



SUPREME COURT OF NAURU
YAREN
CRIMINAL JURISDICTION

Criminal Case No. 13 of 2021

BETWEEN

REPUBLIC

AND

RANDY DOGUAPE

Defendant

Before : Fatiaki CJ.

Date of Hearing : 7, 8 & 9 July, 2021

Date of Ruling : 27 July, 2021

CITATION : *Republic v Doguape*

CATCHWORDS: “intoxication” ; “voluntary and intentional acts” ; “indecent act” ;
“touching” ; “lying on back and squeezing shoulder” ; “entering” ;
“being found in” ;

LEGISLATION : s. 117(a)(b)(c) Crimes Act 2016 ; ss. 5 & 6 Crimes Act 2016 ; s. 164 (a)(ii)
(b) Crimes Act 2016 ; s. 25, 17 & 14(2) ; s. 43 (3) ; s. 7(2) (iii) & 160 (1)
Crimes Act 2016 ;

CASES REFERRED TO : Republic v Taumea [2021] NRSC 10 ; R v Stanley [1965] 2 QB 327 ;
R v Court (1998) 2 ALL ER 221 ; Republic v Hartman [2020] NRSC 7.

APPEARANCES:

Counsel for the Republic : S. Shah

Counsel for the Defendant : T. Lee

VERDICT

INTRODUCTION

The defendant **Randy Doguape** is charged in the Information with Indecent Acts in Relation To A Child Under 16 years contrary to Section 117(a)(b)(c) of the Crimes Act 2016 (**Count 1**) and Being Found in Certain Place Without Lawful Authority or Excuse contrary to Section 164(a)(ii) (b) of the Crimes Act 2016 (**Count 2**).

1. If I may say so the Statement of Offence in Count 2 although it follows the heading of the section , is a misnomer in that the legal description of the offence does not include the expression “*being found in*” nor is it used in the Particulars provided.

BACKGROUND

2. This case concerns an incident which occurred on 22 May 2021 , in which a seven (7) year old girl (**DP**) was rudely awakened while sleeping in her family’s bedroom at Anetan District , by a drunken man lying on her back and squeezing her shoulders.

DIRECTIONS

3. As this is a criminal prosecution I remind myself in terms of section 25 of the Crimes Act 2016 that the prosecution bears the legal burden of proving the defendant’s guilt on each Count. To do this , the prosecution must call and produce evidence that establishes each and every element of the offences charged beyond a reasonable doubt.
4. I also direct myself that I must consider and determine each Count separately on the basis of the quality of the evidence led in support of each Count. Likewise the defendant’s guilt or innocence on each Count depends entirely on the evidence led on each Count only.
5. In other words , just because the defendant may be found guilty on Count 2 does not mean that he must also be convicted on Count 1 and vice versa.

THE CHARGES and THE LAW

6. The elements that the prosecution must establish beyond a reasonable doubt on **Count 1** of Indecent Act In Relation to a Child Under 16 years are :
 - (1) the defendant ;
 - (2) “*touched*” DP ;
 - (3) the touching was “*intentional*” and “*indecent*” ;
 - (4) DP was “*under 16 years old*”.
7. In regard to elements (2) and (3) , subsections (5) and (6) of Section 117 , relevantly provides in subsection (5) : “*touching*” includes the following :
 - (a) *touching with any part of the body* ;
 - (b) *touching a person through clothing or other material.*and , in subsection (6) : “*... whether touching is indecent is one of fact to be determined by applying the standards of an ordinary person.*”

8. Furthermore , section 17 provides that a person has “*intention*” if the person “*means to engage in the conduct*” and section 14 (2) states : “*conduct can only be a physical element if it is voluntary*”.
9. In this latter regard in acquitting the defendant in Republic v Taumea [2021] NRSC 10 on an identical charge where the defendant had “*knocked out*” after 8 hours of drinking kava with little recollection of the circumstances surrounding the alleged indecent act , this Court said after referring to sections 17 and 14 (2) of the Crimes Act 2016 (at para 38) :

“..... *if the defendant’s conduct is involuntary or an unconscious movement or the result of automatism or is coerced , then such actions cannot constitute a culpable physical element*”.
10. As for Count 2 the elements of the offence are :
 - (a) the defendant ;
 - (b) entered a “*dwelling house*” (**not** was found inside) ;
 - (c) without “*the consent of the owner*”.

In addition , the prosecution must prove that the defendant’s entry into the house was a “*voluntary act*” in the sense that the act was “*a conscious product of the defendant’s will*”. Furthermore in terms of Sections 13 and 22 (1) , the defendant must not be found guilty unless the prosecution proves that his entry into the complainant’s house was intentional.

