



IN THE SUPREME COURT OF NAURU
YAREN DISTRICT
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 6/2020

BETWEEN

THE REPUBLIC

AND

WAJEEH UDDIN

Before:	Khan, ACJ
Date of Hearing:	23, 25, 26, 27 May and 6 June 2022
Closing Submission by Defence:	13 June 2022
Closing Submission by Prosecution:	19 September 2022
Supplementary Submission by Defence:	14 and 20 September 2022
Supplementary Submission by Prosecution:	21 September 2022
Date of Judgement:	13 October 2022

Case to be known as: *Republic v Wajeesh Uddin*

CATCHWORDS: Indecent act – Where both the complainant and the defendant were heavily intoxicated – Where the complainant was asleep when an indecent act was committed – Whether the complainant was able to positively identify the defendant notwithstanding her drunken state – Whether instructions may be inferred by questions asked by counsel.

APPEARANCES:

Counsel for the Prosecution:	S Shah
Counsels for the Respondent:	R Tagivakatini

JUDGEMENT

INTRODUCTION

1. In the original information filed on 21 May 2020 the defendant was charged with one count of rape contrary to s.105 of the Crimes Act 2016 (the Act) and an alternative

count of indecent act contrary to s.106 of the Act and two other counts of threatening to cause harm to police officers (public official) contrary to s.93 of the Act.

2. On 4 December 2020 an amended information was filed in which the accused was charged with one count of rape an alternative one count of indecent act.
3. The information was further amended on 9 February 2022 and the charge was reduced to one count of indecent act which states as follows:

STATEMENT OF OFFENCE

Indecent acts: Contrary to s.106(1)(a), (b), (c)(ii) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Wajeeh Uddin on 18 April 2020 at Nibok District in Nauru intentionally touched Christine Jeremiah and the touching was indecent and Wajeeh Uddin was reckless about that fact and Christine Jeremiah did not consent to the touching and Wajeeh Uddin was indifferent to the consent of Christine Jeremiah.

BACKGROUND FACTS

4. On 18 April 2020 there was a drinking party at the defendant's house in Nibok District(Camp 5) which was attended to by Braveman Atto (PW1), Christine Jeremiah (the complainant) (PW2), Kimi Dabwido (PW3) and Manto Tsiode. The drinking party took place in the defendant's bedroom which had about 4 or 5 mattresses. They were all seated on the mattresses.
5. The drinking session started in the early hours of the morning on 18 April 2020 with Braveman Atto, Kimi Dabwido, Abel and Manto Tsiode and the complainant joined in later upon Braveman Otto's invitation who went to pick her up on his motorbike and brought her over. Everyone was drinking Vodka AK47 mixed with water. The drinking continued until the early part of the morning.
6. Kimi went off to sleep on a mattress where the drinking was taking place at around 5-6 am and later the complainant also went off to sleep next to Kimi.
7. The drinking continued until daylight when it was about to finish and Braveman and Manto left at around 9am to buy more drinks. Before Braveman left, he had asked Jenko Karl, a security officer who was on duty at Camp 5 to keep an eye on the complainant and Kimi as they were sleeping.
8. Whilst Braveman and Manto were away the complainant alleges that she was indecently assaulted by the defendant and when Braveman and Manto returned the matter was reported to the police who arrived at Camp 5 and took the defendant into custody and he was charged and later produced in the District Court.

PROSECUTION'S CASE

9. The prosecution's case is that while the complainant was sleeping the defendant indecently assaulted her. I will discuss her evidence in more detail later.

DEFENCE CASE

10. The defendant accepts that the complainant was indecently assaulted but he denies that he was the perpetrator as he was sleeping at the material time in another room. He claimed that Able was the perpetrator, however, he was not an eye witness as he was sleeping at the material time.

ELEMENTS OF OFFENCE

11. The elements of the offence are:
 - 1) That on 18 April 2020;
 - 2) The accused intentionally touched Christine Jeremiah;
 - 3) That the touching was indecent;
 - 4) That Christine Jeremiah did not consent to the touching;
 - 5) That the accused was recklessly indifferent to the consent of Christine Jeremiah.

