



IN THE SUPREME COURT OF NAURU
AT YAREN
(CRIMINAL JURISDICTION)

CRIMINAL CASE NO. 3 OF 2022

BETWEEN

THE REPUBLIC

Prosecution

AND

TOMWELL RAIDINEN

Defendant

Before:	Khan, ACJ
Date of Hearing:	27, 28, 29 June, 4, 5, 10, 13, 17 July 2023
Date of Submissions:	17 and 24 August 2023
Date of Further Submissions:	11 October 2023
Date of Judgement:	

Case to be known as: *Republic v Raidinen*

CATCHWORDS: Indecent act of a child under 16 years of age – Section 117 of the Crimes Act 2016 – Where the birth certificate of the child was disclosed during trial – Whether the age of the child was proved – Where there were contradictions in the complainant’s own evidence and with her mother’s evidence to whom she made the first complaint – Where the police showed photographs including that of the defendant which was not disclosed to the defence – Where no identification parade was conducted – Where complainant carried out the dock identification of the defendant – Whether dock identification is admissible – Where defence counsel in his submissions stated that the complainant fabricated the whole story – Whether failure to cross examine the complainant is a breach of the rule in *Browne v Dunn*.

APPEARANCES:

Counsel for the Prosecution:	S Shah
Counsel for the Defendant:	V Clodumar

JUDGEMENT

INTRODUCTION

1. The defendant is charged with one count of indecent act. The charge states as follows:

STATEMENT OF OFFENCE

Indecent acts in relation to child under 16 years old; contrary to section 117(1)(a), (b), (c) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Tomwell Raidinen between 1st day and 31st day of December 2021 at Anibare District in Nauru intentionally touched DV with his penis on her vagina and that the touching was indecent and that TOMWELL RAIDINEN was reckless about that fact and that DV is a child under 16 years of age.

BACKGROUND

2. At the time of the alleged offending the defendant was 28 years of age and the victim DV was 12 years old.

PROSECUTION CASE

3. The prosecution's case is that in November/December 2021 VD added the defendant on her Facebook account, and they started chatting on Facebook Messenger, and later exchanged phone numbers, and spoke to each other on the phone twice. The defendant asked DV to go out with him, and she agreed.
4. She met him outside the Bauda Church at about 2am. He picked her up in a Toyota Harrier. Having picked her up they drove to Yaren to a friend's place where drinking was taking place. They sat in the car for 2 hours chatting, and later he got out of the car to get some drinks for himself whilst DV remained in the car.
5. From Yaren they drove to Bauda Oval and parked the car for a while.
6. Later he drove her to his place in Anibare District through Topside Road. He took her into his bedroom and they got undressed. They held on to each other and kissed. He applied coconut oil on his penis and attempted to penetrate her vagina and DV felt his penis outside her vagina. They spent about an hour in his bedroom and left at about 4am.

RELEVANT LAW

7. Section 117 of the Crimes Act 2016 (the Act) provides the following in relation to the offence of indecent acts of a child under 16 years old:
 - 1) A person commits an offence if:
 - a) The person intentionally touches another person; and

- b) The touching is indecent and the person is reckless about that fact; and
- c) The other person is a child under 16 years old.

8. Section 117(4) – Absolute liability applies to subsection (1)(c), (2)(c) and (3)(c)

Note for subsection (4) – *Although absolute applies to the circumstance that the other person is under 16 years old (which means that mistake of fact under section 45 is not available), other defences apply to an offence against this section: see section 127)*

MAXIMUM PENALTY

9. The maximum penalty for this offence is 30 years imprisonment, of which at least 10 years has to be served without any parole or probation.

ELEMENTS OF THE OFFENCE

10. The elements of the offence are:

- 1) That the defendant between 1st and 31st of December 2021;
- 2) Intentionally touched DV with his penis on her vagina;
- 3) That the touching was indecent and the defendant was reckless about that fact;
- 4) DV is a child under 16 years old.