11. In the present case in the absence of focused submissions and despite it being common ground that the defendant had consumed a large quantity of alcohol that evening and had “*blacked out*” before the alleged incident , the prosecution it seems , assumes that the mere presence of the defendant in DP’s bedroom is sufficient to establish an intentional entry.
12. In my view , given the elements of the offence and the prosecution’s burden of proof and the defence case based on the provisions of section 43(3) , the discovery of a drunken stranger sleeping in an unfamiliar house without permission is a neutral fact , which does not raise an irresistible inference that entry into the house was intentional and must have been “*a conscious product of the defendant’s will*”.

PROSECUTION CASE

13. To prove Count 2 the prosecution called **Isaac Degia** the owner of the house at Anetan District in which the defendant was found sleeping in the bedroom.
14. He testified that in the early morning hours of 22 May 2021 at about 5.30am he was awakened by a call from a friend on his mobile. He had been sleeping with his three (3) young children. He left his home shortly after the call while his children including **DP** were fast asleep and it was still dark.

15. I interpose here the evidence of the seven (7) year old victim “**DP**” who testified (not on oath) :
- Q : *Tell us what the man did to you ?*
- A : *He got on my back and then I started crying.*
- Q : *Why ?*
- A : *Because I felt something on my back.*
- Q : *What was on your back ?*
- A : *He squeezed my back.*
- Q : *Where on your back did he squeeze ?*
- A : *The middle of my back.*
16. At the time **DP** was sleeping with her siblings in their bedroom of their family home at Anetan District. After the intrusion **DP** and her siblings hurried out of bed and went to their aunts’ place next door and reported the matter to her. They returned with their aunt to their bedroom and when the light was turned on the man was seen sleeping on the floor. **DP** recalls smelling liquor from the man who was on her back. She did not see the man’s face and did not identify him in Court.
17. **DP**’s father identified his house in a folder of eight (8) colour photographs [**Exhibit P(1)**] and Isaac Degia described how it had one bedroom measuring “**3m x 3m**”, with an internal entrance door from the lounge area and an exit door that led directly outside at the rear side where their bathroom and toilet was located. The exit door was left unlocked that evening because his wife had gone out partying during the night and had not returned by the time he left their children sleeping in the bedroom , in the early morning. No photo or evidence was led about the closing or locking mechanism on the exit door.
18. He testified that when he returned home he found his sister and children outside their home. His sister told him there was a drunken man inside their house and he went into their bedroom and dragged the defendant out of their bedroom into the lounge area and slapped him several times on the face to wake him up , and then he proceeded to tie a wire rope used for diving , around the defendant’s neck to prevent him from escaping. Asked in chief :
- Q : *Did you agree to the defendant being there in your house ?”* he answered :
- A : *No , I did not consent to the defendant being in my house”.*
- He denied that the defendant was related to him and he agreed seeing the defendant passing by his house on earlier occasions. There is a drinking spot behind his house.
19. In cross-examination he said that when he first entered his lounge he smelt alcohol and the smell grew stronger as he entered the bedroom to find the defendant lying on the floor asleep face down snoring with his hands folded in front of his face. He pulled the defendant out of the bedroom into the lounge area by one leg and he agreed using his open palm to slap the defendant on the face several times.
20. Despite all that he did to the defendant , he agreed the defendant did not resist or attempt to run away. The defendant remained seated throughout the fifteen (15) minutes they were together and had to be helped onto his feet and assisted by the police to walk to their vehicle.

21. At about 7am after the defendant was taken away by the police , he asked his daughter what the defendant had done to her and she said he had “*grabbed onto her shoulders and squeezed them*”. He thought the defendant had indecently assaulted his daughter and he was relieved to learn that the defendant had not actually done anything of the sort to his daughter.
22. In light of the Isaac Degia’s evidence which was largely unchallenged , I am satisfied and find elements (a) and (c) proven beyond a reasonable doubt , namely , that the defendant was found inside the bedroom of **Issac Degia’s** house without his fore-knowledge or consent. Element (b) will be determined later.
23. Likewise , on the basis of the largely unchallenged evidence of the complainant (DP) , I am satisfied that the prosecution has established elements (1) , (2) and (4) of the offence in Count 1 beyond a reasonable doubt. That is , that the defendant touched DP’s back by lying on her and squeezing her shoulders through her clothes and that DP was seven (7) years of age at the time. The only element that remains to be determined is : “(3) *the touching was intentional and indecent*”.