BURDEN OF PROOF

12. Under s.25 of the Act the prosecution bears the burden of proof of proving each element of the offence and the legal burden of proof on the prosecution is beyond all reasonable doubt.

COMPLAINANT'S VERSION

13. By the time the complainant joined in the drinking party the others had already consumed a considerable amount of AK47 and she decided to "catch up" as she put it and as a result, she was having quick drinks.
14. The complainant knew the accused before the drinking party on the 18 April 2020 as she had been to his house on an earlier occasion and considered him to be a "show off" as he kept her awake and wanted to talk to her.
15. After having her drinks, she felt tired and went off to sleep next to Kimi and continued sleeping until she felt some movement. In her examination in chief the questions and answers were as follows:

Question: You fell off to sleep – what happened next?

Answer: I felt some movement.

Question: Where did you feel this movement?

Answer: Like I felt someone on top of me and I remember feeling so – I wanted to open my eyes to check what was happening – because I could feel the weight on top of me before I opened my eyes.

Question: When you felt the weight on top of you what did you do?

Answer: It was all blurred at first because I felt so intoxicated as I have never felt so intoxicated before.

Question: Then

Answer: Like it was blurred at first, I tried to see what's happening – like I felt so dizzy – when I opened my eyes I saw this person in front of me – I tried to identify him as I was heavily intoxicated.

Question: Were you able to identify who this person was?

Answer: I tried to focus on the person and when I finally had a good look at him I knew it was Wajeeh.

Question: When you saw it was Wajeeh what did you do?

Answer: I tried to fight him off and whilst I was trying to do that I still felt so heavy – I was helpless because I was so intoxicated – I think I said to him 'what are you doing' – I tried my best to push him off.

Question: Can you tell what he was doing when he was on top of you.

Answer: From what I can recall he was trying to take advantage of me.

Question: When you say advantage – what was he doing?

Answer: He had nothing on.

Question: What do you mean?

Answer: Like I felt his skin lying on top of me.

Question: What was Wajeeh wearing?

Answer: Nothing he had no clothings.

Question: What was he doing when he was on top of you?

Answer: I don't know as I said I never felt so intoxicated in my life – dozing off to sleep in a place where I felt insecure so I don't know if he did anything – as I was so numb – all I know I had to get him off.

Question: How did you get him off?

Answer: I struggled to push him off.

Question: Do you recall what was Wajeeh doing?

Answer: I don't know what he was trying to do – but when I woke up he discontinued what he was doing because I tried my best to push him off – hoping that nothing happened at that point.

Question: What happened next?

Answer: I felt cold because this time I realized, after I pushed him, my pants and my underpants were below my knees but luckily for me my t-shirt and bra were still on.

Question: What sort of pants were you wearing?

Answer: They were leggings.

Question: Do you recall how your underwear was below you knee?

Answer: No but I blame him because he was on top of me. There was no one else except him.

Question: Where was Kimi at this time?

Answer: Kimi was still there to my surprise – still asleep. I didn't know who else was in the room but I could see Kimi.

Question: After you struggled to push him off what did you do?

Answer: I tried to cover myself and I pulled the sheet which I did eventually.

Question: After you did that what did you do next?

Answer: I was unable to stand up and walk out of the room as I felt dizzy I didn't have the energy to do so – so when I looked up I saw Kimi was still sleeping and this time I could hear the music.

Question: What did you do next?

Answer: When I saw Kimi was still sleeping but I still did not know who else was in the room at the time and I turned on my side and went off to sleep as I was feeling so dizzy and I could not do anything else – I needed to shut my eyes and regain energy to leave the room.

Question: When you turned to your side to shut your eyes what happened?

Answer: He was at it again.

Question: Who?

Answer: Wajeeh.

Question: What was he doing?

Answer: This time he pulled my pants behind me and when I was sleeping on my righthand side whilst Kimi was there.

Question: What did you do this time?

