



**IN THE SUPREME COURT OF NAURU
AT YAREN
[CRIMINAL JURISDICTION]**

Criminal Case No. 06 of 2024

BETWEEN: THE REPUBLIC

PROSECUTION

AND: MYKO OLSSON

ACCUSED

BEFORE: Keteca J

Date of Hearing: 07th, 08th, 15th October 2024

Date of Judgment: 19th November 2024

Case may be cited as: Republic v Myko Olsson

Catchwords: Rape of a Child under 16 years old: contrary to Section 116(1)(b) of the Crimes Act 2016, Credibility of Witnesses, Motives of a witness

Appearances:

Counsel for the Prosecution: **M. Suifa'asia**

Counsel for the Accused: **R. Tagivakatini**

JUDGMENT

BACKGROUND

1. The accused is charged with one count of 'Rape of child under 16 years.' It is alleged that he intentionally engaged in sexual intercourse with M.E. by inserting his finger into M.E.'s vagina and that she is a child under 16 years old. M.E is the accused's daughter.
2. The accused pleaded not guilty. He opted to give sworn evidence.

THE CHARGE

3. The amended information dated 09th July 2024 reads:

Statement of Offence

RAPE OF CHILD UNDER 16 YEARS: contrary to Section 116(a)(b) of the Crimes Act 2016.

Particulars of offence

MYKO OLSSON on an unknown date between 24 July 2023 and 31 December 2023 at Anabar District in Nauru, did intentionally engage in sexual intercourse with M.E. by inserting his finger into M.E's vagina and M.E is a child under 16 years old.

THE LAW

4. Provisions of the law cited here refer to the *Crimes Act 2016* unless indicated otherwise.
5. Section 116 (1) (a) (b) provides: Rape of a Child under 16 years old-
- (1) A person commits an offence, if
- (a) The person intentionally engages in sexual intercourse with another person;
and
- (b) The other person is a child under 16 years old.
6. Section 8 defines '**sexual intercourse**' as:
- (a) the penetration, to any extent, of or by any part of a person's genitals with any part of the body of another person; or
- (b)-(e)
- (f) the continuation of an activity covered by paragraphs (a) to (e).
7. Section 17 defines '**intention**' as:
- (1) A person has 'intention' with respect to conduct, if the person means to engage in the conduct.
- (2) A person has 'intention' with respect to a circumstance, if the person believes that it exists or will exist.
- (3) A person has 'intention' with respect to a result, if the person means to bring it about or is aware that it will occur in the ordinary course of events.

THE EVIDENCE

8. **PW1, M.E** testified as follows:

She is 15 years old now. The accused is her father. She is the second eldest. In Dec 23, the accused took her to help him clean up at her grandfather's house. He told her to wait in the room. He said, 'he'll clean up my digestive system.' He told her to remove her pants. She refused. He took her pants off. She had her underwear on. He told her to sit on the floor and spread her legs. She didn't want to. He spread her legs. The accused started massaging her tummy. He moved downwards. **He inserted a finger into her vagina. The accused put his finger under her panty to get to her vagina. He did this about three times.** She cried out that it hurt. He said-'almost done.' He continued massaging her tummy. He then told her to put her pants on and to get in the car. He told her not to tell anyone about the incident. If she told anyone, the accused said that he'll punch her mother. Her father told her that that the massage was necessary so she won't be like her aunties. She didn't know what that meant. She did not have any sickness. **She did not complain to the accused or her mother about 'any sickness to my stomach.'**

Her parents constantly fought. Her father did not live with them at Nibok. Her father was abusive. He beats her and her siblings.

Q- In 2023, why didn't you tell anyone?

Ans – Because accused asked me not to tell.

Q- Who did you tell first?

Ans- My mother in May this year.

Q- Why tell your mother this year?

Ans- My mother asked whether accused had done anything to me.

Question- How did your mother come to ask you that question?

Ans- I had asked my mother about what had happened to my cousin. So, my mother asked me that question. *I said- nothing happened.* Then I told her what the accused did to me.

9. **Under cross examination**, PW1 said- The accused was living with his father on the day of the incident. The accused only picked her up and no one else. **She did not have stomach pains. She did not tell her mother about stomach pains.** She already had her **menses**. She was seated on the floor when he massaged her and she had her underwear and shirt on. The massage was painful as her father pressed into her stomach. She did not cry out when her stomach was pressed. She cried out when the accused penetrated her with his finger.

