IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 6/2022

BETWEEN

THE REPUBLIC — Prosecution

AND

GLENSON DEPAUNE — Defendant

Before: Khan, ACJ
Date of Hearing of Submissions: 24 March 2023
Date of Ruling: 28 March 2023

Case to be referred to as: *Republic v Depaune*

CATCHWORDS: Section 201 of Criminal Procedure Act 1972 – No case to answer – Where an element of the offence stated in the information against the defendant has not been proved – whether the court should proceed to determine the submission for no case to answer at that stage of the trial under section 201(a) of the Criminal Procedure Act 1972 or allow the case to proceed to trial stage and then convict the defendant of an alternative count under the provisions section 273 of the Crimes Act 2016

APPEARANCES:

Counsel for the Prosecution: F Puleiwai
Counsel for the Defendant: R Tagivakatini

RULING

INTRODUCTION

1. The defendant is charged with one count of rape:

STATEMENT OF OFFENCE

Rape of a child under 16 years old: contrary to Sections 116(1)(a), (b) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Glenson Dapaune on 7 June 2022 at Denig District in Nauru, intentionally engaged in sexual intercourse with FS by penetrating the anus of FS with his finger and FS is a child under 16 years old.

BACKGROUND

2. The complainant FS in this matter is a 4-month-old female (victim). The charge states that the defendant had sexual intercourse with her by penetrating her anus with his finger.

3. The defendant pleaded not guilty to the charge and the matter was set down for a 3-day trial commencing on 21 March 2023.

4. There were no eye witnesses to the actual commission of the offence and the prosecution case depends entirely on medical evidence.

5. The defendant was known to the victim's family. His fiancé was the victim's mother's sister (who will be referred to as KS to suppress the identity of the complainant).

6. On 7 June 2022 KS and her 3 children, including her 2 sons aged 7 and 3 and the victim together with her sister (the defendant's girlfriend) and their adopted son went to the church. The defendant had dropped them to the church and he the victim's father referred to as BS stayed back.

7. All of them later returned from the church and the defendant and the victim's father came to their house at around 11pm. The defendant's fiancé took their son to the hospital as he was not well whilst the defendant stayed back at the victim's family house.

SUBMISSION OF NO CASE TO ANSWER

8. At the end of the prosecution's case the defence counsel made a submission of no case to answer under the provisions of s.201 of Criminal Procedure Act 1972 (CPA). S.201(a) and (b) provides:

> *Close of case for prosecution*
>
> *Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any, of the accused taken in the preliminary inquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the court:*

(a) if it considers that, after hearing, if necessary, any arguments which the prosecutor or the legal practitioner conducting the prosecution and the accused, or his or her legal practitioner if any, may wish to submit, that a case is not made out against the accused, or anyone of several accused, sufficiently to require him or her to make a defence in respect of the whole information or any count thereof, shall dismiss the case in respect of, and acquit that accused as to, the whole of the information or that count, as the case may be; but

(b) if it considers that a case is made out against the accused or any one or more of several accused in respect of any offence charged or any other offence of which he or she may lawfully be convicted on the trial of that offence, shall inform every such accused of his or her right to address the court, either personally or by his or her legal practitioner, if any, and to give evidence on his or her own behalf or to make an unsworn statement, or to refrain from doing either of these things and to call witnesses, or tender statements under Section 146, in his or her defence; and in all cases the court shall require him or her, or his or her legal practitioner if any, to state whether he or she intends to call any witnesses as to fact other than the accused himself or herself. If the accused says that he or she does not intend to give evidence or make an unsworn statement or to adduce evidence, then the prosecutor, or the legal practitioner conducting the prosecution, may sum up the case against him or her. If the accused says that he or she intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him or her to enter upon his or her defence.

9. Both counsels relied on the case of *R v Dabwido*[1] in which I adopted the guidelines for no case to answer established in the case of *Republic v Jeremiah*[2] where Crulci J stated at [22] as follows:

> *[22] Taking the above matters into consideration, the following are guidelines when a submission of no case to answer is to be made at the end of the prosecution case:*
>
> *1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.*
>
> *2) If the evidence before the Court the evidence has been so manifestly discredited through cross examination that no reasonable tribunal could convict upon it, the defendant has no case to answer.*
>
> *3) If the evidence before the Court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witnesses reliability, the matter should proceed to the next stage of the trial and submission of no case to answer be dismissed.*

[1] [2020] NRSC 1; Criminal Case No. 13 of 2019 (11 February 2020); Khan, J
[2] [2016] NRSC 42

EVIDENCE

10. KS stated that after their return from the church her husband changed the victim's diaper in their bedroom. She was present when he changed the diaper and her clothing. She did not notice anything on the victim's genitalia (vagina and anus); nor did she see any foreign objects in the diaper. After the baby was changed she breast fed her and went out with her into the lounge and spoke to the defendant, whilst her husband stayed back in the bedroom with their 2 sons and was trying to put them to sleep.

11. According to her evidence, the defendant had by then finished having his dinner and she sat on a bed in the lounge and had a conversation with him. The defendant asked for her fiancé's mobile phone which she had left in their bedroom. The defendant asked for the victim and she gave her to him and she left to get the phone.