Answer: This time when he tried to pull off my pants from behind I knew it was no longer safe for me to be there and I had to leave.

Question: This second time around how did you know it was Wajeeh?

Answer: Because it was not long before I pushed him off he tried to pull my pants.

Question: Can you tell what was the time?

Answer: I can't tell.

Question: The second time you knew Wajeeh can you tell the Court whether you turned around to see if it was Wajeeh?

Answer: I was not trying to see who it was this time I was trying my best to keep my pants on.

Question: At that time how were you feeling?

Answer: I was feeling mad, angry and annoyed at this person.

Question: What did you do next?

Answer: I pulled my pants and tried to get off the bed and get out of the room.

Question: What happened as you were getting out?

Answer: He was in the way. I don't know what he was saying to me.

Question: When you say he was in the way what do you mean?

Answer: He was standing in front of the door.

Question: Do you recall what he was wearing at the time?

Answer: No.

Question: What happened next?

Answer: I pushed him aside and managed to open the door and I went straight to the bathroom which was on my left.

Question: What did you do when you went in the bathroom?

Answer: I shut the door and he was right behind me and I shut the door on him.

Question: What was Wajeeh trying to do when you were shutting the door?

Answer: I can't remember. I just wanted to be safe.

Question: After you were locked in the bathroom what happened next?

Answer: I lay on the bathroom floor and went to sleep.

Question: When did you wake up?

Answer: I heard a knock.

Question: When you heard the knock what did you do?

Answer: I did not open it.

Question: So how did you know someone was outside?

Answer: Someone was speaking and it was Kimi.

Question: When you heard it was Kimi what did you do?

Answer: I let him in.

Question: Once Kimi was inside the bathroom what happened.

Answer: I told him what happened.

Question: After you told him what happened, what was Kimi's reaction?

Answer: Obviously he looked like he just woke up because I trust Kimi as he is a very close friend.

Question: What was Kimi's reaction?

Answer: He was surprised because he was there when the incident happened.

Question: After you told Kimi what had happened what happened next?

Answer: I told Kimi to check to see whether there was some penetration and Kimi's response was – Are you crazy? Am I a doctor or something – so we both laughed but I was serious I wanted to know whether the worst happened or not.

Question: Can you recognize Wajeeh if you were to see him?

Answer: Yes.

Question: Is he in Court today?

Answer: Yes

Question: Did you consent to Wajeeh doing all that?

Answer: Never that's why I was angry.

CROSS EXAMINATION

16. The complainant was cross examined by the defence counsel, Mr Tagivakatini as follows:

Question: Was there another person there by the name of Able?

Answer: I'm not sure whether Able was there when I arrived. I can't remember as this is the second time we had drink's at Wajeeh's. This time I can't remember whether Able was there.

Question: I suggest to you that Able was there when you arrived.

Answer: I can't remember.

Question: Do you know Able?

Answer: Yes.

Question: You mentioned as soon as you arrived you decided to catch up with drinks.

Answer: Yes.

Question: Is it normal thing in Nauru for latecomers to catch up?

Answer: I believe so.

Question: From your experience how does catch up affect a person?

Answer: I don't know as I have not been to many drink ups. I started drinking when I was 29 years old.

Question: On 18 April 2020 do you recall how much did you drink?

Answer: No.

Question: During the drinking session you made sure you stayed away from Wajeeh?

Answer: Yes.

Question: During the drinking session Wajeeh did not bother you?

Answer: No he did not bother me.

Question: You said you didn't like Wajeeh because he was a show off.

Answer: Yes.

Question: The other reason you didn't like Wajeeh was because during an earlier drinking session pictures were uploaded?

Answer: Yes that's correct.

Question: I note that you are separated from your husband.

Answer: Yes.

Question: Of course uploading of the pictures would have damaged the relationship?

Answer: No not with my husband but with my children and family as he was not in the country.

Question: Why did you still decide to drink in Wajeeh's room despite what happened?

Answer: Because I thought I will be there for a while and not long.

Question: Can you recall from the drinking session who slept first? You or Kimi?

Answer: Kimi.