10. Q- The accused only went down to your belly button?

Ans- He went further than that.

Q- Your brother Mark was running in and out of the room whilst you were being massaged?

Ans- No, they were back in Nibok.

Q- The accused did not penetrate your vagina. You made it up because you were disciplined this year?

Ans- No, not correct.

Q- After the massage, the accused did not threaten you?

Ans- He only told me.

Q- Accused cautions you to be careful around men?

Ans- Yes

Q- Your mother influenced you to make this report about the massage?

Ans- No, I was the one who told her to report it.

11. On Re-Examination, PW1 said- She wanted to report against the accused.

12. **PW2-** the mother of the complainant is 35 years old. She is not married. The accused is the father of five of her children. **PW1 told her, the accused touched her private part- not clear on how. PW1 did not describe what happened.** In her words- **‘When she told me we got in the car and drove around the island.’** PW1 asked if this could be reported to police. PW2 was afraid of the accused but said yes. She had an argument with the accused the day after. She said- “How can anyone do such things to their children? The accused responded- Why are you telling me this? **He added- Did anyone harm our children?**

He got a bush knife. PW2 ran to the neighbour’s house. She called the police that the accused had threatened her with a bush knife. The accused had done this to her before. When the police came, she told PW1, this was her opportunity to tell the police and make her report on what PW1 had told PW2.

At the front desk, she asked for the DVO Unit officer. She wanted to speak directly to the DVO Officer about her daughter. ***She did not want to lodge the report at the front desk as it may go viral.***

13. **Cross Examination of PW2-**

Q- In 2023, PW1 complained of her stomach pains?

Ans- Yes. We all knew about it. I also told my mother about it in case her period was irregular.

Her mother was the head of the baby clinic. Her mother advised her for PW1 to drink hot tea and do exercises.

Q- You informed the accused of PW1's pains?

Ans- Yes as he has the transport. He said- not serious, just go to hospital for Panadol.

Q- How long was she suffering these pains?

Ans- Can't recall. Not a big issue.

Q- The accused told you that he'll massage her for three days?

Ans- No. When was he ever a masseuse?

Q- You recall her being taken to Anabar for massage last year?

Ans- Can't recall.

Q- Accused is strict with the children?

Ans- No.

Q- Accused gets angry with PW1 on phone usage?

Ans- Yes- swears at her. He hit her over the head with a phone.

Q- For PW1's medical check, you were not there?

Ans- No.

Q- PW1 already had a haircut and neck pinching incidents before she told you of the massage?

Ans- Yes

14. **Re- Examination-** Q- your mother suggested the massage?

Ans- No

Q- Accused told you to do traditional massage on PW1?

Ans- Can't recall. He was not asked to do any of that.

15. **PW3- Dr Aisen Waike** testified that he examined PW1 on 23rd May 24. His findings- no evidence of trauma or assault. Allegation was over a year old. Can't exclude sexual report one year before. On D (12) of the medical report- Specific medical Findings –
- Normal general examination of body
 - Normal external genitalia, hymen absent
 - Normal anus
 - Currently menstruating
16. **PW4 Sergeant Marson Notte** took photographs at the crime scene.
17. **PW5- Constable Ralton Akubor** arrested the accused on a report of threatening a female with a bush knife. He read the accused his rights and took him to the station.
18. **PW6- Constable Rachel Notte**-was the IO. She has served **for more than two years** in the Nauru Police Force. She produced the birth certificate of PW1. PW2 was the complainant who came to the police station with PW1. She took their statements.
19. **Cross Examination of PW6-** Accused was frustrated during the interview. Accused said that complaint was 'bullshit.' **No statement was taken from the accused's father nor one from PW1's brother Mark.**
20. I note that there is a trend in this jurisdiction that junior police officers are given the task as investigation officers whilst the senior ones are the photographers. Sexual offences against children are very serious offences. Experienced police investigators who are specifically trained in investigating sexual offences against children should have carriage of such cases. The omission to get statements as in [19] above is quite telling in this case and an example of police investigation that is found wanting. I had raised the same point with the prosecution in the *Republic v Andy Doguape, Criminal Case 04/2024* case. That case was investigated by a junior police officer too. She had no special training in dealing with complaints from children with special needs. The investigator did not seek the assistance of those trained in special education to properly communicate with the complainant in that case. The outcome of that case also exemplifies investigation that was found wanting.

