



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No 13 of 2019

BETWEEN

The Republic

And:

Obadiah Dabwido

Before: Khan, J
Date of Hearing: 10 February 2020
Date of Ruling: 11 February 2020

Case may be cited as: *Republic v Dabwido*

CATCHWORDS: Submission of no case to answer - Where there is no evidence that the offences were committed by the defendant.

APPEARANCES:

Counsel for the Prosecution: S Serukai
Counsel for the Defendant: S Valenitabua

RULING

INTRODUCTION

1. The accused is charged with the following offences:

First Count

Statement of Offence

Aggravated burglary: contrary to section 161(1)(b) and (c) of the Crimes Act 2016.

Particulars of Offence

Obadiah Dabwido on 31 August 2019 at Aiwo District in Nauru, unlawfully entered into the dwelling house of WJA at night.

Second Count

Statement of Offence

Indecent assault: contrary to section 117 (1)(a), (b) and (c)(i) of the Crimes Act 2016.

Particulars of Offence

Obadiah Dabwido on 31 August 2019 at Aiwo District in Nauru, indecently assaulted VA, a child under the age of 16 years old, by touching and squeezing her buttocks.

2. This matter was set down for trial yesterday and the prosecution stated that the following were the elements of the offence in relation to Count 1:
 - 1) That the accused entered into a building;
 - 2) He was armed with an offensive weapon;
 - 3) That he had an intent to commit an offence in the night.
3. In relation to Count 2, the prosecution stated that the elements of the offence were:
 - 1) That the accused intentionally touched the victim;
 - 2) That the touching was indecent;
 - 3) That the victim was under 16 years of age.
4. In her opening address the prosecutor stated that she will call VA who was 6 years old at the time of the incident, and now 7 years old. She stated that VA will give evidence of seeing the accused entering their house and indecently assaulting her. After he left the house, VA went to her mother's room and related the entire incident to her mother.

VA's EVIDENCE

5. VA was sleeping in the lounge with her younger brother whilst VA's parents and her elder sister were sleeping in the bedroom. VA's evidence is as follows:

Question: When you were in the lounge was the light on?
Answer: The lights were on.
Question: What did you see?
Answer: I don't know.
Question: How do you know the lights were on?
Answer: I saw the lights were on.
Question: How did you know the lights were on when you said you were asleep?
Answer: I woke up.
Question: What made you wake up?
Answer: I just woke up.
Question: What did you notice when you woke up?

Answer: I don't know.
 Question: When you woke up what position were on you the bed?
 Answer: I was on the side.
 Question: Can you explain what happened when you woke up?
 Answer: I can't.
 Question: Why can't you tell your story?
 Answer: I don't know.
 Question: Do you remember speaking to the police?
 Answer: I don't remember.
 Question: Do you remember meeting me?
 Answer: Yes.
 Question: You remember telling me the story?
 Answer: I don't remember.
 Question: How are you feeling right now?
 Answer: Fine.
 Question: When you woke up in the lounge do you remember what happened?
 Answer: No.
 Question: Where was your mummy sleeping?
 Answer: In the room.
 Question: Who was sleeping with her?
 Answer: My sister and my dad.
 Question: How do you know they were in the room?
 Answer: I just know.
 Question: When you woke up were you able to go to their room?
 Answer: Yes.
 Question: Do you know what happened before you went into their room?
 Answer: No.
 Question: Do you know why you went in their room?
 Answer: Because I was scared.
 Question: What were you scared of?
 Answer: Obadiah.
 Question: Who is Obadiah?
 Answer: My cousin.
 Question: Why were you scared of your cousin?
 Answer: I don't know.
 Question: Where did Obadiah live?
 Answer: Aiwo.
 Question: Do you know who he lived with?
 Answer: No.
 Question: How often do you see Obadiah?
 Answer: Often.
 Question: As cousins, what do you and Obadiah usually do?
 Answer: We play.
 Question: Is it just playing with Obadiah?
 Answer: Yes.
 Question: Why did you say you were scared of Obadiah?
 Answer: I don't know.
 Question: Does Obadiah come to your house?
 Answer: Yes.
 Question: Do you remember the last time he came to your house?
 Answer: No.

Question: Do you remember the last time you saw Obadiah?
 Answer: No.
 Question: You mentioned you were scared, what were you going to do in the room?
 Answer: Wake my mother up.
 Question: Why?
 Answer: Because of Obadiah.
 Question: What did Obadiah do?
 Answer: I forget.
 Question: When you woke up your mother what happened next?
 Answer: I forget.
 Question: Do you remember speaking to your mother when she woke up?
 Answer: No.
 Question: Can you explain as to what it is about Obadiah that you made you wake up?
 Answer: I've forgotten that too.

6. Except to say that she was scared of Obadiah she did not give evidence of seeing him enter the house or evidence of him indecently assaulting her.

VA'S MOTHER'S EVIDENCE

7. I will not use her mother's name as it may lead to the identity of VA, so I will refer to her as VA's mother. Her evidence is that VA entered her bedroom on the day in question at around 4.45 to 5am and told her that she was scared of Obadiah.

RECENT COMPLAINTS

8. Prosecution has called VA's mother who received the 'recent complaint' from VA.
 9. The law on recent complaint is stated in Victorian Trial Manual¹ as follows:

"Evidence of recent complaint is not admissible in a case not involving a charge of sexual offence: *Camilleri* 23/2/1999 Sup Ct Vic. However, there are limits to the use which may be made of such evidence: *Lillyman* (1896) 2QB 167. In *Lillyman*, Hawkins J. said at 170-71:

It is necessary, in the first place, to have a clear understanding as to the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestae*, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to which she complains."

¹ Page 1202 [28.302]

In every case one of the old text-books proof of complaint is treated as a most material element in the establishment of a charge of rape or other kindred charge. In Hawkins's Pleas of the Crown, bk. i.c. 41 s.9 it is said "It is a strong, but not a conclusive presumption against a woman that she made no complaint in a reasonable time after the fact"; ... It is too late, therefore, now to make serious objection to the admissibility of evidence of the fact that a complaint was made, provided it was made as speedily after the acts complained of as could reasonably be expected."

SUBMISSION OF NO CASE TO ANSWER

10. Prosecution closed its case after calling two witnesses and the defense counsel, Mr Valenitabua, made a submission of no case to answer. In the *Republic v John Jeremiah and others*² Cruickshank J. issued guidelines on 'submission of no case to answer'. In her judgement she stated at [4], [5], [14] and [22] as follows:

- [4] In Nauru the statutory provision for a consideration of no case to answer is found in the Criminal Procedure Act 1972:

'201. Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any of the accused taken in the preliminary enquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the Court –

- a) 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 a case is not made out against the accused, or any one of the several accused, sufficiently to require him to make a defence in respect of the whole of the information or any count thereof, shall dismiss the case in respect of, and acquit that accused as to, the whole of the information or that count, as the case may be; ...'

- [5] Section 201 is applicable to both the Supreme and District Courts as provided for by section 158 of the Criminal Procedure Act 1972.

- [14] Lord Lane CJ then set out the process for a judge to follow when dealing with a submission of 'no case to answer':

'(1) *If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*'

- [22] The following are the guidelines when a submission of no case to answer is made:

² [2016] NRSC 42

(1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.

11. Miss Serukai concedes and quite rightly so, that the elements of the offence in relation to both counts have not been proved.

CONCLUSION

12. In the circumstances, I uphold the submission of no case to answer and acquit the accused of both counts.

DATED this 11 day of February 2020


Mohammed Shafiullah Khan
Judge

