



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal No. 7 of 2021

BETWEEN

REPUBLIC

AND

TOMMY TEBOUWA

Defendant

Before : Fatiaki CJ.

Date of Hearing : 25, 26, 27, 28, 31 May & 1, 2, 3, June 2021

Date of Judgment : 2 July, 2021

CITATION : *Republic v Tommy Tebouwa*

CATCHWORDS : “elements of indecent act and rape” ; “is non-specific touching sufficient evidence of an indecent act ?” ; “relevance of opportunity and motive” ; “admissibility of reputational evidence” ; “proof beyond a reasonable doubt” ; “credibility factors” ;

LEGISLATION : ss 25, 105, & 106 Crimes Act 2016 ; ss 91 & 135 Criminal Procedure Act 1972

APPEARANCES:

Counsel for the Republic : R.Talasasa (DPP)

Counsel for the Defendant : Ludwig.Scotty

VERDICT

INTRODUCTION

1. In this case an “*uncle*” is accused of allegedly raping his “*niece*” at a relative’s house in Yaren District on the night of Sunday 27 September 2020 while his family was attending church. The niece had just finished having a shower and only had a towel wrapped around her as she was looking for a change of clothes in a bedroom of the house at the time of the alleged incident.

INFORMATION AND ELEMENTS

2. On 01 April 2021 (7 months after the incident) the defendant was arraigned on an Information that charged him with : Rape contrary to section 105 (**Count 1**) and Indecent Act (**Count 2**) on the complainant. The defendant pleaded “*not guilty*” and the prosecution called five (5) witnesses including a Doctor from the RON Hospital. The defendant for his part , gave sworn evidence and called four (4) witnesses including his wife. All witnesses were cross-examined.

GENERAL DIRECTIONS

3. This is a criminal trial where the prosecution bears the legal burden of proof to establish each of the elements of the offences with which the defendant is charged to the requisite criminal standard of proof beyond a reasonable doubt.
4. The relevant elements of Rape under section 105 of the Crimes Act of 2016 are :
 - (1) the defendant had “*sexual intercourse*” with the complainant ;
 - (2) the intercourse was “*intentional*” in that the defendant meant to commit the act ;
 - (3) the complainant did not consent to intercourse with the defendant ; and
 - (4) the defendant either “*knew*” the complainant did not consent or was “*recklessly indifferent*” to her consent as defined in section 20.
5. In the present case the defendant completely denies that sexual intercourse occurred so the prosecution must establish all of the above elements beyond a reasonable doubt. Additionally, the prosecution has a legal burden of disproving any reasonable defence raised by the defendant.
6. The relevant elements of the offence of Indecent Act under section 106 are :
 - (a) the defendant “*intentionally*” touched the complainants’ body ;
 - (b) the touching was “*indecent*” by ordinary standards ;
 - (c) the defendant was “*reckless*” about whether or not the act was indecent ;
 - (d) the complainant did not consent to the touching by the defendant ; and
 - (e) the defendant “*knew*” the complainant didn’t consent to being touched or was “*recklessly indifferent*” to the complainants’ consent.

7. On this charge the defendant also denies touching the complainant either intentionally or at all and in respect of this offence also the prosecution has to establish all five (5) elements beyond a reasonable doubt.
8. Be that as it may where Rape and Indecent Act are committed in the same incident and therefore may technically be joined in the same Information (*see* : s.91 Criminal Procedure Act 1972) , consideration should nevertheless, be given to the provisions of s.135 which permits the Court on a Rape charge to convict of Indecent Assault although it is not charged in the Information.
9. It therefore behoves the DPP to reconsider in future , charging such lesser cognate offences together with a principal charge of Rape especially where the lesser cognate offence arises as part of the “*res gestae*” of the Rape offence and is unlikely to attract a consecutive sentence.
10. In the present case , the alleged indecent act occurred immediately before the alleged Rape was committed and might be considered part and parcel of the Rape offence. Such an integral part of the Rape offence should not be isolated or made the subject matter of a separate charge. In my view , such a charge is difficult to justify and is inevitably embarrassing to defend.

THE PROSECUTION EVIDENCE :

11. The evidence on this latter charge comes only from the complainant who testified that as she was towelling herself in Stephanie’s bedroom , the defendant dressed only in a towel entered the room and closed the door behind him and approached the complainant and in her own words :
“...touched me (where and how is not mentioned) **I said : “what’s up with you ? and I pushed him away but he kept touching me and moving on to me** (where and how is again , not described) **and I felt disgusted. He kept on** (doing what is not described) **and we struggled as I tried to stop him** (from doing what is again not know) **and I couldn’t believe this uncle who was close to me and who I respected would be doing such a** (unspecified) **thing to me...”**
12. In the light of the non-specific Particulars provided in the charge namely : ,“*touched* (the complainant) *over her body*” , one is driven to ask - is the complainants’ evidence enough to establish the charge beyond a reasonable doubt *ie. both* the touching and its indecent nature. Unfortunately , the DPP did not attempt to clarify from the complainant , the specific nature and location of the “*touching*” that is alleged against the defendant or even from the defendant’s cross-examination , and so , the prosecution’s evidence on Count 2 remains in the vague , unsatisfactory state in which the complainant testified.
13. Returning however to the complainants’ evidence before the alleged touching and following on from it , she testified that earlier on that Sunday , she was drinking alcohol at the Temaki’s place in Meneng District until almost nightfall. Then she left the drinking party on foot to go and look for some food and have a shower to freshen-up. She walked

to her grandmother **Mary Tebouwa's** (hereafter "**Mary**") place at Yaren District. On arrival she saw her uncles Laurie and the defendant and their wives and children at Mary's place. She approached them shyly because she was "*a little drunk*". She asked for something to eat and was told to go to the defendant's house next door with her uncle's wives.