ACCUSED's EVIDENCE

21. In his sworn testimony, the accused said: - He is 38 years old. PW1 is his daughter. PW1's mother kept complaining about PW1 having menstruation problems. He picked PW1 and three of his other kids, - Kikiama, Ali and Mark from Nibok. He took them to Anabar. He asked PW1 if she still had tummy pains. She said –'small pain.' He performed a local massage on her. He learned this from a Kiribati chap. She told PW1 not to be scared or embarrassed as after the massage, she'll feel better. She told her daughter to trust him as he was her father. His son Mark was going in and out of his room. Ali, 6 years old and Kikiama 4 years stayed with him. Kikiama and Ali were behind him during the massage in the room.

22. (He demonstrated the massage from chest to belly button and back- using his thumb.) PW1 was sitting on the floor. He was seated behind her doing the massage. **The first time was light massage. The next day, harder massage- to push out all the bad stuff.**

Q- PW1's reaction?

Ans- **First time, no reaction. The second time, she asked him to stop as it hurt her. He said- 'I was going to go down to the thigh. She's not happy, I stopped.'**

Q- Purpose of massage?

Ans-Help push out all the bad stuff- if you can't go to the toilet or problem with **menses. After the first day of massage, PW1 said nothing. The second time, she said – 'a little bit pain.'** A few months before the massage, she was 'dark skinned.' After the massage, she changed. PW2 told him that she's always visiting the toilet.

Q- The allegation- you touched her vagina. What do you say to that?

Ans- Bullshit- Disagree

Q- Why massage at Anabar and not Nibok?

Ans- I was fighting with PW1's grandmother. She did not welcome him into her house.

Q- Why didn't you take her to the Kiribati guy for massage?

Ans- **I don't want anyone to touch my children.**

Q- In May this year, you had an argument with PW2?

Ans- Yes- she was talking about a rape case. She said- "I don't understand how anyone can finger fuck their own children? I said- "Shut up, none of your business. **I asked her- has someone molested our own children?** She said- "I was wondering how someone can do that to their own children.'

He said- 'Stop there. If something happened to our children, that's our business, you can then talk to me.'

Q- What happened?

Ans- She kept crying saying- 'I hate this kind of people.'

I said- 'Let justice deal with them, none of your concern.' He called a woman and said- 'See what you've done to my family?'

He cut PW1's hair as she was smoking.

Q- When did you first hear of the allegation of rape?

Ans- When police took me from Corrections facility for interview. That's why I was angry.

Q- Why do you think PW1 complained?

Ans- A lot of reasons.

- a. I caught her talking to an older boy on the phone. I told her to remove herself from messenger/ FB.
- b. She was asking for smokes/ vape through messenger.
- c. I disciplined her when she came home with a 'hickie' on her neck. She said someone pinched her.

23. **Cross- Examination** of the accused- he doesn't want to marry PW2, PW1's mother.

Q- Your idea to massage her?

Ans- Yes.

Q- You watched Kiribati man do massage on a girl?

Ans- Yes.

Q- Kiribati guy would massage girl's stomach?

Ans- Yes

Q- Massaged girl's thighs?

Ans- Yes

Q- Massaged girls' private part?

Ans- On top of private area. Not really down there. I wouldn't take my daughter to Kiribati guy- saw him touching the girl's private part.

Q- Purpose was to massage for stomach pain or menses?

Ans- Yes. For pneumonia too. Not for skin disease- but if blood not circulating well. Massaged PW1 to clear her dark skin.

Q- Alone with her?

Ans- No

Q- Told her to be massaged so she does not turn out like her deceased aunty?

Ans- Yes

Q- Wearing underwear and a top?

Ans- Yes

Q- You touched her private part?

Ans- No

Q- Inserted you finger into her vagina?

Ans- No, bullshit.

I didn't tell PW2 -she's always sleeping. Stays up all night.

Q- Not a traditional masseur?