BURDEN OF PROOF

- 11. Under s.25 of the Act the prosecution bears the legal burden of proving each element of the offence beyond all reasonable doubt.
- 12. Although the alleged incident took place between 1 and 31 December 2021 it was not reported to the police until the 9th of March 2022.

DETENTION OF THE DEFENDANT

- 13. Following the report, the police carried out its investigation, and in the midst of the investigation made an application in the District Court for the detention of the defendant under Article 5(3) of the Constitution.
- 14. In making the application for detention, Sgt Doggeiy Alefio (Sgt Doggei) the investigating officer stated as follows in her affidavit sworn on 22 March 2022:
 - 1) That I depose this affidavit from my personal knowledge as a result of information obtained in my official capacity unless otherwise stated, and the contents of which are true to the best of my knowledge, information and belief.
 - 2) That the complainant in this matter is a 12-year-old juvenile.

- 3) That the suspect is 30-year-old male.
- 4) That around November 2021 the suspect contacted the juvenile on Facebook.
- 5) That the suspect and juvenile then exchanged mobile numbers on Facebook.
- 6) That in December 2021 the suspect contacted the juvenile and asked her if he can pick her up. The suspect proceeded to pick up the juvenile from the church at Bauda.
- 7) That the suspect then took the juvenile to Topside where they went and had a conversation, they then left Topside.
- 8) That the suspect took the juvenile to Anibare at his residence and took her inside room.
- 9) That once inside he then took a bottle of coconut oil and took off his pants.
- 10) That he then went and lay beside the juvenile and kissed her.
- 11) That the suspect then rubbed his penis with coconut oil while the juvenile was lying beside him. That the suspect then rubbed his penis on the juvenile's vagina.
- 12) That thereafter the suspect dropped the juvenile back to Bauda.
- 13) That the juvenile on 26th February told her mother about the incident.
- 14) There was no medical examination conducted on the juvenile.
15. Initially, Sgt Doggeiy was the investigating officer in this case, but during the course of the investigation she was told by her superiors to hand over the investigation to Const. John-Ross Dube who then became the investigating officer.
16. Although Const. John-Ross Dube was subpoenaed to attend court, he left for Brisbane without seeking the court's approval, and the prosecution was forced to close its case without calling him as a witness.

BIRTH CERTIFICATE OF DV

17. The birth certificate of DV was obtained by the investigating officer after the trial had commenced. It was not disclosed to the defence until after DV gave evidence in chief. The disclosure of the birth certificate was objected to by Mr Clodumar. Having heard submissions from both the defence and the prosecution, on 4 July 2023 I delivered a ruling, and allowed the birth certificate to be served on the defence by way of additional disclosure.
18. The defendant was interviewed by the police on 23 March 2022. He participated in a record of interview and gave his personal details, and after the allegations were put to him he chose to remain silent.

EVIDENCE OF PROSECUTION WITNESSES
DV'S EVIDENCE

19. DV was sworn on the bible to give evidence. She stated that her date of birth was 12 March 2009. She stated that she left school in 2022 having completed Form 1 (year 7). When asked to explain as to why she left school she stated that she was not happy with the principal, and the things that he said to her. She explained that the principal reprimanded her for hanging around the school premises, and not attending classes.
20. She also stated that she was teased by her class mates about her relationship with Renack Mau.
21. She stated that she attended court to tell the story about herself and Tomwell. When asked as to who was Tomwell she said "Tomwell Raidinen". She stated that she got to know Tomwell Raidinen through Facebook in November/December 2021. She stated that she chatted with him on Facebook, and that he asked her for her phone number, and they spoke on the phone twice. She was asked by Tomwell Raidinen to accompany him to where they were drinking as he did not have a girlfriend, and she agreed to meet him outside the church at Bauda at 2am. As arranged, he came in a grey Toyota Harrier, and she got into the car. The first thing that she noticed was a cup full of alcohol in the cup holder.
22. She stated that Tomwell took her to Yaren District to his friend's place where there was a party. Having reached Yaren they sat in the car and chatted for 2 hours. She did not get out of the car but Tomwell went out to get some drinks for himself. From Yaren they drove to Bauda Oval where he parked the car, and they again chatted for a while.
23. At around 4am Tomwell drove to the Topside Road to his place in Anibare. He parked the car, and they got out of the car. She noticed that people were sleeping in the house. He took her into his bedroom, and asked her to sit on the bed, and he went to get coconut oil. Upon his return he asked her to undress, and she stated that she was feeling scared as this was the first time for her to have sex; and that she was very young. He assured her that it will be alright. He asked her to take her clothes off, and she agreed but she was still very scared.
24. After taking their clothes off, they laid on the bed and he held on to her and kissed her. He applied coconut oil to his penis, and attempted to insert it into her vagina – not full insertion but just a little. She stated that he rubbed his penis around her vagina for a few minutes.
25. His friend called him on the phone, and they stopped and put on their clothes. She stated that they spent about an hour in his bedroom. They got dressed, and he dropped her off to her place in Bauda.
26. She stated that they started chatting on Facebook Messenger around Christmas, and that this incident took place on 31 December 2021. She was asked if she could recognize him, and the questions and answers were as follows:

Question: If you were to see Tomwell again would you recognize him?

Answer: Yes.

S Shah: Can I do a dock identification?
V Clodumar: No objections.

Court: Witness goes into the dock.

Question: Is Tomwell Raidinen present in Court:
Answer: Points to the accused.

27. She stated that she regretted going out with him as he took her virginity.
28. She stated that the only person she confided in was her mother. She was not sure about the month but stated that it was around April or May 2022. She stated that she told her mother as she had problems urinating.

CROSS EXAMINATION

29. In her cross examination it was suggested to her by Mr Clodumar that the birth certificate was shown to her by Mr Shah, and she said it was not, and she knew her date of birth as 12 March 2009.
30. Mr Clodumar challenged her version of not going to school. He suggested to her that her reasons for not going to school was not what the principal said to her, but it was that she took vape to the school. She agreed that she took vape to school, but that was not the reason for her not attending school. She agreed that she was suspended from school for taking vape, and the other reason was that she was teased by the students about Renack Mau.
31. She agreed that she told her mother about the incident at their house in Location District some 6 months later, and denied that she told any of her school friends. She was adamant that her mother reported this matter to the police at the police station, and that she accompanied her mother to the police station on 9 March 2022 to report against Renack Mau. She refuted the suggestion that it was at the police station on 9 March that her mother had told her to report the incident against the defendant.
32. She denied that she told her mother that the defendant did the same thing to her as Renack Mau, but she was unable to recollect or remember as to what she exactly told her mother. She agreed that she also told her mother that nothing happened.
33. She agreed that her conversations with the defendant started in November/December 2021 after they added each other on Facebook, and it was normal conversations, and nothing improper was suggested to her.
34. She agreed that in December 2021 she received a phone call from someone, and she did not know who the person was, and she went out with this person in the early hours of the morning.
35. She stated that she related to Sgt Doggeiy as to what happened, and the sergeant asked her if she knew him, and she said that she did not. Then the sergeant asked her if she knew his name, and she gave his name as Tomwell.

36. On the identity she was asked as follows:

Question: Did Sgt Doggeiy show you photographs of the person to identify from?

Answer: Yes, she showed me photos.

37. She denied that Sgt Doggeiy showed her any information about phone calls being made to her. She was not shown any pictures of the vehicle that she claimed that she was taken in, nor the pictures of the house that she was taken to.

38. She agreed that her entire story depends on the two phone calls made to her, and that if the phone calls were not made then nothing happened.

39. Her further cross-examination was as follows:

Question: You said that you spoke to your mother when you were sick and could not pee?

Answer: Yes.

Question: Do you agree that you also told your mother that the incident took place first before Renack's case?

Answer: Yes.

Question: So the Renack's case was sometimes in February 2022?

Answer: Yes.

Question: You gave a statement to the Police in that case?

Answer: Yes.

Question: In that statement you said that you were sick and could not pee?

Answer: Yes.