14. At the defendants' kitchen , the complainant was served some food by **Tiledin** , the defendant's wife. After she had eaten she asked to have a shower and for a change of clothes. The complainant's was given a change of clothes by Tiledin and she claims she was told by Tiledin to go and shower at Mary's place because their house was running low on water.
15. This latter claim is vigorously denied by Tiledin who was called as a defence witness. She testified that she told the complainant to use the shower at their house which was situated outside , but the complainant said she wanted to shower at Mary's place where there was an inside shower as well. As she was in a hurry to go to church , she called out to the defendant who was in the toilet, to check on the complainant who had gone to shower at Mary's place, as there was no-one at Mary's place and the complainant wasn't a member of Mary's household.
16. The complainant testified that after taking a long relaxing shower in Mary's bathroom (**F**), she went into Stephanie's bedroom (**H**) to dry herself and change into the clothes that Tiledin had given her.
17. It is common ground that the complainant ignored two (2) other rooms closer to the shower where she could have dried herself and changed , preferring instead for some undisclosed reason , to go to Stephanie's bedroom at the other side of Mary's House. [see : Rooms **F, D, & H** in the rough sketch plan **Exhibit P(3)**].
18. Continuing with her evidence, the complainant testified that as she was drying herself behind a cupboard in Stephanie's bedroom (**H**), the door opened and she called out : "*I'm here changing*". The bedroom door closed and she turned and saw the defendant approaching and she thought he was looking for something so she didn't expect what happened next.
19. The complainant testified that the defendant came to her and touched her (*how and where is not disclosed*) She said to him: "*What's up with you?*" and she pushed him away. The defendant continued to touch her (*how and where is again not disclosed*) and kept moving towards her. They struggled (*how is also not revealed*) and eventually, the defendant pushed her onto a bed causing her towel to fall off and the defendant mounted her. Although she pushed hard against him , the defendant managed to spread her thighs apart and penetrated her vagina with his erect penis. She slapped his face and pushed him away from her five (5) times and , each time , the defendant managed to penetrate her. Then "*all of a sudden*" the defendant got off her and left the room.

20. She then got up and looked for some clothes in the cupboard and drawers in Stephanie's bedroom as the change she was given by Tiledin apparently got lost in the struggle with the defendant. As she was looking through the cupboards , the bedroom door opened a second time and the defendant entered again and told her not to touch any clothes in the cupboards as they were : "*Stephanie's favourites*". She managed to find a top and an underwear which she took to the shower room (**F**) and wore with her old shorts and bra that she had taken off before showering.
21. After dressing she went into the lounge (**A**) and the defendant offered her a cigarette and a mango. She went and had a drink in the kitchen (**B**) and when she came out the defendant was sitting on a couch on the front porch (**I**) outside. She took the mango and cigarette and left Mary's place and headed to the main road where she began walking towards the Temaki residence at Meneng where she had been drinking earlier that day.
22. At Kibaba Store she met two (2) friends **Thomas Adam** and **Captain Scotty** and she hitched a ride with Thomas to the Temaki house where the drinking party was still going on. She said that as a result of what had just happened to her , she lost the mood to drink so after a while , she left and went to her aunt Pancia's house and slept there. The next morning Monday she called her dad to pick her up and her mum arrived and picked her.
23. She didn't tell her aunt **Pancia Depoudu** about what the defendant had done to her , nor did she tell her mother when she picked her from Pancia's house although she had wanted to , but "*was too afraid to tell her*". The complainant eventually told her cousin **Rosalie Dediya** when they had gone later that evening to Simon Brechtefeld's home at Location Compound, Denig to pick up a song he had recorded for Rosalie.
24. The next person she told was her aunt **Fatima Olsson** after Rosalie dropped her at home. Her aunt then convinced her to tell her mother and when she told her mother about what the defendant had done , her mother "*..went ballistic*" and left in a highly agitated state with Fatima. Next she received a call from the police that they would be coming to take her to the RON Hospital for a medical examination and the complainant realised then , that her mother had reported the incident to the police. That evening she was taken and underwent an examination at the RON Hospital conducted by Dr Angeliqe Makutu.
25. Asked in-chief of the whereabouts of her grandmother Mary at the time of the incident the complainant said : "*Mary was at church that's why no-one was in the house*". She explained that her uncle Laurie lived with his wife (Dorcas) at Aiwo and the defendant and his wife (Tiledin) lived at Yaren in a separate house behind Mary's house. She was shown the rough sketch plan of Mary's house and she confirmed that the alleged incident had occurred in bedroom (**H**) and the bathroom (**F**) was where she had her shower. Likewise , she was shown and identified several features in a set of seventeen (17) colour photos including the double bed in bedroom (**H**) where the alleged rape occurred.
26. The complainant explained that her maternal grandfather and the defendant's mother are brother and sister making the defendant , her mother's first cousin. She also explained that she lived in Mary's house during her teenage years (13 to 18) and returned to live with her

mother in Aiwo when she turned 19 years of age. She further explained that she called Mary Tebouwa her “grandmother”. She claimed that her feelings of “shame and disgust” prevented her from telling other people earlier about what allegedly happened to her in Mary’s house. She only related her experience to people that she trusted and was close to.