Ans- I know but not a traditional one.

Q- Other children were not there?

Ans- They were there. When I take my kids, I take them all. But not the 16-year-old. Stays in Nibok- sleeping.

24. I note that it was not put to the accused as to why he removed PW1's pants before he massaged her.

25. **Re- Examination**, Kiribati massages- around the pelvis area. To clear blood flow- he knows how to massage for sprains, pneumonia.

CLOSING SUBMISSIONS

26. Amongst other things, Counsel for the Prosecutions submits:

- i. **At paragraph 9-** ‘The defendant first told her that he will clean up her stomach. He told M.E to take off her pants, but M.E refused, however he removed it himself. The defendant told her to sit on the floor and spread her legs. M.E says she did not want to but he spread her legs anyway. The defendant started massaging her tummy and his hand was going downwards. And then he inserted his fingers into her vagina. He inserted his finger 3 times. M.E says she cried out because it hurts and the defendant told her, that its almost done.’
- ii. **At paragraph 15-** ‘When asked in chief if M.E (PW1) complained to Myko (the accused) about her menstruation pain on her stomach, **she said no**. When asked if she complained to her mother, **she says no**.
- iii. **At paragraph 26-** ‘PW2 testified that PW1 first told her, they were at Myko’s place of work. PW1 told her mother some things which led her to come out and tell about that Myko touched her at Anabar. PW1 only told PW2 that Myko touched her and that she was quite vague about the details as she was crying. PW2 took PW1 for a drive around the island so that PW1 can come out with it. PW2 says although she insisted with the questions, **PW1 still really did not describe to her how it happened.**’
- iv. **At paragraph 37-** ‘Also in cross, PW2 agreed that PW1 had been complaining about stomach pain last year in 2023. PW2 says, they all know about that and she told her mother about that in case PW1 was having irregular menstruation. That it was usual thing and her mother advised that PW1 drink tea and exercise. **[I note that in PW1’s evidence in chief and cross examination, she testified that she did not have any stomach pains. She did not tell her mother about any such pains.]**
- v. **At paragraph 38-** ‘PW2 agreed in cross that she told the defendant about PW1 having pains with her stomach, because she had to, that the defendant is the one with transport. It was not a serious issue for them, it only meant going to the hospital to get Panadol.’
- vi. **Para- 59-** ‘The defendant says it was the first time- the first massage was light. That he massaged on the second day as well and the second day he massaged harder to push all the bad stuff out.’ **[I note that this confirms my notes at para 22 above that the accused massaged PW1 on two occasions.]**

27. Mr Tagivakatini's submissions include:

- i. The accused massaged PW1 on two separate days.
- ii. The allegation 'that he fingered PW1's vagina is 'bullshit.'
- iii. He was going to massage her thighs but PW1 was not happy so he left it.'
- iv. 'He argued with PW2 because she kept bringing up the topic of people 'finger- fucking' their children. This angered him as he thought someone touched his children.'
- v. On credibility of witnesses, *R v Taumea [2019] NRDC 3*; Criminal Case 36 of 2018 (22 May 2019) is relevant.
- vi. On 'motive' of a witness- *Onassis v Vergottis [2 Lloyds Rep 403 (at 431)*; *Armagas Ltd v Mundogas S.A. (The Ocean Frost) [1986] AC 717*; Lloyd's Rep1 (at 57) is relevant.

DISCUSSION

28. I note the following:

- i. There is no dispute that the accused did massage PW1.
- ii. PW1 only refers to one massage. The accused says that he massaged her on two occasions.
- iii. PW1 testified (with no emotion at all) that the accused, in the course of massaging her stomach, went further down, his hand went into her underwear and he inserted a finger into her vagina.
- iv. The accused referred to the above allegation as – 'bullshit.'
- v. **The question before me- Do I believe PW1 or the accused?**

29. In *R v Bill, [2024] NRSC 25; Criminal Case 1 of 2023* (24th September 2024), I said:

1. At common law, the credibility of a witness generally depends on the following factors:
 - i. Knowledge of the facts on which the witness gives evidence;
 - ii. Impartiality;
 - iii. Integrity; and
 - iv. Truthfulness.

In this case, the factor of truthfulness applies here. Should I believe PW3LD and PW6VD or the accused?