DEFENCE CASE

24. The defendant gave sworn evidence in his defence. He testified that he is twenty-three (23) years of age , single , working under the Housing Scheme and living with his parents at Anetan District. On the early evening of Saturday 22 May, 2021, he and a group of friends gathered at a home in Anabar District to celebrate their passing a course they had completed. They started cooking and drinking “Vodka” and “Red Horse” liquor. The party went on all night until the next day and continued after the group had eaten the cooked food.
25. The defendant recalls that a box of “AK47 Vodka” bottles and a box of “Red Horse” cans of liquor was purchased and consumed at the party. The Vodka was mixed with water. He estimated drinking more than 20 glasses of liquor throughout that evening before losing consciousness. Asked in-chief if he left the house where the party was held , he replied : “A : *No , I stayed there*”.
26. Questioned about the victim DP’s evidence , he said : A : *No , I don’t remember*”.
 Asked : “Q : *what is the last thing you remember doing that night ?*”
 he replied :
 “A : *I don’t recall the night. I blacked out at (our hosts’) house. I recall waking at (our host’s) house and I thought my friends had knocked me out there. When I woke up I realised it wasn’t my friends but a totally different person hitting on my face.*”
Q : *Where did you regain consciousness ?*
A : *When I was being escorted to the police.*
Q : *Heard (the victim) say you squeezed her shoulder ?*
A : *I don’t recall doing that.*

Q : Heard girl tell court you lay on her back ?

A : No I don't recall doing that."

27. In cross-examination the defendant was asked to explain how he went from the party house at **Anabar** to Isaac Degia's house in **Anetan** , he said :

A : I don't recall , I thought I had knocked out at (the party house).

Q : What distance approximately between the two (2) houses ?

A : Roughly 800 metres , a fair distance between the two (2) houses.

When it was suggested to him that he went inside Isaac Degia's house , entered the bedroom and touched DP's shoulders, he replied :

A : No , it's not correct as far as I know I was at the (party house)."

DISCUSSION and DECISION

28. Four (4) days after the incident in his police caution interview the defendant admits knowing Isaac Degia as a friend of his uncle. However he consistently maintained and denied any knowledge or memory of how he ended up in the bedroom of Isaac Degia's house at Anetan ; about lying on DP and squeezing her shoulders. He recalls however , waking up to someone assaulting him and , even then , he thought he was still at the drinking party at Anabar.

29. For present purposes , Section 43 of the Crimes Act relevantly provides :

"(1) A person is not criminally responsible for an offence if the person's conduct constituting the offence was as a result of intoxication that was not self-induced.

(2) Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct.

(3) This section does not prevent evidence of self-induced intoxication being considered in deciding whether conduct is voluntary.

(4) In this section: 'intoxication' means intoxication because of the influence of alcohol, a drug or another substance....."

(my highlighting)

30. Although the defendant's intoxication was mainly self-induced , subsection (3) clearly states that evidence of self-induced intoxication does not prevent the Court considering it "*in deciding whether conduct is voluntary*".

31. In the present case there at least three (3) acts or "*conduct*" by the defendant that the defence submits are directly affected by the defendant's self-induced intoxication :

(1) entering the bedroom of Isaac Degia's house at Anetan District ;

(2) lying on DP's back and

(3) squeezing DP's shoulder.

32. Dealing firstly with (1) above , which is “*element (b)*” of Count 2 , prosecuting counsel submits that the entry into the bedroom of Isaac Degia’s house was “*intentional*” because , although the defendant may have developed a “*mental block*” and/or amnesia about the events after he claims to have “*blacked out*” at the drinking party at Anabar, the fact remains that the defendant walked 800 metres from Anabar District to Anetan District and at Isaac Degia’s house , he had to turn the door knob or handle to open an external door in order to enter the bedroom where DP was sleeping. These acts , counsel submits , are all conscious physical acts requiring some effort , at the time they were performed , even if , the defendant later claims he is unaware of them.
33. For his part defence counsel submits , that the defendant “*blacked out*” because of the quantity of alcoholic drinks he took (20+ glasses) and his actions in entering the wrong house in the district in which he lived and lying on a child on the floor , are the unintended involuntary actions of a heavily intoxicated person who didn’t know where he was or what he was doing and counsel emphasizes that the offence requires affirmative proof of actual conduct , rather than , an inactive “*state of affairs*” such as being found in [eg : s.7(2)(iii) of the Crimes Act] or remaining in a building as in a Burglary offence. [see : section 160 (1)]. No evidence was led however , as to the location or distance between the defendant’s home and Isaac Degia’s home at Anetan.
34. As for “*element (b)*” in Count 2 , after carefully considering all of the evidence for the prosecution and the defence as well as counsel’s closing addresses and mindful that the prosecution has the legal burden of proving that the defendant’s entry into the bedroom of Isaac Degia’s house at Anetan was an “*intentional*” and “*voluntary act*” , I am not satisfied that the prosecution has established that element beyond a reasonable doubt and the defendant is accordingly found not guilty on Count 2.
35. Turning next to “*element (3)*” of Count 1 namely the “*intentional*” and “*indecent*” touching of DP in her bedroom , as already noted , most of the evidence is unchallenged as to the nature and details of the “*touching*” that allegedly occurred.
36. In this instance prosecuting counsel’s submission is that the lying on DP’s back and squeezing her shoulders did occur and was not imagined by DP. Furthermore , both “*acts*” were not accidental but were deliberate and intentional.
37. As for the “*indecent*” nature of the defendant’s actions , counsel submits that despite no-one directly using the word in describing the defendant’s actions , nevertheless , the actions are objectively “*indecent*” because the defendant and DP “*are not related as close family*”, were “*unknown to each other*” , and it occurred inside the privacy of DP’s dark bedroom while she was asleep , and counsel submits the defendant’s actions were “*morally offensive especially in a sexual way*” insofar as the acts could be considered to be acts of some intimacy involving actual contact.
38. Defence counsel’s brief submission on “*element (3)*” of Count 1 asks the Court to view the case as a drunken man who stumbles into a room and all he wants to do is lie down and sleep and in the process he unintentionally and accidentally lies on top of DP. That , counsel submits is not “*indecent*” because the defendant didn’t know where