27. She claimed that she had briefly visited Mary’s house a month before the incident to drop something off and she went to Mary’s house on the Sunday for food and to have a shower : “because they are my family. I know them well. We know and talk to each other”.
28. The complainants’ cross-examination began with her admitting that she was a reserve police officer and wasn’t allowed to drink alcohol. She denied receiving any police training in self-defence and she agreed that her maternal grandmother owned a house directly opposite from Mary’s house. Asked : “Q : You and your family were banned from the Tebouwa’s residence in Yaren?” the complainant replied : “A : That , I don’t know” Asked again about her family’s banning , She maintained her ignorance of any such thing and claimed that she herself had visited and spoke with the Tebouwa’s. Asked specifically about her relation with the defendant and Laurie and their wives and children , the claimant said : “A : I believe we do have a good relationship and Laurie and his wife (Dorcas) visit us at our place and we meet at shops and I also play with their children.”
29. Asked if she was aware that the defendant was out of work since the alleged incident and of his family’s suffering and whether she felt any remorse , the complainant replied : “A : I only know about that now that you’ve mentioned it”. Likewise she denied knowing that the defendant was sacked from his employment and she said to defence counsel that she only “ know about it now that you’ve mentioned it”. She knew however , that the defendant was in remand since 22 April 2021 because the Police Domestic Violence Unit (DVU) informed her.
30. She denied telling Dorcas and Tiledin that she had been dropped off at Yaren compound by “Lloyd” (Vunipola). She confirmed receiving a change of clothes from Tiledin and being told by Tiledin to go and shower at Mary’s house next door where then was no-one at home. Despite defence counsel’s pointed questions, the complainant maintained that both Stephanie and her grandmother Mary would have allowed her to shower in their house in their absence had they known.
31. Asked if she was aware of Stephanie making a police report against her , the complainant agreed the Police Internal Investigation Unit (IIU) had told her. She denied knowing the substance or details of the police report and assumed it had to do with the clothes she had removed from Stephanie’s bedroom. She eventually agreed that she had been “...blamed for the loss of over \$2000” from Stephanie’s bedroom after she had used her room to change in after her shower.
32. She admitted from having lived with them of being aware of the Tebouwa family tradition of attending church service every Sunday evening at the time that she decided to go there and ask for food and have a shower , but she insisted that Mary’s house was never left

vacant , there was always a member of the family who remained behind. She accepted however , that when she came out of the shower , there was no-one at Mary's place , *"not even the defendant"*.

33. The complainant's cross-examination took a dramatic turn at the luncheon adjournment when the Court and counsels received a typed letter addressed to the Court Registrar signed by the complainant in which she wrote interalia :

"I want to withdraw the case and not proceed further. I do not want to relieve (sic) the moment as I have moved on".

34. Defence counsel confirmed receipt of a copy of the letter and although he supported the request , he correctly noted that the letter *"does not constitute a complete admission and confession that it did not happen"*. The DPP also confirmed receiving a copy of the letter on his way to Court , which he didn't expect and his position *"remains the same , that the case should proceed in the public interest"*.

35. In the circumstances the defence counsel was directed to continue with the complainants' cross-examination. The following records verbatim the exchange between defence counsel and the complainant :

Q : You wrestled inside the room while trying to defend yourself tell the court how?

A : I cannot proceed further from here.

Q : Were you struggling and screaming at the same time?

A : I don't want to continue with this case. I do not want to go back to that time.

Q : You stated defendant opened your legs and climbed on-top of you locking your legs and

gripped both hands on the bed ?

A : I just want to withdraw this case what more can I say.

Q : You felt his erect penis enter your vagina you managed to free your hands and pushed him away?

A : I don't want to hear this anymore.

Q : You said you told him off and said "how could you , we grew up together and this is what you do ?"

A : I would like to ask you to stop. I don't want to continue , I don't want to hear anymore. I just want this case to stop.

Q : In your statement you said defendant did not say a single word but just smiled towards you ? you then said he managed to insert his erect penis into your vagina 5 times , was that correct ?

A : Is it possible to stop this right now ?

Q : You said also that defendant stopped after , inserting his penis into your vagina 5 times and then he stopped ?

A : *Why are you continuing with this case ? I want to stand up and say something. The thing that happened here yesterday at the court house my mind was fixed to continue but what I saw I can see what's happening between us and our families. Our families picture in public and here in Court is not good and when my mother did what she did outside...I saw my mother and myself on this side of the court and my relatives on the other side it is not good and it is better for us all to sit on one side together. It dawned on me while I am still here in court yesterday to forgive him and even when I left court I took my own transport and left this place. I remember all those times how they cared for me , looked after me.*

Q : Would you confess that the rape and all offence did not happen?

A : *As for this case the incident really happened but I want to forgive him and ask him not to repeat this again in future , he is my uncle , we are close we are family. I do not want to continue with this case. I will not speak anymore.*

36. At the end of the above exchange defence counsel indicated that he had twenty (20) more questions to ask. The complainant's attention was then drawn to the provisions of Section 102 of the Criminal Procedure Act 1972 which relevantly provides :

102 Refractory witnesses

Any person who being present in court and being verbally required by the Court to give evidence ;

(a)..... (inapplicable)..... ;

(b) having being sworn refuses to answer any question properly put to him ;

(c)..... (inapplicable).....

without in any case offering any sufficient excuse for such refusal..... , is guilty of an offence

and is liable to imprisonment for six months and a fine of two hundred dollars.”

After the above provision was translated to her in Nauruan good sense prevailed and the complainant agreed to answer defence counsel's questions.

37. Defence counsel then questioned the complainant about the defendant not saying anything to her before , during , and after the alleged incident in Stephanie's bedroom. He just smiled To the Court's question :

Q : *why didn't you go to the police station directly and report?*

The complainant replied :

A : *I was afraid and ashamed. I wanted my mother with me.”*

38. The next day , defence counsel confirmed much of the complainant's evidence-in-chief including returning to the Temaki's residence drinking party but not drinking as her mind was pre-occupied. Sleeping at her aunt Pancia Depoudu's residence in Meneng and not complaining to anyone , not even her parents , before she did to her cousin Rosalie. About

“*all hell breaking loose*” when she told her mother. The complainant confirmed that she did not personally report to the police and it was her mum who did but she had wanted to press charges.

