IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL APPEAL JURISDICTION

Criminal Appeal No 1 of 2020

BETWEEN

REPUBLIC

Appellant

AND

TR

Respondent

Before: Khan, J
Date of Hearing: 20 October 2020
Date of Judgement: 30 October 2020

Case may to be referred to as: The Republic v TR

CATCHWORDS: Criminal Law – Submission of no case to answer – Where the test is whether there is sufficient evidence at the close of the prosecution case.

APPEARANCES:

Counsel for the Appellant: R Talasasa (DPP)
Counsel for Respondent: R Tagivakatini

JUDGEMENT

INTRODUCTION

1. The respondent in this matter was charged for an offence of indecent act contrary to section 106(3)(a), (b) and (c)(i) of Crimes Act 2016. The particulars of the offence alleged that on

10 August 2017 TR indecently showed his penis to TB without his consent and was reckless about that fact that it was indecent.

BACKGROUND

2. At the time of the offence the respondent was 11 years 1 month old, and was 12 years old at the date of the trial.

3. The trial was before Magistrate Lomaloma on 14 January 2020, and upon completion of the case for the prosecution a submission of no case to answer was made by the defence, and the Magistrate upheld the submission of no case to answer and acquitted the respondent on 2 March 2020.

4. The Magistrate in his judgement stated as follows at [29] and [30]:

> [29] I have set out the evidence in full and it is clear that the only evidence that the prosecution has provided is evidence of offence alleged to have been committed. There is no independent evidence that can be used to rebut but the presumption of doli incapax. I need not go into the evidence of other elements of the offence.
>
> [30] I find therefore that the prosecution has not proved beyond reasonable doubt that the defendant understood that what he did was seriously wrong. They have not rebutted the presumption and I therefore acquit the defendant.

APPEAL

5. Following the Magistrate's ruling the Director of Public Prosecutions filed this appeal. The grounds of appeal are as follows:

   1) That the learned trial Magistrate erred in law when he applied the wrong test at this stage the trial, that is, 'proof beyond reasonable doubt'. The test is for the end of the entire trial and not at the close of the prosecution's case, (Not at the No case to Answer Stage);

   2) That the learned trial Magistrate erred in law and fact when he stated as follows:

      "There is no independent evidence that can be used to rebut the presumption of doli incapax. I need not go into the evidence of other elements of the offence."

   The evidence of a complainant should have satisfied the learned trial Magistrate to find there is a case to answer, if he applied the correct test.

SUBMISSIONS

6. The DPP's submissions is that the Magistrate applied the incorrect test when he made the finding at the close of the case for the prosecution at [30] that:

   "*The prosecution have not proved beyond reasonable doubt that the defendant understood that what he did was seriously wrong.*"

He submits that since the wrong test was applied the appeal should be allowed, however, he is not seeking an order that the matter be remitted to the District Court for further hearing as both the complainant and the respondent are of very tender age.

7. He submits that the case of *R v John Jeremiah and Rennick Mau*[1] sets out the guidelines at [22] when a submission of no case to answer is made where it is stated as follows:

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

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

b) If the evidence before the Court the evidence has been so manifestly discredited through cross-examination that no reasonable tribunal could convict upon it, the defendant has no case to answer.

c) If the evidence before the Court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witness's reliability, the matter should proceed to the next stage of the trial and the submission of no case to answer be dismissed.

8. He concedes that since the respondent was 11 years old at the time of the offence the principles of doli incapax applied to him; in that the prosecution was required to rebut the presumption of innocence in his favour.

9. Mr Tagivakatini concurs with the DPP that the Magistrate applied the incorrect test when he upheld the submission of no case to answer. He submitted that if the words '*beyond reasonable doubt*' is removed then there is no defect in the ruling.