Question: Do you know when you went to sleep – time wise?

Answer: No.

Question: When you went to sleep do you know who was awake?

Answer: No.

Question: You said when I was sleeping you felt someone on top and you were heavily intoxicated like never before?

Answer: Yes.

Question: You said you tried to open your eyes and were dizzy?

Answer: Yes.

Question: You said you tried to focus on who this person was?

Answer: Yes.

Question: You said yesterday that it was Wajeeh.

Answer: Yes.

Question: I am suggesting/putting that you were mistaken about Wajeeh – it was not him.

Answer: Oh no it was him.

Question: I am also putting to you that because of your having been intoxicated you could not identify the person properly.

Answer: At first it's like a camera lens when you set the focus on.

Question: I put to you that you thought it was Wajeeh because you didn't like Wajeeh?

Answer: I didn't think it was Wajeeh – didn't know who it could be before I had good focus.

Question: You said later when you got up you went to the bathroom.

Answer: Yes.

Question: I'm putting to you that Wajeeh did not stop you going to the toilet?

Answer: He did that before I left the bedroom.

Question: I'm putting it you that it's not true because Wajeeh was lying in the spare room that is on the rough sketch plan.

Answer: That is not true.

Question: I put it to you that when you were inside the toilet Wajeeh did not come after you.

Answer: He came after me before I entered the toilet – but not sure whether he was trying to apologize – I don't know.

Question: Do you recall picture and video taken on 18 April 2020?

Answer: I am not sure of that.

17. The complainant was cross examined on video (no. 2). She was questioned as to whether she was in the video together with Able. Her response was that the video was not clear and therefore she was unable to recognize anyone in the video.
18. The complainant was further cross examined that the person on top of her was Able and not the defendant. The cross examination went as follows:

- Question: I put it to you that on 18 April 2020 it was not Wajeeh who was on top of you – it was Able on top of you.
- Answer: That is not correct.
- Question: I also put it to you that the video played was taken on 18 April 2020 at around 9.30am.
- Answer: I still believe it may be from another occasion before the 18th April. I met Able before the 18th April as well.
- Question: I put to you that when you opened your eyes it was Able and not Wajeeh.
- Answer: It was definitely not Able.
- Question: I put to you that it was Able who tried to stop you from going to the toilet.
- Answer: No it was not Able it was Wajeeh.
- Question: I put to you that you blame Wajeeh because you never liked him.
- Answer: I don't blame because I hate him – because I saw him. When I was talking to this person I was speaking in English and not Nauruan.
- Question: When you went off to the toilet it is true that Wajeeh was sleeping in the spare room.
- Answer: I don't know I don't remember that.
- Question: Finally I put it to you that Wajeeh was not in the bedroom – he was in the spare room knocked out from drinking.
- Answer: No he was there because I had a fight with him.

BRAVEMAN ATTO'S EVIDENCE

19. Braveman is a security officer at Nibok District (Camp 5). On 18 April 2020 he was on duty and knocked off at midnight. He had made arrangements with Able and Kimi to drink alcohol and at around 1am he received a call from the defendant who invited him to his place.
20. Having arrived at the defendant's house they started drinking Vodka AK47 in the defendant's bedroom and according to him he was asked by the defendant to invite the complainant to join them in their drinking and he called her at 2am and asked her whether she wanted to join them for drinks and later he went to pick her up.