39. Unexpectedly , defence counsel did not cross-examine the complainant about her withdrawal letter or her motivations behind it and , after unsuccessfully trying to establish from the photos that nothing in Stephanie’s room had been disturbed during the incident , the cross-examination ended.
40. In re-examination when asked about the status of Stephanie’s \$2000 theft report , the complainant said she didn’t know. However , she did confirm being aware of it last year after the incident when the police Internal Investigations Unit (IIU) told her about the report.
41. Thereafter the defendant’s record of interview (ROI) and charge statement were admitted in evidence as **Exhibit P(1)** and **Exhibit D(1)** respectively.
42. **Rosalie Dediya** was then called and she confirmed that after 8pm on 28 September 2020 (almost 24 hours after the alleged incident) the complainant told her about what the defendant had allegedly done to her after she had showered in Mary’s house and while she was changing in Stephanie’s bedroom. In cross-examination she confirmed the complainant began drinking alcohol at 18 years of age and how the complainant’s relationship with her mother was “*..not good, its irregular*”. To the Court’s questions , she confirmed that the complainant began smoking at 18 years of age and was still smoking. Although she too had been a police constable for three (3) years , she considered that what happened to the complainant was her “*private business*” and a “*family situation*” for her family to deal with.
43. **Sgt Dan Botelanga** testified to taking the photos in this case and being 18 years in the Police Force working mainly in General Duties and in the Criminal Investigation Unit (CIU) from 2009. He testified that not all rape reports were lodged by the victims , sometimes friends and family did it on their behalf. He couldn’t say if the bedroom where the alleged incident occurred had been disturbed and he was aware of Stephanie’s report about her missing money. In re-exam he confirmed that Stephanie’s room was a “*closed room*” with the windows sealed and closed and not visible from outside.
44. **Dr Angeliqe Makutu** testified with the assistance of the medical report she prepared at the time of examining the complainant on the night of 28 September 2020 at 11pm (more than 24 hours after the alleged rape). She read her conclusions into the court record :

“...physical examination revealed normal female genitalia with foul white discharge consistent with STI (Sexually Transmitted Infection). Medical evidence cannot prove recent penetration but STI suggests sexual activity previously.”
45. She noted no bleeding or laceration in the complainant’s vagina to suggest recent penetration but absence of injury doesn’t necessary exclude it. The “*STI*” was identified

from a smear slide as “*Trichomonas Vaginalis*” which is a protozoide parasite that can be transmitted through an exchange of body fluids.

46. The doctor’s evidence which was of little assistance in establishing recent penetrations brought the prosecution’s case to a close.

THE DEFENCE EVIDENCE

47. When the case resumed after the weekend , defence counsel said he would not be making a “no-case” submission instead he would call defence evidence starting with the defendant.
48. The defendant testified that he is 26 years , married to Tiledin and they have three (3) children. He was employed in the Nauru Meteorological and Hydrological services until his termination when he was charged within the present offence. Before that he was suspended without pay for 1 to 2 weeks. He lived with his family behind Mary’s house at Yaren District.
49. On Sunday 27 September 2020 , in the evening he was at Mary’s house with his wife (**Tiledin**) and family. His brother Laurie and his wife (**Dorcias**) were also there when the complainant arrived outside the house intoxicated and looking for food. The complainant used to live at Mary’s house but was sent away a few years ago because of her “...*taking money*”. That was the first time for the complainant to return to Yaren since being sent away.
50. On learning that the complainant after eating had asked to have a shower and had been given a change of clothes by his wife and further , that she had then gone to Mary’s house to shower, the defendant asked his wife :

“**Q** : *Why allow the complainant into the empty house?*” and his wife replied :

“**A** : (I) *didn’t tell her but she had gone there ahead on her own accord*”

Although his family had planed to go to church that evening , he couldn’t go and leave Mary’s house “*since the complainant was there*”. So the defendant remained behind after coming out of the toilet.

51. While playing an on-line game on his mobile , he remembered that the complainant was at Mary’s house so he went to check on her and found the complainant rummaging through Stephanie’s bedroom drawers looking for something. He told the complainant not to touch anything there as they don’t belong to her and he left Stephanie’s bedroom.
52. When the complainant came out after changing her clothes , he offered her a cigarette , mango and water and told her to take care as she headed towards the main road. He turned on his mobile and continued with his on-line game.

53. He denied that the complainant had returned to live with her parents voluntarily when she turned 18 years , rather , his understanding was that she had been told to return to her parents:
“...because of the things she was doing stealing money and buying smokes”. He denied the complainants claim that she had visited Mary’s house at Yaren , a month earlier and said if she had done so , his family would have told him. He maintained that he had not spoken to the complainant for about a year since she was told to leave Mary’s house. He agreed however speaking to the complainant in Stephanie’s bedroom : *“...because he found her rummaging through the drawers.”*
54. Asked why he had given the complainant food when she asked for it , the defendant said :
“she asked for help in form of food and we supplied. It is not my place to allow or refuse people to eat at my parents place.”
- He and his wife are Christians and treated the complainant their relative , well. He already knew of the complainant’s reputation for *“touching and stealing things that didn’t belong to her”* but he didn’t tell her to behave because he wasn’t *“her father”* to say such things to her.
55. Likewise , he didn’t think to chase the complainant away when she came to Mary’s house :
“...because its not my place to tell her to go away or to come in. I cannot say that” Besides it was Mary’s place.
56. Asked why he had offered her mango and a cigarette as the complainant was leaving Mary’s house , he said :
- “It is my nature to be kind. It’s something I would do for people and to let her know to take care of herself as she was intoxicated. That’s what I would do for anyone...to look after themselves and to return home safely.”*
57. He confirmed that opposite Mary’s residence on the beachside is a house that belongs to the victim’s mother **Monisa**. He described that although she is his cousin , they were *“not on talking terms”* for about a year because on a family trip to Tasmania , she had mismanaged their money and had lied to them about it.
58. The defendant described how on the evening of the day after the alleged incident namely , 28 September 2020 , **Monisa** had arrived at their house in Yaren , in a car and had confronted, abused and assaulted him , then she got back into her car and while reversing to leave , she bumped him on the outer side of his right leg before speeding off. He went and reported the matter at the Police Station and was told to go home and expect a call from the Domestic Violence Unit (DVU). Nothing came of his assault report against Monisa. Instead , he was called to the Police Station and was detained by officer Dunstal Ika Reweru *“..as ordered from higher up”*.