he was or what he was doing and , at not time , did the defendant attempt to stop DP extricating herself and leaving the bedroom.

39. Moreover , the defendant’s actions were not driven by his will , rather , they were the involuntary reflexes of a heavily intoxicated drunk who had consumed 20+ glasses of “*hard liquor*” or spirits and was looking for a place to sleep.
40. In R v Stanley [1965] 2 QB 327 Lord Parker CJ ruled that to be “*indecent*” the publication in that case would need to be highly offensive against the recognised standards of common propriety. In Nauru , however the standard is that “...*of an ordinary person*”.
41. In most cases the indecent nature of the act(s) complained about presents no difficulty. Most often , the act is of a sexual nature involving the victim’s breasts and/or genitalia or it may be an act of intimacy that offends the modesty of the victim such as uninvited caressing or kissing or it may even include exposure of the male genitalia and/or masturbation as occurred in Republic v Hartman [2020] NRSC 7.
42. In this regard the House of Lords in R v Court (1988) 2 ALL ER 221 explained :
- “ To decide whether or not a right-minded person might think that the assault was indecent , the following factors were clearly relevant : the relationships of the accused to his victim (were they relatives , friends or virtually complete stranger ?) how had the accused come to embark on this conduct and why was he behaving in this way?.... ”*
43. Of greater relevance however , to the circumstances of the present case , are the observations of Lord Griffiths where he said *ibid* (at p 223) :
- “The gravamen of the offence of indecent assault is the element of indecency. It is this element...that distinguishes the offence from common assault ...***
- ...By indecency is meant conduct that right thinking people will consider an affront to the sexual modesty of a woman.*
- Although the offence of indecent assault may vary greatly in its gravity.....there is agreement that the offence cannot be committed accidentally..... Once this concession is made it is apparent that some extra mental element is required than that necessary for common assault..... this mental element should be that which constitutes the essence of the offence , namely an intent to do something indecent to a woman in the sense of an affront to her sexual modesty..... Indecent assault is after all a sexual offence appearing in (Our PART 7 - SEXUAL OFFENCES) and one should on general principle look for a sexual element as an ingredient of the offence.”*
- (my highlighting)
44. In light of the foregoing and mindful of the level of intoxication of the defendant at the relevant time (“*blacked out*”) and bearing in mind the defendant’s actions that are said to be “*indecent*” , I do not accept that a drunk who lies down on the back of fully-clothed female child and squeezes her shoulders while she is lying face down asleep ,

commits an act that offends the child's sexual modesty or commits an "*indecent*" act according to ordinary Nauruan standards.

45. In this case , the victim's father did not consider that what the defendant did to his daughter amounted to an indecent assault and , quite extraordinarily the victim herself told the police officer who took her to be medically examined at the hospital that :
"...no sexual contact was made but only her shoulder hurts in result from this male person squeezing her shoulder very hard". [see : Exhibit D(3)].
46. This is corroborated by the result of DP's physical examination which revealed :
"No perineal injury or signs of penetration only tenderness at both shoulders."
47. For completeness , there is evidence that the defendant is a known patient of the RON Hospital suffering from heart disease and epilepsy. He also confirmed that he takes tablets for his heart condition and receives monthly injections to assist his pace-maker. [see : Exhibit D(1)].
48. Accordingly the defendant is also found not guilty and acquitted on Count 1 of the offence of Indecent Act in Relation of a Child Under 16 years. The defendant is ordered to be immediately released from custody.

Dated : 27 July 2021

D.V.FATIAKI
CHIEF JUSTICE