21. He said the defendant kept bothering the complainant and was touching her on her side and her legs and the complainant continuously asked him to stop bothering her. He said that when he went out to pick up the complainant Manto Tsiode joined in the drinking; he is unable to recall as to how many bottles of AK47 they consumed; and that they continued drinking until 7am.
22. He stated that Kimi and the complainant went off to sleep; and that Able had left, he was not able to say as to what time they went to sleep or the time that Able left. He said that he left at around 9am to buy more AK47.
23. He said that before he left he had asked Jenko Karl (a security officer) who had earlier joined them to keep an eye on the complainant as the defendant was bothering her and he promised to look after the complainant.
24. He had been out for about an hour to buy the drinks and when he returned he saw Jenko Karl was outside the defendant's house and he asked him as to what was he doing outside and in response he said that the defendant had asked him to leave his house.
25. He went towards the defendant's house and saw him coming straight to him and told him that Kimi had beaten him up. He did not enter the house at that point in time and met Kimi in the porch and spoke to him and he did not say anything. He and Manto entered the house and were later joined by Kimi who told him that the complainant was in the toilet.
26. He checked the toilet door and it was locked and he knocked on it and the complainant opened the door and he noted that she looked scared. He spoke to her and asked her as to what happened and she told him that someone had pulled her pants down.
27. After the complainant told him that someone had pulled her pants down the examination in chief was as follows:

Question: What did she say?

Answer: She felt someone pulling her pants down.

Question: What did you do after she told you that?

Answer: After we spoke we went outside and continued drinking.

Question: Where was Manto at this time?

Answer: I can't recall.

Question: Who continued drinking?

Answer: Myself, Christine, Wajeeh and Manto.

Question: After Christine told you that someone was pulling her pants down did you ask who it was?

Answer: I did not ask her who it was but she told me who it was.

Question: Who did she say it was?

Answer: Wajeeh.

Question: When Christine told you that how did you feel at the time?

Answer: I went to Wajeeh and asked him if it was him – but he did not say anything.

Question: What happened after that?

Answer: Manto called the police.

CROSS EXAMINATION

28. He maintained that he went to pick up the complainant at 2am and not at 4.30am. He denied that he was in a relationship with the complainant, that he had only known her for a few months prior to 18 April 2020, that he got to know her through their drinking sessions.

29. He maintained that the defendant kept bothering the complainant. He agreed that he left at 9am to buy more drinks and it was put to him that Able was still there when he went to buy the alcohol and his response was: “No he was already gone.”

30. He was shown a video footage taken by the defendant and he agreed that he saw Able in the footage (video No. 1) and that it was taken at around 3.36am. In the second video shown to him he was unable to recognize anybody but agreed that there was only one female with them during the drinking session. He agreed that the defendant was recording the video on his phone and he was not able to say that it was recorded at 9.29am.

31. His further cross examination was as follows:

Question: I put it to you that the video showed that Able was still there when you went to buy alcohol.

Answer: Incorrect.

Question: I further put it to you that you blamed Wajeeh for what happened to Christine.

Answer: I did not blame him.

Question: When you returned from Anibare Able was no longer there?

Answer: Correct.

Question: I put to you that it was Able who was bothering Christine.

Answer: That is wrong.

Question: You said you knocked on the toilet door and Christine told you that she felt someone was pulling her pants down.

Answer: Correct.

Question: After that you went out and continued drinking?

Answer: Yes.

Question: I put it to you that Christine did not tell that it was Wajeeh – she said that she did not know who it was.

Answer: That is wrong.

Question: I put it to you that you just blamed it on Wajeeh.

Answer: We did not blame him.

Question: I further put it to you that you did not want to blame Able – you just wanted to blame Wajeeh.

Answer: It was not us who blamed Wajeeh.

32. In a question asked by me as to who continued to drink after he had spoken to Christine in the toilet and his response was: “Wajeeh, Manto, Kimi and myself.”

KIMI DABWIDO

33. He came to the defendant’s house at around midnight on 18 April 2020 to drink alcohol. He had earlier been to a club with Braveman. Upon arrival at the defendant’s house he went straight to the bedroom and had drinks.

34. He stated that Braveman had invited some guests – the names he could not remember but he knew the complainant (Christine). He had difficulty remembering the other names but remembered the names of Able and Manto. He did not know when Manto arrived.

35. He went off to sleep at 5am and when he woke up he saw no one was in the house and he walked outside the house and a little later he said that he saw the boys arrive with more drinks. When asked to explain as to who did he refer to as ‘the boys’ he stated: “Braveman, Able and Manto.” He heard them talking about the complainant and they thought that she was in the bedroom whilst he thought she was with them. He then went to the toilet and knocked on the door and the complainant answered.