59. In the result, he was unable to attend his father's traditional "*kerida*" ceremony and 60th birthday celebrations. He was released the following evening after the police had unsuccessfully sought his further detention in the District Court.
60. In cross examination the defendant vehemently denied remaining behind when his family went to church because he had planned to have sex with the complainant and that he had entered Stephanie's bedroom twice while the complainant was inside. Instead, the defendant said when he remembered, he went looking for the complainant in Mary's house:
"Because I know she's always touching things and stealing things that's why I went to check on her".
61. He firmly denied touching or having sexual intercourse with the complainant on a bed in Stephanie's bedroom and he confirmed he was wearing a towel over his black training shorts. The DPP then put the complainant's evidence to the defendant and he firmly denied each and every allegation and suggestion while maintaining that all "...*(he) did was tell her not to touch anything*". Asked by the DPP in cross-examination:
Q : *Why would the complainant make the allegations against you a respected role model uncle ?*
the defendant answered :
A : *I don't know what she's going on about but if she thought all that about me then she wouldn't be drinking in front of me or doing anything that shows disrespect."*
62. In re-examination, the defendant said they were not expecting the complainant to come to Mary's house and when she did, they treated her as Christians would offering her help like a "*prodigal daughter*." He reaffirmed that Mary and Stephanie would not be happy to learn that the complainant had come to their house in their absence.
63. To the Court's questions, the defendant explained that the shower occupied a third of the area of room (F) which leads into a larger room (D) where a person could have dried him/herself and changed. He said there was a mirror in room (D) and Stephanie's room (H) where the complainant chose to dry and change, had : "*...lots of stuff, and an assortment of things including her money which she leaves in her room.*"
64. The second defence witness was **Dorcias Tebouwa** the defendant's sister-in-law and his brother Laurie's wife. She recalls visiting with her family at Mary's home at Yaren on Sunday 27 September 2020. She recalls seeing the complainant come to the house smelling of vodka and slightly drunk and she asked for food and a shower. She clearly recalls the complainant saying that "*Lloyd*" had dropped her off on his motorbike and she had enjoyed the ride. Then she and Tiledin (the defendant's wife) and the complainant went to the defendant's house where Tiledin served her some food. Then she and her husband and their child and Tiledin and her children left Yaren to go to church. The defendant remained behind.

65. Dorcas testified that at the time she worked at the Chief Secretary's office and part of her duties when she stood in for his PA , was to open correspondence received from members of the public. She recalled that around 19 October 2020, the complainant had hand-delivered a letter to the Chief Secretary's office which she received , opened , and read. The letter concerned the defendant and it mentioned his suspension because of this case. It also incorrectly described the food that they served the complainant as : "*beef-stew*" when they had in fact served her : "*fish and corned beef*".
66. Dorcas testified that she overheard the complainant apologizing to Laurie and the defendant for being drunk and that she was there to ask for food and to have a shower and then she would leave. The complainant spoke to Tiledin about having a shower and she was given a change of clothes and Tiledin told her to shower at their place but the complainant said she wanted to shower at Mary's house.
67. Under cross-examination , Dorcas iterated that she was entitled to open public correspondence received at the Chief Secretary's office and that she had mentioned about the letter incident to Tiledin two (2) days after it was delivered by the complainant , because it concerned her husband. She admitted knowing of the rift that existed between the defendant and the complainant's mother Monisa before the date of the incident, but, she firmly denied taking sides. Asked if anyone tried to stop the complainant going to shower at Mary's house , she said :
"A : Tiledin tried to stop her from going to Mary's place and asked her to shower at their place but the complainant just insisted and headed off towards Mary's house."
68. She also firmly denied that anyone told the complainant that there was "*no water*" at the defendant's house. After telling the complainant where to shower they all left for church. She denied the complainant was told to go and shower at Mary's place when there was no-one there and she agreed that noone went to Mary's house to stop the complainant. When the complainant left to go to Mary's house she was already in the car ready to go to church. In re-examination she iterated that Mary and Stephanie would never agree to the complainant entering their house when they weren't there.
69. The third defence witness was **Eliana Agigo** a close relative of both the defendant and the complainant who knew their families very well. She testified that the complainant's father was her "*nephew*" , the son of her eldest brother. She was aware of relations within her nephew's household and she had helped both her nephew and his wife Monisa , the complainant's mother. The last "*family fight*" she was aware of concerned the complainant lying to her parents "*about money*". Over the DPP's objection , she testified :
"from my knowledge My-Girl is not a good person. There was a time that something went missing and My-Girl was blamed but we got tired of scolding her because we know that she'll just lie to us" In her opinion the complainant "**is not an honest person.**"
70. In cross-examination she admitted that she might have something against the complainant because of the way she had handled her police complaint. To the suggestion that she had com to testify to help the defendant she replied : "*I want the truth to come out*". Ssked if she was saying My-Girls' complaint was not true , she answered :

A : I'm not saying that , I just want the truth. I know there's something wrong with her.

I don't hate My-Girl , it's the character and behaviour inside that uniform.

Q : That's what you come to tell (in court) ?

A : As long as it helps with the truth

Q : Are you saying My-Girl's story about the rape by the defendant is not true because of her past behaviour ?

A : I don't say anything about that , all I know is about here character."