Question: So it is possible that you are taking incident in Renack's case and saying that it happened in this case?

Answer: I mixed it up.

RE-EXAMINATION

40. In her re-examination she was asked if she knew who she was talking to, and she stated that it was Tomwell, and she agreed that they were not related to each other. That she did not know him personally. She stated that it was Tomwell that she went out with in the middle of the night.

THE MOTHER

41. I am not referring to the mother by her real name as it could lead to the identity of VD and she will be referred to as "the mother".

42. The mother stated that she is a teacher at the Nauru Police Force teaching the police officers. She has 8 children including DV.
43. She was asked about DV's date of birth, and she remembered 12 March, but could not remember the year. She was shown her birth certificate without any objection from Mr Clodumar, and she identified it to be DV's birth certificate, and stated that her date of birth is 12 March 2009. The birth certificate was marked for identification by Mr Shah, and he stated that he will tender it through the investigating officer Const. John-Ross Dube.
44. The mother stated that DV stopped going to school after she turned 12; she stated that she attended Keysar College and later went to Nauru College.
45. She stated that she stopped going to school after she was raped.
46. When asked to explain as to how and when she came to know about this incident her response was that she only got to know about it when the police came to her house, and it was before DV's birthday – sometime in February 2022.
47. When asked to explain as to how the incident came to her knowledge, her response was that:

“I noticed difference in her behaviour, she was not herself – she was withdrawn.”
48. She also stated that she was convinced that she was neglecting her as she was always working and DV “shut me out”. The only thing that she told her was that she could not urinate properly – it was very painful.
49. As she was talking to DV there was a knock on the front door, and she opened it, and met the police officers who came looking for DV. They told her that they wanted to question her. She went back inside the house and told DV that she was not telling her anything – that's ok – the police are here and will tell me everything.
50. She was asked as to what communication she had with DV before the police arrived, and she said that she did not have any communication with her.
51. At the police station she stated that the police told her that there was an incident in the school – that someone reported that incident, and they asked if I was aware of it, and I told them that my daughter did not tell me anything.

SGT DOGGEIY

52. Sgt. Doggeiy was initially the investigating officer in this case, and she took the victim's and the mother's statements and other witnesses statements, including making her own statement.
53. At some point in time, which is not very clear, she was told by her superiors that the file in this case was to be handled by Const. John-Ross Dube. She stated that she instructed Const. John-Ross Dube and Sgt. George Herman to obtain an arrest warrant for the defendant, and a search warrant to search the Digicel office.

54. She agreed to give evidence in English language but had difficulty understanding, and the case was stood down for an interpreter to be made available.
55. After an interpreter was made available, she continued to give evidence and stated that she was advised by Const. John-Ross Dube and Sgt. George Herman that a magistrate was not available.
56. She stated that the defendant was not arrested, and he came into the police station voluntarily. She was advised by Sgt. Liberty that the defendant was at the front counter, but she could not attend to him as she was busy in obtaining statements in other cases.
57. She instructed Sgt. Liberty to execute the arrest warrant and search warrant (which had been issued by the lay magistrates), and to explain to the defendant his rights. She also instructed Sgt. Liberty and Sgt. Marvin to make their statements.
58. When asked to explain if they made their statements, she said that she does not know if they did as Const. John-Ross Dube was the investigating officer, and she told him to take their statements.
59. She was then asked as to what did she do after she gave out instructions, and she sought time to think about it and remember things.

REFRESHING MEMORY

60. She had difficulty remembering as to what she did, and an application was therefore made for her to refresh her memory from her statement which was granted despite objections by Mr Clodumar.
61. Having refreshed her memory she stated that she was in contact with the DPP's office to seek further detention of the defendant to allow them time to complete their investigations.
62. She further stated that the defendant requested to see his lawyer before the record of interview was conducted, and she spoke to Mr Clodumar who could not attend to the defendant, but he spoke to him on the phone.

