to who the accused was and also his name. When she referred to her cousin she was referring to Esmi Dekarube who gave evidence about the incident on 1 November 2013 to February 2014 when she stated that an unknown person had told her that the accused took VM on his motor bike. Having been informed by the unknown person she in turn informed VM who said in her evidence that her cousin gave her the name of the accused. See *Alexander v R*<sup>1</sup> where it was stated as:

“The view of the majority in *R v Christie* (49) was accepted as corrected by the Judicial Committee in *Teper v The Queen* (50), where a witness gave evidence that an unknown passer-by had identified the accused; it was held that the statement did not form part of res gesta and was inadmissible.”

#### CONSEQUENCES OF FILING AMENDED INFORMATION

20. The consequences of filing the amended information is that the police and Mr Lacanivalu have accepted that there was merit in the alibi raised by the accused. Sgt Sereima stated in her evidence that she received a verbal direction from the DPP's office not to investigate the alibi anymore and to record additional statements from

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<sup>1</sup> (1981) 145CL 395 at pg 406



VM, her mother and her cousins about the alleged rape between November 2013 to 28 February 2014. She further added that for the incident on 10 March 2017 there was another suspect and that the investigation is still on going.

21. In light of the foregoing discussions I find that the identification of the accused by VM for the incident on 10 March 2017 was flawed and with this finding there is no evidence of identification left for the court to consider.

### CONCLUSION

22. The identification of the accused for the incident in the amended information is an essential element of the charge and there being no identification I uphold the submission of no case to answer and acquit the accused of the charge of rape.

### OBSERVATIONS AND GUIDELINES

23. In this matter the way the issue of alibi was dealt with is of real concern. Whilst the police were carrying out investigations about the alibi Mr Lacanivalu advised them to discontinue the investigations and instead take additional statements for the offence in the amended information.
24. The police should have been allowed to continue with their investigations so that they could come to a conclusion as to whether there was any merit or substance in the alibi and if their investigation revealed that what the accused was saying was correct then both he and his lawyer should have informed accordingly in writing. If the response was positive and that is the case as I made a finding to that effect, then Mr Clodumar could have made appropriate submissions to the DPP that there was no evidence of identification, instead of going through this lengthy and expensive trial.
25. Considering what happened in this case I think it is important that I shall issue a guideline for investigation of alibi. When an alibi is raised by an accused then it ought to be investigated within a reasonable time, and in my view 4 to 6 weeks is more than reasonable to enable the police to carry out the investigations. Once the investigation is completed its result should be communicated in writing to the accused or his lawyer if he is represented and all the witnesses' statement is to be disclosed to the defence.

DATED this 22 day of February 2019

  
Mohammed Shafiullah Khan  
Judge