2. In *THE STATE OF WESTERN AUSTRALIA -v- COATES [2007] WASC 307*, BLAXELL J at [54] said this-
'The determination of a witness' credibility on the basis of demeanour does not require the exercise of any legal skill, and is not something which can be the subject of reasoned analysis. It is largely a semi-intuitive process, and most ordinary members of the community have the life experiences which equip them to make such an assessment.'

At [57], he said:

*'Obviously, the assessment of each witness' credibility will be a matter of critical importance in arriving at my findings of fact. It may be that I accept the whole of a witness' evidence or that I reject it all. It may also be that I accept part of what a witness has had to say but reject the rest. The fundamental question in relation to each witness, and in relation to each matter the subject of his or her testimony, is **whether or not I believe the evidence**. The answer to this question will turn on my evaluation of a number of factors, including the **truthfulness of the witness**, the reliability of the observations made by him or her at the material time, and the accuracy of his or her recollections'*

At [58] Justice Blaxell said:

*'Matters to be taken into account in this evaluation include the witness' general demeanour whilst testifying, the consistency of the evidence (both within itself and with other evidence in the trial), personal characteristics such as powers of expression and apparent levels of intellect, the possible impact of alcohol or drugs, and the emotional state of the witness at the material time. **In the end, I should carefully assess all relevant matters and decide whether or not I can accept the witness' evidence on a particular issue as being truthful and correct.**'*
(My emphasis)

30. In *Excelerate Technology Ltd v Cumberbatch & Another* [2015] Lexis Citation 6, Queen's Bench Division, at paragraph [9], Justice Simon Brown QC said this:
- ' . The most compendious judicial statement on this is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 at p 431: "Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. **First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others?***

He added:

*'Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. **And motive is one aspect of probability.** All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'*

31. Although the above case dealt with the issue of fraud, I believe that the questions raised therein, regarding the credibility of witnesses are equally apt here. Based on these questions, I will assess how PW1 and the accused measure up to them. The questions are:

i. Is PW1 a truthful or untruthful person?

*PW1 testified – she did not have stomach pains. She never told the accused or her mother about any stomach pains. This is **inconsistent** with the evidence of PW2, her mother.*

Under Cross Examination of PW2-

Q- In 2023, PW1 complained of her stomach pains?

Ans- Yes. We all knew about it. I also told my mother about it in case her period was irregular.

Q- You informed the accused of PW1's pains?

Ans- Yes as he has the transport.

***The accused testified-** He asked PW1 if she still had tummy pains. She said – 'small pain.'*

***At paragraph 37 of the prosecution closing submissions-** 'Also in cross, PW2 agreed that **PW1 had been complaining about stomach pain last year in 2023.** PW2 says, they all know about that and she told her mother about that in case PW1 was having irregular menstruation*

From the above, PW2, the mother of the complainant, testified that PW1 complained about her stomach pains to her. In her words- We all knew about it.

This is supported by the evidence of the accused himself.

Do the denials by PW1 that she did not have stomach pains in 2023, and that she did not tell PW2 and the accused, and the fact that this is inconsistent with the testimonies of PW2 and the accused, make her an untruthful witness? Does it necessarily follow that she was also untruthful on her allegation that the accused inserted his finger into her vagina? ***This question will be answered later.***

ii. Is the accused a truthful or untruthful person?

There is no inconsistency in the accused's testimony. He came out as a forthright and straight forward witness who cared for his children.

iii. Is the witness, though a truthful person telling something less than the truth on the allegation of the accused inserting a finger in PW1's vagina?

Was the accused telling something less than the truth on the allegation against him?

To answer this, I note this from the accused's evidence in chief:

When PW2 was talking about a rape case, this discussion ensued-

Q- In May this year, you had an argument with PW2?

Ans- Yes- she was talking about a rape case. She said- "I don't understand how anyone can finger fuck their own children? I said- "Shut up, none of your business. I asked her- has someone molested our own children? He went on to say- - 'Let justice deal with them, none of your concern.'

He then called a woman and said- 'See what you've done to my family?

He also said:

Q- Why didn't you take her to the Kiribati guy for massage?

Ans- I don't want anyone to touch my children.