CROSS EXAMINATION

63. In her cross examination she agreed that she was the investigating officer, and she was asked to hand over the case to Const. John-Ross Dube, and thereafter, she was not the investigating officer.
64. She stated that after DV's and her mother's statements were taken she handed over the case to Const. John-Ross Dube, who carried out investigations as to the complaint made in this case. She took the statements of DV and her mother in respect of the other case (Renack Mau), and before their statements were completed DV's mother mentioned to her about this case.
65. When it was suggested to her that the mother in her evidence earlier had stated that she learned about this case from the police – her response was:

“that as I was taking the statement in the other case the mother told her about this case.”

SGT. GEORGE HERMAN

66. He stated that he assisted Sgt. Doggeiy in obtaining the search warrant from the lay magistrates.
67. He also stated that he went to look for the defendant at his house, and that he was advised by his siblings that he had gone out, and upon his return to the police station he found him at the police station. He was told by Sgt. Doggeiy to escort him to court for further detention.
68. As to the search warrant, he stated that he delivered it to the Digicel Office to locate a mobile device as it was missing. He was unable to say as to whose device it was as he was not told.
69. He was present during the record of interview when Const. John-Ross Dube explained to the defendant his rights and put the allegations to him, and the record of interview was tendered as an exhibit (Exhibit P1).

CROSS EXAMINATION

70. He clarified that the defendant was arrested when the record of interview was conducted and not before that, and that before that he was a suspect and became an accused when the record of interview was conducted. He stated that he did not do any investigation in this case apart from performing the tasks that were allocated to him.
71. He had no recollection of DV stating that phone calls were made to her, nor did he have any recollection of her saying that she was taken in a car. He stated that he recalled DV saying that she was taken to a house in Anibare, but he did not carry out any investigations to check the house that she was taken to.

NO APPEARANCE OF CONST. JOHN-ROSS DUBE – INVESTIGATING OFFICER

72. Mr Shah advised the Court that Const. John-Ross Dube was the investigating officer, and he was informed by the police that he left for Brisbane last Friday, and he was therefore unable to call him as a witness.

DEFENCE CASE

73. At the close of the case for the prosecution the defendant elected to give an unsworn statement, and did not call any witnesses on his behalf.

CONSIDERATION

74. As I stated at [10] above, that there are four elements of the offence which are:

(1) That the defendant between 1st and 31st of December 2021:

(2) Intentionally touched DV's vagina with his penis;

(3) That the touching was indecent;

(4) That DV was a child under 16 years of age

75. The prosecution is required to prove all the elements of the offence beyond all reasonable doubt, and I shall first address the issue of age of DV, and then the identity of the defendant – whether he was correctly identified, as to whether the touching of DV's vagina took place by the defendant's penis, and lastly, as to whether it was indecent.

AGE OF DV

76. As I stated, DV's birth certificate was not part of the disclosure documents, and therefore, it was not disclosed to the defence before the commencement of the trial. It was disclosed during the evidence in chief of DV; her birth certificate was disclosed following a ruling in *Republic v Raidinen*¹ where I stated as follows at [13]:

[13] The victim's age can be proved by the prosecution, without relying on her birth certificate, through the evidence of her mother. On the basis of the mother's statement the victim confided in her about the incident and when she gives evidence of the complaint made to her she can also give evidence of the victim's age as her mother. see *Carter's Criminal Law of Queensland* page 2290 where it is stated:

The girl's age may be proved by testimony of a person present at her birth or by inference from the appearance of the person; and as is case of *Wallworth v Balmer* [1965] 2 All ER 721; [1966] 1 WLR 16. Often, however, appearance alone may not be enough and would need to be supported by other evidence.

77. DV's mother was asked if she remembered her date of birth, and she stated that it was 12 March and was unable to state the year. She was shown DV's birth certificate without any objection from Mr Clodumar, and thereafter, she stated that her date of birth is 12 March 2009. The birth certificate was marked for identification, and Mr Shah stated that he was going to tender it through the investigating officer, Const. John-Ross Dube, but could not do so as he failed to attend court.