71. **Mark Lloyd Vanipola** the fourth defence witness testified that he was at the drinking party at his family (the Temaki's) residence on Sunday afternoon and throughout the night. He recalls seeing the complainant at the party drinking AK47 vodka and "*having fun like everyone*" then after 6-7pm he noticed the complainant was missing. Then she returned with a friend and she had changed her clothes. The complainant brought two (2) large bottles of liquor and the drinking continued into the night. He saw the complainant drinking after she returned with the two (2) bottles. He testified that he did not have his Scrambler bike with him as the police had seized it when they arrested him the night before for Drunk Driving.
72. In cross-examination , he was adamant that he saw the complainant bring two (2) bottles of liquor to the drinking party when she returned and she had continued drinking. To the Court's question he said liquor could only be bought at a "*black market*" on a Sunday and a bottle of AK47 vodka would cost \$50.00
73. The second last defence witness was **Stephanie Tebouwa**. She is the daughter of Mary and lives with her mother at her mother's house at Yaren. The defendant and his family lives in a separate house in the compound behind their house. She recalls rushing to attend church on the evening of Sunday 27 Sept 2020 and leaving with her children at just after 7.30pm which was the time when the service began. The service finished after 10pm.
74. During the church service Tiledin had mentioned to her that the complainant had gone to their house to have a shower when they left and she immediately thought about the valuable items in her bedroom that might be taken and she was worried that she might need to check her bedroom. Asked what kind of valuables she had in her room , Stephanie said :
- A : I had money in my room**
- Q : How much ?**
- A : I had bundles of notes in my bag about \$2100 in notes.**
- Q : What kind of bag?**
- A : An unused bag hanging in my room coloured black.**
- Q : Where hanging ?**
- A : Behind my cupboard on the wall."**
75. Asked to describe what she saw on returning to her bedroom after church , she said :
- A : When I walked in I went straight to check my black bag and opened it and noticed the bundle of cash was missing. I also have 2 poles on which I hang my bags and I looked**

and noticed that they were all opened.

Q : *Where did you get the cash from ?*

A : *I have a business that I sell fresh meat at the store and the cash was from my sales that I recently received it on Saturday of the weekend the money is from.*

Q : *Always keep your monies in your room?*

A : *Yes because I always bank it and I received the money on Saturday. I was planning to bank it on Monday.*

Q : *How did you feel when discovered money missing ?*

A : *I was disappointed and frustrated.*

Q : *Do you blame anyone ?*

A : *I blame My-Girl because she used to live with us before and when she stayed with us we always had money missing small changes and she showed up again and my money was missing again.*

Q : *Living in the same house ?*

A : *Yes in the same house under the same roof.*

76. She recalls being worried when told by Tiledin in church , that the complainant was showering at her home , because she had money in her bedroom. Asked if it was alright for the complainant to shower in her home , she stated :

A : *No because she doesn't stay with us anymore and there was no-one at home".*

Even if Tiledin had told the complainant to shower in her house , she would still be annoyed if it was without her consent.

77. She testified that she reported the loss of her money on Tuesday 29 Sept 2020 at the front desk of the Police Station and was directed to officer **John Benjamin** who made her type out her own statement unassisted. She also took with her to the Police Station , a plastic bag containing the complainant's dirty clothes that she had taken off and left in their bathroom -a t-shirt top, panties and a hair piece. Asked about what had become of her report , she said "*No feed back*" and when she rang and enquired about it , she was told her report had been referred to another unit within the force.

78. When she complained of police in-action , she received a reply from the Commissioner of Police dated 27 October 2020 a month after her complaint was first lodged , advising that her case had been referred to the Criminal Investigation Unit (CIU). Since that date there has been no developments or investigations whatsoever conducted into her report nor has her money been recovered. No statement was recorded from her about the complainant's clothes that she took , nor has the police "*ever got back to me*".

79. In cross-examination , she confirmed keeping cash in her bedroom especially if she had takings in the weekend , which she would then bank on Mondays. Usually her average weekend takings was \$500 but that particular weekend , the \$2000 was from frozen goods she had sold to Chinese shopkeepers. She had kept it in her unlocked bedroom. Asked why she hadn't locked her bedroom door , she replied :

A : *No body comes at home. I have always kept money in the room but it never goes missing.*

Q : You didn't lock the room ?

A : We never lock the house everyday.

Q : Why leave the \$2000 there without locking the room?

A : My room is very stuffy with lots of things in it. ***I didn't expect My-Girl would do this to me over the weekend.***

80. She didn't call and ask the complainant about her missing money and , when pressed , she replied : "A : *I don't have her contact*". When it was put to her that she only reported about her missing money after she learnt of the complainant's allegation against the defendant , she replied :
"A : *I reported it on Tuesday because we were busy on Monday and I had no time to go to the station.....I did report because I had my money missing not only because of what happened to Tommy (the defendant).*"
81. In cross-examination she confirmed that the three (3) windows and the door leading to the outside from her bedroom were all closed shut and locked.
82. The sixth and final defence witness was **Tiledin Tebouwa** the defendant's wife who dished up the complainant's food and gave her a change of clothes before telling her to use their outside shower at their home. She testified that when she gave the complainant the change of clothes, she asked for "leggings" but when none was provided, she observed that the complainant "*wasn't agreeable - she didn't like the clothes I gave her.*" When the complainant said she wanted to shower in Mary's place , she and Dorcas exchanged glances because they *knew that "not just anyone can take a shower at Mary's place"* which incidentally , had two (2) showers – one outside , and the other inside the house. She said as she rushing to go to church she had called out to the defendant who was in the toilet , to check-up on the complainant as she had gone to shower in Mary's house and there was no-one there.
83. Asked why she had told the defendant to check on the complainant , she replied :
"A : *Because Mary's house was empty and My-Girl is not part of the household and also because I realized that My-Girl didn't like the clothes I gave her and I thought she would look for more clothes at Mary's house.*" She also agreed that My-Girl "*had the habit of taking money*" when she lived at Mary's house. When she returned from church the defendant was home playing on-line games on his phone "*because he's a gamer.*" The next day they were busy preparing for her father-in- laws' "*traditional kerida*" ceremony in the build-up to his 60th birthday celebration to be held on Tuesday 29 September 2020.
84. She testified about the distressing incident that occurred late that Monday night between her husband and Monisa when she drove into their compound at Yaren and started abusing and assaulting her husband on the face and neck. Although she and her husband reported it to the Police Station, nothing has been done about their report. Not even their statements were recorded. She testified about returning to the Police Station that same night and the defendant being detained overnight despite his pleas to attend his father's "*kerida*" because apparently , the order to detain the defendant "*..came from higher up.*"(whatever that means).