36. She opened the door and he saw that the complainant appeared to be very frightened and she told him that something happened to her and Mr Shah asked him a series of questions which were as follows:

Question: What happened?

Answer: She thought that she was being touched.

Question: Did she say by who?

Answer: I can't remember – she said that Wajeeh touched her.

Question: Did she tell you where Wajeeh touched her?

Answer: She said Wajeeh touched her whilst she was sleeping. Wajeeh touched her.

Question: What else did she tell you?

Answer: She was examining herself – if she was really touched.

Question: Did Christine tell you where she was touched?

Answer: Her private organs – vagina.

Question: You said she was examining herself. What was she checking for?

Answer: Not sure what she was checking for but I am pretty sure that she was looking for evidence if she was raped or touched.

Question: And after she examined herself – what did you do?

Answer: I just stood up and did not know what to do. I was shocked.

Question: Where was Braveman, Manto and Able?

Answer: They were outside.

Question: Can you tell how long you were in the restroom?

Answer: An hour or less than an hour.

Question: After you spoke to Christine what did you do next?

Answer: I tried to comfort her and told her to go outside to see the guys.

Question: Where did you go after that?

Answer: We went outside Christine went to Braveman and I just went straight home as I felt uncomfortable at the things happening.

CROSS EXAMINATION

37. Kimi stated that before he went off to sleep the complainant, the defendant, Braveman, Manto and Able were still there and when he woke up he saw Jenko Karl. He is unable to recall whether it was still dark or daylight had broken.
38. He did not recall any pictures being taken during the drinking session but recalled that music was being played and there was dancing. When shown video No. 1 he recognized Able who was dancing and he confirmed that it was from the drinking session on 18 April 2020.
39. In further cross examination he was asked:
- Question: You said when you woke up there was no one around and then you met Braveman, Manto and Able who had returned from buying alcohol.
- Answer: Yes.
- Question: At that time you did not see Wajeeh?
- Answer: Yes correct.
- Question: After the complainant and you left the restroom she went to Braveman and others and you left for home?
- Answer: Yes correct.

JENKO KARL

40. He was the security officer on duty on 18 April 2020 at Camp 5 and he was told by Braveman and Manto to keep an eye on the complainant and Kimi who were sleeping while they went to buy more drinks. At that time the defendant was in the top building talking to a friend and he kept a watch on the complainant and Kimi for about 15 minutes.
41. He was asked as to why did he leave the house when he was told by Braveman and Manto to keep an eye on the complainant and Kimi and he stated that he was on duty and had to write a report and he also went to sit under a tree and later returned to the verandah when he was told by the defendant to leave his place. He told the defendant that it is his place and he owns it and that he is also on duty as a security officer. But he left the house and went and sat under a tree.
42. He was asked that when he went to sit under the tree who was inside the house and he stated: "Only Kimi and Christine were sleeping and Wajeeh." He was seated outside for 10 minutes before Braveman and Manto returned.

CROSS EXAMINATION

43. In cross examination he agreed that he only checked the bedroom as he was asked to check the two persons sleeping therein; he did not check the other part of the unit, nor was he familiar with the locking device on the toilet door.

44. He agreed that since he did not check the other part of the unit he could not say if anyone else was present apart from the complainant, Kimi and the defendant.

ARREST OF THE DEFENDANT

45. The defendant was arrested by PC Dageago. At the time of the arrest he was sitting on a chair and he was told that he was being arrested for assaulting a female and was escorted to the police vehicle. PC Dageago smelt alcohol on his breath. After he was put in the police vehicle the defendant asked Constable Dageago that he wants his wallet and his mobile phone. PC Dageago went back into the house to look for the mobile phone and wallet but was unable to find either the mobile phone or the wallet. At the police station PC Dageago carried out a body search of the defendant before putting him in the cell and found that the mobile phone was inside the pants pocket.