78. DV's mother upon refreshing her memory stated that her date of birth was 12 March 2009. She is the natural mother who gave birth to DV, which is not in dispute. I am, therefore, satisfied that DV's age has been proved, which is 12 March 2009, and that she was 12 years old when the alleged incident took place.

¹ [2023] NRSC 21; Criminal Case No. 5 of 2022 (4th July 2023)

DV'S COMPLAINT TO HER MOTHER AND IDENTITY OF THE DEFENDANT

79. DV and the defendant had not met before the day when the alleged incident took place; they were not related to each other. The only conversation they had was on Facebook messenger and telephone calls.
80. The police case against the defendant is that following a telephone call the defendant and DV met at the church in Bauda District at around 2am. According to DV's version, the defendant came to pick her up in a grey Toyota Harrier. This version was not challenged by the defence.
81. Having picked her up they drove to a place at Yaren District where there was a party at a friend's place, and they sat in the car for approximately 2 hours chatting. DV, as I stated earlier, never left the car whereas the defendant went to get some drinks for himself.
82. From Yaren they drove to Bauda Oval where they parked the car for a while, and thereafter, they drove the car to the defendant's house in Anibare District.
83. As DV entered the house she noticed people sleeping in the house, and she was taken into the defendant's bedroom where she was asked to sit on a bed, and the defendant went to get something. He came back with coconut oil. They got undressed and held on to each other, and they kissed each other, and he applied coconut oil on his penis, and attempted to insert it into her vagina, and did this for a few minutes. The defendant's phone rang, and they stopped and got dressed and left at on or about 4am. and the defendant dropped DV to her house in Bauda District.

COMPLAINT TO THE MOTHER

84. DV gave two versions of how she first told her mother about the incident with the defendant. Her first version was that she told her mother around mid-year (following year 2022); and later when asked to clarify she stated that it was in April or May, and further added that she did not remember what she told her mother.
85. DV further stated that after she told her mother and that her mother reported the matter to the police. The mother in her statement to the police stated that she was told about it in February 2022, which is the prosecution's case, but in her evidence, she stated that she only got to know about it when she went to the police to give a statement about the case of Renack Mau.
86. Just by going through the time frame, and if it is true, that she told her mother sometime in April/May, then the mother could not have reported the incident to the police as it is common ground that the matter was reported to the police on or about 9 March 2022. I do not know why the mother resiled from her statement to police. In the application for detention of the defendant under Article 5(3) Sgt Doggeiy stated at [13]:

“The juvenile on 26th February told her mother about the incident”.

87. This confirms DV's contention that her mother knew about the incident and reported it to the police.

RECENT COMPLAINT

88. On the issue of recent complaint, it is stated in Victorian Trial Manual 1 (2nd Edition, 2002) at page 1202 as follows:

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

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

89. The question of consent does not arise as it is not the defence's case that DV was a consenting party, and she could not be a consenting party, see s.117(4) of the Act.

DELAYED COMPLAINT

90. This was not a case of recent complaint, but it was a case of delayed complaint. The matter came to light on 9th March – some 2 months after the incident.

PHOTO IDENTIFICATION AND DOCK IDENTIFICATION

91. DV in her cross examination stated that she was shown photographs, and she identified the defendant from the photographs. The identification of the defendant by the police was not part of their case nor is it reflected in the disclosure documents – but DV said that she was shown photographs, and she picked the defendant from the photographs.
92. DV had already identified the defendant by way of “dock identification”, without any objection from the defence counsel. She had not seen the defendant after the day of the alleged incident, and in her cross examination she admitted to being shown photographs. The defence counsel only cross examined DV on being shown photographs by Sgt. Doggey but chose not to cross examine her on this issue.
93. Identification by use of photographs is admissible – see *Alexander v Queen*² where it is stated at page 402 as follows:

The authorities support the conclusion that I have reached, which is that, as a matter of law, evidence of an identification made out of Court by the use of photographs produced by the police **is admissible. However, a trial judge**

² [1981] 145 CLR 395

has a discretion to exclude any evidence if the strict rules of admissibility operate unfairly against the accused. It would be right to exercise that discretion in any case in which the judge was of opinion that the evidence had little weight but was likely to be gravely prejudicial to the accused. (emphasis added)