85. Tiledin's verbatim cross-examination is as follows :

Q: *Was the water at your house running low when the complainant was there?*

A: *We had lots of water.*

Q: *My-Girl told court that you told her to shower at Mary's house because of low water at your home?*

A: *That is incorrect. She said herself she wanted to go to Mary's house.*

Q: *Clothes you gave for change from your house?*

A: *Yes.*

Q: *You didn't give her a towel?*

A: *No.*

Q: *Where would she get towel from? Since you didn't give her one?*

A: *There are towels in the shower at our home.*

Q: *Put what you told court is not true because you told the complainant to shower at Mary's house?*

A: *I didn't tell her, she insisted herself.*

Q: *That's why you didn't give her a towel because she could get it from Mary's house?*

A: *I don't know about that. I have nothing to say about that.*

Q: *The complainant didn't like the change (of clothing) you gave her. How do you know she didn't "agree with it?"*

A: *Because when she asked for leggings I saw her face that she was unhappy with the change of clothes I gave. What I gave is for her to change after freshening up and go home and get her own change (for outing).*

Q: *Did you ask the complainant about what you saw in her face?*

A: *No I didn't ask but I recognize and know the look she was not happy.*

To the Court's question :

Q: *What are leggings?*

A: *They are tights like leotards. They are attractive show shape and figure and used for going out.*

Q: *For men?*

A: *They wear skins normally for sports.*

Q: *When the complainant insisted to go to Mary's house did you insist that she not go there?*

A: *No I didn't she just went ahead she knew **there was no-one in Mary's house.***

Q: *Why didn't you stop her?*

A: ***I don't know why, but she insisted and she won't be stopped.***

Q: *Because you told the complainant to go and shower at Mary's house?*

A: ***I didn't tell her that she insisted on going and Dorcas also knew about this.***

86. Additionally , to the Court's questions , Tiledin said :

"A : *I have no say over Mary's house. I don't live there...(nor) is it my place to forbid or chase people away from Mary's house."*

To the DPP's question that after 8 years of living beside Mary's house whether she felt
"part
of Mary's household, " she firmly replied :
"A : No, I live in the house with my husband and Mary is in her own home."

CLOSING ADDRESSES

87. Both counsels filed written submissions but more useful were counsels' oral answers to the Courts' questions. Defence counsel who addressed first, in answer to the Courts' question:

Q : Why should the Court disbelieve My-Girl? enumerated twenty (20) factors as follows:

- her
- (1) *She has a habit of lying ;*
 - (2) *She has a habit of stealing ;*
 - (3) *She has a habit of doing unlawful things drinking under age in September 2020 she was just 20 years of age ;*
 - (4) *She is not a dependable police officer ;*
 - (5) *She had a motive to get revenge on the defendant because of problems between mother and Tommy ;*
 - (6) *She wanted revenge against the Tebouwa family of Yaren ;*
 - (7) *She trespassed into Mary's home without permission and knew no one would be home ;*
 - (8) *She had a clear intention to enter Stephanie's room to look for money ;*
 - (9) *She knew Stephanie keeps money in her room from the time she lived with them ;*
 - (10) *She knew that Stephanie would not be home as they would be at church ;*
 - (11) *She lied about Tiledin telling her to go and shower at Mary's residence ;*
 - (12) *She lied about there being no water at the defendant's residence ;*
 - (13) *She lied about Mark Vunipola bringing her on a scrambler to Yaren ;*
 - (14) *She lied about not being in good mood when she returned to the Temaki drinking party;*
 - (15) *She lied about having a good connection with Tommy's family of Yaren ;*
 - (16) *She lied in her police report about the food she ate when she wrote to the Chief Secretary*
 - (17) *She lied about the drinking small bottle when Mark said big 750ml bottles bought from black market ;*
 - (18) *She lied about having a bad/good relationship with her mother ;*
 - (19) *She lied about not knowing of the effect of the charge on Tommy and his family ;*
and
 - (20) *She lied about remorse for the defendants family."*

88. The DPP for his part submitted that "(the complainant) was frank about her story i.e. openly telling and not holding back her story" and although there was no corroboration, counsel submits that the court should accept her evidence as credible and she should be believed. In his oral submissions , the DPP disputed the truth of the allegations of stealing Stephanie's money which was only made after Monisa had lodged the report of

rape against the defendant , and even if true , that does not mean the complainant’s claim of being raped is not true – “*even a prostitute can be raped*”. Besides , the defendant had both the “*opportunity*” and a “*motive*” to get back at the complainant’s mother Monisa.