CROSS EXAMINATION

46. In cross examination PC Dageago was asked if he saw Jenko Karl upon arrival and he said he did and he did not know as to what he was doing there. He agreed that Manto helped him arrest the defendant and he knew Braveman and he saw other people whose names he did not know. He did not see the brand of the defendant's mobile phone except that it was black in colour.

LADY JANE HILO

47. She was the investigating officer in this case and escorted the complainant to the domestic violence office and made an application for further detention of the defendant. She took statements of Braveman Otto.

CROSS EXAMINATION

48. In her cross examination she was asked whether Able was present during the drinking and she agreed that he was. She was asked whether she considered taking his statement and she said no as Able had left the place before the incident. She stated that Inspector Gregory conducted the record of interview and she was the witnessing officer.

DEFENDANT'S EVIDENCE

49. At the close of the case for the prosecution the defendant elected to give sworn evidence. He agreed that Braveman, Kimi and Able came over to his place to drink alcohol and later on Braveman told him that he will invite Christine. He felt that Braveman and Christine were in a relationship.
50. He stated that music was being played and there was some dancing during the drinking. He said that Manto joined in in the early part of the morning. When the drinks was about to finish Braveman and Manto went to buy more drinks leaving behind Kimi, the complainant, Able and him.
51. He stated that after they left, he saw that the complainant and Able were flirting and Able was touching the complainant on the stomach. From the body language he

thought that they were flirting and he took a video of them at 9.30am on his Samsung mobile phone to show it to Braveman. He stated that at that time Kimi was sleeping.

52. He stated that having made the video he mixed his AK47 in a 600 ml bottle and went to the other room where smoked a cigarette and fell asleep.
53. He said that he did not know when Braveman and Manto returned after buying more drink as he was sleeping and does not know as to when Able left his place.
54. He said that he heard some noise and that when he went outside, he saw the police. At that point in time, he felt that he was a little drunk.

CROSS EXAMINATION

55. He stated that he had been in Nauru for 9 years having arrived on 7 September 2013. He is a mechanic and repairs mobile phones and air conditioning. He said that he had been doing this for the last 12 years – well before his arrival to Nauru from Pakistan.
56. Mr Shah put to him that when Braveman and Manto went to buy the drinks only the complainant, Kimi and he were left behind and he disagreed with that and said that Able was also there. He was also told that shortly after Braveman and Manto left Jenko Karl came to his house and he refuted that and said: “No, I did not see Jenko.”. He denied chasing Jenko Karl away and he also denied that after that he went into the complainant’s room.
57. He also denied that he indecently assaulted the complainant, and also denied that she pushed him, that he did not follow her to the bathroom as he was sleeping at the time.
58. He denied that Able had left the drinking party at around 3.30am.

CONSIDERATION

COMPLAINANT’S ARRIVAL TO THE DRINKING PARTY AND THE ACT OF TOUCHING

59. There is conflict as to how the complainant arrived at the drinking party. Braveman stated in his evidence that the accused had asked him to contact the complainant and invite her to the party whilst the complainant’s evidence is that he just called her and asked her whether she wanted to join in the drinking party without telling her where and when she met him, he did not tell her that she was being taken to the defendant’s house. It was only upon arrival at Nibok District that she realized that she was going to the defendant’s house.
60. There is also conflict as to the time of arrival of the complainant to the party. Braveman stated that he picked her up at around 2am whilst the complainant’s evidence is that she arrived at around 3-4am. There is further conflict between Braveman’s evidence of the defendant touching or bothering her. Braveman had stated that the defendant was touching and bothering the complainant during the drinking whilst the complainant’s evidence is that he never touched or bothered her.

61. The defendant's position is that he never asked Braveman to invite the complainant to the drinking party and that the complainant arrived at around 4-4.30am; and that he never touched or bothered her.
62. The exact time of the complainant's arrival is not clear but what is clear is that the defendant did not bother her whilst they were drinking together.

INDECENT ACT

63. The defence does not dispute that the complainant was the victim of an indecent act but denies being the perpetrator¹. The question whether the touching is an indecent act is one of fact and is to be determined by applying the ordinary standards of an ordinary person (see s.117(c) of the Act).
64. I sat both as the judge and jury in this trial and in my capacity as the decider of fact (as jury) I am satisfied that the act committed on the complainant by pulling her pants down to her knee level, and pulling her pants from behind and the person who committed this act being completely naked at the time the act is indecent according to the standards of an ordinary person.