94. It is further stated in *Alexander v Queen*³ at page 402 as follows:

In *R. v. Fannon and Welsh* and *Reg v Doyle* and also in the report in the case of *Reg v Russell*, identification parades were held but only after identifying witnesses had identified the accused from a number of photographs produced by the police. In *Reg v Doyle* and *Reg v Russell* the photographs were shown to the witness during the investigation of the crime and before the arrest of the accused; the report in *R v Fannon and Welsh* does not make it clear at what stage the photographs were shown. In all these cases, the evidence of identification by means of photographs was held admissible and the convictions were upheld. In *Reg v Russell* Richmon P said:

“...we respectfully agree with what was said in *Reg v Doyle* that evidence of identification by a photograph is legally admissible and relevant. The real question in all cases is whether the trial judge ought to have exercised in favour of the accused his discretion to exclude admissible and relevant evidence on the ground that its prejudicial effect is out of proportion to its true evidential value, or on general grounds of ‘unfairness’.”

95. In *Aurelio Pop v The Queen Privy Council*⁴ it is stated at [12] as follows:

[12] The entire case turned on the issue of identification. It was therefore of the utmost importance that the jury should receive proper directions on how to approach the evidence of Adolphus identifying the appellant as the person who shot the deceased. The general requirements for such directions have not been in doubt since the judgement of Lord Widgery LCJ in *R v Turnbull* [1977] QB 224, 228-229:

“first, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused **which the defence alleges to be mistaken**, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to

³ n2

⁴ Privy Council Appeal 31 of 2002 (judgment delivered on 22 May 2003)

be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any special weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger." (emphasis added)

96. In this case the defence does not allege that the identification was mistaken. DV's evidence is that she spent in excess of 3 hours with the defendant in his car and in his bedroom.
97. The dock identification had already been made, and it is a matter for me as to what weight I shall attach to the identification, and in doing so I shall take into consideration the period of time that they spent together, which was in excess of 3 hours and in close proximity.

DEFENCE WRITTEN SUBMISSIONS

98. In his written submissions⁵ it is stated at [9(iii)] as follows:

"...She watched him place oil on his penis, then laid down on the bed with him on the bed and they kissed. Her whole story does not add up. It is either she willingly consented to what transpired, or she fabricated the story. The defence submits that the evidence, as a whole, suggests the latter."

99. I accept that there are many contradictions in DV's own evidence when she gave evidence in chief, and during her cross examination as discussed above. I also accept that there are contradictions in DV's and her mother's evidence in respect of how she confided in her and as to how the matter was reported to the police, but there is no contradiction in her evidence of how she started communicating with the defendant and

⁵ Filed by Mr Clodumar on 1st August 2023

how they met and the time that they spent together in the car and in his bedroom and about how the alleged incident took place there.

100. In his written submissions Mr Clodumar submits that DV fabricated her story. It is a very serious allegation as it means that whatever she said never took place – but Mr Clodumar did not cross examine her on that issue or suggested to her that she is making it up, and consequently her whole evidence on how they met and the time that they spent together has been unchallenged. In failing to put the defence case, there has been a clear breach of the rule in *Browne v Dunn*⁶. Again, it is stated in Victorian Trial Manual 1 (2nd Edition, 2002) at page 981 as follows:

The rule of natural justice, now known as the rule in *Browne v Dunn* (1893) 6 R 67, antedated that case but derives its most authoritative statement from the speech of Lord Herschell who said at 70-71:

“Now, my Lords I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit...”

CONCLUSION

101. In the circumstances, I am satisfied that the prosecution has proved all the elements of the offence against the defendant, that is, it was the defendant who committed the act of touching DV’s vagina with his penis which is indecent. I, therefore, find the Defendant guilty of the offence of indecent act.

DATED this 10 day of November 2023

Mohammed Shafiullah Khan
Acting Chief Justice



⁶ (1893) 6 CR 67