89. To the Court’s question of why the complainant had chosen to use Stephanie’s room to dry off and change instead of the bathroom (F) and middle room (D) which had also a mirror? The DPP iterated:
“A: *The middle room belongs to the grandmother matriarch Mary and is sacred and also the complainant had no motive other than to change and even if had an ill motive and remove Stephanie’s clothes and money, the case of assault and rape are a separate matter and the report of the missing money and complainant’s clothes ended up with the police and had been the subject of investigation. Room would be more comfortable for changing in (why, is unexplained). The complainant chose Stephanie’s room even though her grandmother Mary’s room had a mirror, she preferred Stephanie’s room.”*
90. DPP was unable to provide details n his submission , of the police investigations conducted (if any) in Stephanie’s report of her stolen money even after being made aware of the defence complaint and suggestions of police inaction and closing ranks around one of their own.
91. This , is no better exemplified then by the Police Commissioner’s own letter to Stephanie Almost one (1) month after she had made her report against the complainant. Nowhere in the letter is the exact nature of Stephanie’s complaint disclosed nor what manner and type of investigations were undertaken to substantiate the complaint.
92. No details are provided of the nature of the “*circumstantial evidence*” referred to in the letter and the categorization of the complaint as “*a one on one*” type , completely and blithely ignores the plastic bag of the complainant’s dirty clothes that accompanied the complaint when it was lodged. Even eight (8) months after the Commissioner’s letter and the referral of Stephanie’s complaint to the Criminal Investigation Unit (CIU) , still nothing has been done to investigate it, not even, finger-printing Stephanie’s bedroom and/or collecting her black bag out of which the money was allegedly stolen.
93. Defence counsel in reply , emphasized the reputation of the Tebouwa family at Yaren as being devout practising Christians who are God-fearing and intolerant of liars. Counsel described the complainant as having “*a bad intention*” when she went to Mary’s residence at that hour on a Sunday. Having lived in Mary’s house with Stephanie for eight (8) years she would have been aware of the Tebouwa family’s normal Sunday routine and she knew that Stephanie was a part-time business woman “*who always keeps money in her bedroom.*”
94. In similar vein , the complainant, by her own admission, “*took a long shower*” in Mary’s house with the clear motive to ensure that everyone would have left for church by the time she finished , and then she could “*make her move to rummage in Stephanie’s room*

to look for money” knowing that Stephanie couldn’t bank any weekend takings until Monday.

DISCUSSION AND DECISION

95. In discussing the evidence and making my findings of credibility, I remind myself that the prosecution has the legal burden to prove the charges against the defendant beyond a reasonable doubt. Conversely, the defendant who is presumed innocent, need not call any evidence or prove anything. Nevertheless, the defendant elected to give sworn evidence and to call five (5) witnesses in his defence which was a complete denial of both charges against him.
96. In short , the defendant says neither incident happened and the complainant blatantly lied to divert attention away from theft of \$2,000 cash out of Stephanie’s black handbag hanging on the wall behind the cupboard in her bedroom which was discovered missing after the complainant had used her bedroom to dry herself and change.
97. The complainant for her part , says the defendant not only had the “*opportunity*” and “*revenge motive*” to assault and to rape her and Stephanie’s report of her stolen cash was a complete fabrication made after the event and with the same intent namely , to divert attention from the defendant’s disgusting behavior towards her in Stephanie’s bedroom.
98. I confess that at the end of the complainant’s and defendant’s sworn testimony and on the basis of their oral evidence and demeanor alone, I was undecided as to who was telling the truth. Both gave their evidence confidently and were mostly unshaken in cross-examination. There was little to choose between them. Likewise the other prosecution and defence witnesses all gave their evidence in an objective and straight-forward manner.
99. After careful consideration of all of the evidence and counsel’s closing addresses, and mindful that the prosecution bears the legal burden of proving the defendant’s guilt on each charge beyond reasonable doubt, I am finally persuaded and disbelieve the complainant on the basis of the following critical features of her evidence:
 - (1) I disbelieve the complainant’s feigned ignorance of being sent away from Mary’s home because of her unacceptable behaviour and her unconvincing claim of maintaining good relations with the Tebouwa family at Yaren since her departure ;
 - (2) I accept the adverse general reputational evidence from the defence witnesses that the complainant “*had a bad habit of stealing money and lying*” ;
 - (3) I prefer and accept the contrary testimony of Dorcas and Tiledin that the complainant was told not to shower at Mary’s place or that the defendant’s house had “*no water*” when , at the same time, the defendant was using the toilet in his own house;

- (4) I prefer and accept the contrary evidence of Stephanie that both she and her mother Mary would not have approved of the complainant showering in their house in their absence and without their permission;
- (5) The highly significant and “*suspicious*” fact that the complainant specifically chose Stephanie’s bedroom (**H**) in which to dry herself and change and in , doing so, she would have had to transit through the middle bedroom (**D**) which was the bedroom she had used and slept in when she stayed at Mary’s house;
- (6) I reject the complainant’s unbelievable gratuitous claim that the defendant re-entered Stephanie’s bedroom for “*second time*” after he had indecently assaulted and raped her and for the sole reason, to tell her not to touch Stephanie’s clothes in the drawers ;
- (7) I also disbelieve the complainant when she claimed on , oath , that she first learnt of the defendant losing his employment and about his family’s consequent suffering, when defence counsel mentioned it during her cross-examination. Needless to say in this regard, I prefer and accept the evidence of “*Dorcas*” about the complainant hand-delivering a complaint letter about the defendant to the Chief Secretary’s’ office a month after the alleged incident had occurred ;
- (8) I accept and prefer the evidence of “*Lloyd*” (Vunipola) that he saw the complainant return to the drinking party at the Temaki residence with two (2) bottles of AK47 Vodka and he saw her drinking and behaving normally after she returned to the drinking party ;
- (9) The not unimportant fact that the complainant was aware that there was no-one in Mary’s house “*not even the defendant*” when she came out of the shower to dry and change. She therefore had her choice of bedrooms in the house , and it was only the defendant who had the misfortune of finding the complainant in Stephanie’s bedroom. The defendant was the only other person who saw and knew that the complainant had been in Stephanie’s bedroom after her shower and was seen rummaging through the drawers in Stephanie’s bedroom. In other words ,

only the defendant could place the complainant in Stephanie’s bedroom close to the time when her money allegedly went missing.

100. In light of the forgoing I entertain a real doubt about the truthfulness of the complainant’s evidence about being indecently touched and then raped by the defendant in Stephanie’s bedroom and , accordingly , I acquit the defendant and order his immediate release from custody.

DATED this 02nd day of July 2021.

D.V. Fatiaki
Chief Justice