CONSIDERATION

10. In Republic v John Jeremiah[2] before Her Honour Crulci J issued the guidelines at paragraph [22] she discussed section 201(a) of the Criminal Procedure Act 1972 where she stated that the requirement is that of 'sufficiency' rather than that of 'no evidence'. She discussed at paragraph [21] the two different test to be applied by the court when dealing with the submission of no case to answer to that of the final determination of guilt at the end of the trial. It is stated at [20] and [21] as follows:

[20] Section 201(a) Criminal Procedure Act 1972 has the requirement of 'sufficiency' rather than that of 'no evidence'. Some assistance may be found in a Practice Note dated 9 February 1962, Queen's Bench Division by Lord Parker, CJ who issued guidelines in relation to justices faced with submissions of no case to answer:

"*A submission that there is no case to answer may properly be made and upheld:*

[1] [2016] NRSC 42; Case No. 119 of 2015 (17 March 2016) Crulci J

[2] Ibid., at 7

a) Where there has been no evidence to prove an essential element of the alleged offence;

b) Where the evidence adduced by the prosecution has been so discredited as a result of cross examination or was so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so laid before it there is a case to answer."

[21] The law requires two different tests to be applied by the court when ruling on an application of no case to answer submission to that of final determination guilt at the end of the trial. At the conclusion of a trial the court has the benefit of addresses by counsel or pleaders on the issues of witness credibility of a no case submission. These different tests are applicable whether the matter is tried as in this jurisdiction by judge alone, or whether with assessors or a jury.

11. In *R v Mathew Batsiua and Others*[3] Fatiaki J stated as follows:

> *"After careful consideration of the foregoing matters and the submissions of the DPP, and bearing in mind the 'test' to be applied at this stage, I am satisfied that the DPP has produced sufficient evidence for the defendants to make their defence in respect of the various charges against each of them jointly or individually."*

12. In *R v Dabwido*[4] I upheld a submission of no case to answer where an element of the offence was not proved

DOLI INCAPAX

13. When a child is charged with a criminal offence the onus is on the prosecution to firstly, prove that the child committed the offence; and secondly, to rebut the presumption of innocence in favour of the child when he committed the offence that his conduct was wrong beyond all reasonable doubt. This is rebuttal of the presumption becomes an element of the offence; if that presumption cannot be rebutted then the child should be acquitted.

14. In *R v RD*[5] I discussed section 41 and it is stated at [10] and [13] as follows:

[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*

[3] Criminal Case No. 12 of 2017 and Criminal Case No. 8 of 2018 (unreported)
[4] [2020] NRSC 1; Criminal Case No. 13 of 2019 (11 February 2020) Khan J
[5] [2020] NRSC 21; Criminal Case No. 10 of 2018 (28 June 2019) Khan J

burden of proof which is beyond all reasonable doubt to prove that a child knew that his conduct is 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.

[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.

15. The Magistrate in his judgement at [17], [18] and [19] stated as follows:

[17] Section 41 of the Crimes Act reflects the law regarding doli incapax at common law.

[18] The test for rebutting doli incapax is set out in the House of Lords decision of *C v DPP* (1996) 1AC at 38; [1995] 2 All ER 43.

[19] The test can be summarised as follows:

a) The prosecution must rebut the presumption of doli incapax as an element of the prosecution case.

b) The child knew that the act was seriously wrong as opposed to naughty.

c) The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.

d) The evidence to prove the accused'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.

e) The older the child is the easier it will be for the prosecution to prove guilty knowledge.

16. At [19(a)] the Magistrates states that:

"The prosecution must rebut the presumption of doli incapax as an element of the prosecution case."

17. At [29] the Magistrate made a finding that no evidence was adduced to rebut the presumption of doli incapax; and at [30] he made a finding that the prosecution has not proved beyond reasonable doubt that the respondent understood that what he did was seriously wrong, and then acquitted the respondent as the presumption was not rebutted.

18. I accept that the onus is on prosecution to rebut the presumption of doli incapax beyond all reasonable doubt, however, that standard is applicable at the end of the trial, and not at the close of the prosecution's case. At that stage the correct test is whether there is sufficient evidence for the defendant to called upon to make his defence.

19. The Magistrate applied the wrong test in acquitting the respondent and his finding at [30] that: "……the prosecution have not proved beyond reasonable doubt that the defendant understood that what he did was seriously wrong" is set aside."

CONCLUSION

20. At the close of the case for the prosecution the magistrate made a correct finding that the prosecution had not adduced sufficient evidence to rebut the presumption of doli incapax (however he applied the incorrect test) which is also an element of the offence, as discussed above and the respondent was correctly acquitted of the charge. I uphold the finding of acquittal.

DATED this 30 day of October 2020.

Mohammed Shafiullah Khan
Judge