VIDEO RECORDING

65. The defendant took two sets of video recording, one at 3.36am and another one at 9.30am when he alleges that he saw the complainant and Able were flirting and he put a time of 9.30am. I accept that videos were taken and also accept that the video with the time 9.30am shows that the complainant and Able were in close contact or flirting, however, at around 9 – 9.30am the complainant was awoken when she felt some movement and she was fast asleep. I therefore find that it was taken during the earlier part of the drinking session and not around 9.30am.
66. What is clear from the evidence of the complainant is that there were no eye witnesses to the indecent act except for Kimi who at the material time was fast asleep; and what is also clear is that the act took place in the room where the drinking had taken place earlier.
67. Kimi had gone off to sleep at around 5am and the complainant went to sleep next to him later and she does not know who was awake at the time.
68. Braveman was awake right through until he left to buy the alcohol and he stated that Able had already left before he left to buy the alcohol. Jenko Karl stated that when he went out of the defendant's house to sit outside only Kimi, the complainant and the defendant were left in the house and the defendant completely denies meeting Jenko in his evidence and his counsel did not cross examine Jenko on that issue.
69. When the complainant felt a weight on top of her, she struggled to wake up as she was very intoxicated but when she woke up, she saw the person on top of her was Wajeeh, the defendant, with no clothes. Having seen him she went off to sleep again after changing her sleeping position, and she said that he was at it again when he was pulling her pants from behind.

¹ See written submissions filed by Mr Tagivakatini dated 14 September 2022

70. It was suggested to the complainant that the person on top of her was Able and not the defendant and it was also put to her that she just blamed the defendant as she did not like him and her response was:

“I don’t blame because I hate him – because I saw him. When I was talking to this person I was speaking in English and not Nauruan.”

71. The defendant’s position is that he was sleeping in the other room and yet he does not dispute that the complainant was subjected to an indecent act. The question that I ask is that: If he was asleep then how did he know that she was subjected to an indecent act? The other question that I ask is how does he know that it was committed by Able if he was asleep?

72. In a series of questions asked by Mr Tagivakatini as mentioned herein above, he stated: “I put”. I rely on *R v Robinson*² (Court of Criminal Appeal) Wanstall A.C.J; Douglas J, Dunn J where it is stated at page 394 as follows:

“By contrast, cross examining counsel is concerned with primary facts. His instructions are as to the primary facts, and it is his obligation – a strict obligation – that, if he ‘puts’ occurrences to witnesses, he ‘put’ them in accordance with his instructions. This being so, his instructions may be inferred from the questions. If there is a discrepancy in a significant particular (I do not know mean a minor or inexplicable discrepancy, for whilst perfection in communication between client and legal advisor is aimed at, it is not always achieved) between questions based on instructions as inferred and the evidence of the person from whom instructions must be taken to have come, it seems to me to be quite permissible for a judge to ask the jury to have regard to the discrepancy in evaluating the evidence.

The truth is, I think, that whilst in a strict sense questions are not evidence, questions asked (and indeed questions unasked) form part of the conduct of his client’s case by counsel. The conduct of the case is something from which the jury may be asked to draw inferences, so long as due regard is had to the requirement of fairness and the possibility of human error (especially in relation to peripheral matters).”

73. By asking a series of questions and stating “I put” I draw the inferences that the defendant was awake when the incident took place. Notwithstanding the fact that the complainant was very heavily intoxicated, tired and sleepy, I am satisfied that she positively identified the defendant who committed the indecent act on her.

CONCLUSION

74. I am satisfied that the prosecution has proved its case beyond all reasonable doubt and I find the defendant guilty of the charge of indecent act.

DATED this 13 day of October 2022

² [1977] Qd. R 387

Mohammed Shafiullah Khan
Acting Chief Justice