12. She went to her bedroom to fetch the phone and she came back in less than a minute with the phone. As she entered the lounge she noticed that the defendant was coming through the corridor which leads to their toilet and the bathroom. The defendant handed the victim back to her and the victim burst out crying. FS stated that the victim was out of breath and "turned pale and pink" and the defendant told her to breast feed her.

13. FS suspected that something was wrong as the defendant had never used the bathroom area prior to that date. She said that he had his limits and never went anywhere in the house except that day when he came out of the corridor.

14. She took the victim back to the bedroom and noticed that the diaper had been moved to the middle of her buttocks and she opened the diaper. She saw yellowish fluid which appeared to be the victim's stool discharge and mucus like substance on her vagina and a finger nail inside at the front of the diaper. She also noticed that the victim's genital area around the vagina and inner thigh was very pinkish.

15. By the time she took the victim into the bedroom her husband had left the bedroom and came back when he heard the victim crying.

16. She stated that her husband does not have long fingernails – they are very short. She suspected something had happened to the victim and she asked her husband to look at the victim's genitals and his response was that she was over reacting.

17. She stated that the defendant left immediately after her husband came back into the bedroom.

18. She also stated that she and her husband took the victim to RON Hospital between 12 midnight to 1 am.

HUSBAND'S EVIDENCE

19. The husband's evidence is that he did not see any reddish or pinkish mark or the fingernail when he changed the diaper when they had returned from the church. He stated that he was outside in the lounge talking to the defendant and he went into the bedroom and KS did not tell him as to what happened, except that she felt that the

victim was molested. She wanted to take her to the hospital for a medical checkup. He stated that KS was very angry, panicky and emotional. He also confirmed that he saw the fingernail in the diaper as well as mucus like substance. He said that he had short fingernails as he has a habit of chewing his nails.

MEDICAL EVIDENCE

20. Dr Iso Moreo examined the victim at RON Hospital. He is a graduate of the University of Papua New Guinea and has 6 years medical experience. Dr Moreo examined the victim on 8 June 2022 at around 1.25am in the presence of her parents and Sister Myreena. In his examination in chief he was asked:

> *Question: When you are examining a child of alleged rape or indecent touching – will you be able to see on the genital whether he/she has been indecently touched?*
>
> *Answer: It depends on the mechanism as to how much force was applied.*

21. He also filled in a medical report form in which he stated – for brevity: "No traceable element of sexual penetration to minor as per exam". He clarified that he did not find any physical evidence that is suggestive of rape.

22. The doctor's finding was that there no physical finding of vaginal or anal penetration; and that if there was any indecent touching then he was not in a position to comment on that and when asked as to why not, he responded: "Because I will not be able to see any trace of touching/foreplay unless there is a significant amount of force which is penetrative in nature – which leaves a physical mark on the body".

23. His evidence is that he did not see any physical finding that would suggest a penetrative sexual act and an indecent touching, he reiterated that it depended totally on the force used and he did not find any evidence of force. He stated that the victim was wearing a diaper and the mother showed him a fingernail in the diaper.

NURSE

24. Sister Myreena's evidence is that she was present during the examination of the victim and she confirmed the doctor's findings that everything was normal. On the presence of the mucus in the diaper she said that she saw it but did not bring it to the doctor's attention as she felt that it was the lubricant that the doctor had used whilst examining the victim.

SEXUAL INTERCOURSE

25. Sexual intercourse is defined in s.8 of the Crimes Act 2016 (the Act). 'Sexual Intercourse' means:

> *a) The penetration, to any extent, of or by any part of the person's genitals with any object of the body of another person;*

b) *The penetration, to any extent, of the anus of a person by any part of the body by another person;*

c) *The penetration to any extent, of any part of a person's genital by an object, carried out by another person;*

d) *The penetration to any extent of the anus by an object, carried out by another person;*

e) *Oral sex; or*

f) *The continuation of an activity covered by paragraphs (a) to (e).*

CONSIDERATION

26. Miss Puleiwai concedes that on the doctor's evidence the element for the offence of rape has not been proved in that there is no evidence of penetration to any extent. However, she submitted that instead of the court making a finding under the first limb of the guideline as stated in the case of *R v Jeremiah,* the court should instead make a finding on the third limb of guideline and hold that there is a case to answer, and allow the trial to proceed, and at the end of the trial convict the defendant on the alternative count of indecent act under the provisions of s.273 of the Act.

27. I am surprised that Miss Puleiwai is making this submission as to the alternative count at this stage of the trial as that option was open to her under the provisions of s.191 of the CPA to amend the charge and include an alternative count of indecent act before the close of the prosecution case but she chose not to do so.

28. In the circumstances I am unable to accede to Miss Puleiwai's request, and to do so would deprive the defendant of his rights contained in s.201(a) of the CPA.

29. The information as presented before me states as I have stated earlier that the defendant had penetrated the victim's anus. On the doctor's evidence before me and on Ms Puleiwai's concession that there is no evidence to prove that there was "penetration to any extent", I therefore, find that the prosecution has failed to prove an essential element of the offence, that is, "penetration to any extent".

30. In the circumstances, I dismiss the information of rape against the defendant and I acquit him of the charge of rape.

DATED this 28 day of March 2023

Mohammed Shafiullah Khan
Acting Chief Justice

SUPREME COURT OF NAURU