The evidence above leads me to infer that the accused is one that cared for his own children. He wants to mind his own business. He referred to letting the law deal with those in the 'rape case' that PW2 was bringing up. He was not happy with the woman that had been discussing the 'rape case' with PW2. That is the reason he called her and said- "See what you've done to my family?

He was adamant and unwavering as he denied the allegation that he inserted his finger into the vagina of PW1. He kept saying- 'Bullshit.'

- iv. ***Is the witness, though an untruthful person, telling the truth on her allegation that the accused inserted his finger into her vagina?***
PW1 was not truthful as regards her stomach pains. Was she telling the truth on her allegation against the accused?
To answer this, I refer to PW1's evidence in chief.
PW1 said-
Q- In 2023, why didn't you tell anyone?
Ans – Because accused asked me not to tell.
Q- Who did you tell first?
Ans- My mother in May this year.
Q- Why tell your mother this year?
Ans- My mother asked whether accused had done anything to me.
Question- How did your mother come to ask you that question?
Ans- I had asked my mother about what had happened to my cousin. So, my mother asked me that question. I said- nothing happened. Then I told her what the accused did to me.

It is noteworthy that - **PW1 initially said that nothing happened.**

In the testimony of PW2. She said this- 'PW1 told her, the accused touched her private part- not clear on how. She was crying. M.E did not describe what happened. In her words- 'When she told me we got in the car and drove around the island.'

At paragraph 26 of the prosecution closing submissions- 'PW1 only told PW2 that Myko touched her and that she was quite vague about the details as she was crying. PW2 took PW1 for a drive around the island so that PW1 can come out with it. Finally, PW1 told her that Myko touched her private part, but she was still vague about it. **PW2 says that although she insisted with the questions, PW1 still really did not describe to her how it happened.'**

In contrast, when PW1 testified in court, her demeanour showed no sign of any emotion at all. There was no indication of current or former trauma as she recounted and relived the allegation. There was no indication of being hurt due to a breach of trust by the accused. PW1's calmness was uncanny.

Though corroboration is not necessary in sexual cases, it is noteworthy that PW1 did not tell anyone about her alleged sexual abuse by her father in 2023. It was after she was disciplined by the accused, that this allegation came to light. She also told her mother when they were discussing something that happened to her cousin. PW1, despite the insistence of PW2, was not able to fully describe what the accused allegedly did to her. In fact, according to her own evidence, when asked by her mother as to what the accused did to her, PW1 said- '**Nothing happened.'**

From the above, I find that PW1 was not telling the truth about the allegation against the accused. Her response to the probing questions by her mother that 'nothing happened, and her failure to fully describe to her mother, PW2, how the accused touched her, leads me to conclude that again, she was not being truthful here. I also note that this is the second occasion, based on her own inconsistent testimony, where I have found PW1 to be an untruthful person.

v. ***Have the recollections of PW1 and the accused been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others?***

From the evidence of the accused, it appears that PW2 had been discussing a rape case with another woman. This comes out in the evidence of the accused.

Q- 'In May this year, you had an argument with PW2?

Ans- Yes- she was talking about a rape case. She said- "I don't understand how anyone can finger fuck their own children? I said- "Shut up, none of your business. I asked her- has someone molested our own children? He went on to say- - 'Let justice deal with them, none of your concern.'

He then called a woman and said- 'See what you've done to my family?

From the above, one can draw the inference that PW2 had been discussing a rape case with another woman.

In her Examination in chief, PW1 said-

Q- In 2023, why didn't you tell anyone?

Ans – Because accused asked me not to tell.

Q- Who did you tell first?

Ans- My mother in May this year.

Q- Why tell your mother this year?

Ans- My mother asked whether accused had done anything to me.

Question- How did your mother come to ask you that question?

Ans- I had asked my mother about what had happened to my cousin. So, my mother asked me that question. I said- nothing happened. Then I told her what the accused did to me.

This exchange between PW1 & PW2 bring out two points. Firstly, PW1 had asked PW2 about another case. It was PW2 that asked PW1 about whether the accused had done anything to her.

Secondly, when PW1 was asked by PW2 whether the accused had done anything to her, **PW1 said that nothing happened.**

In changing her story later and coming up with the allegation that the accused inserted his finger into her vagina, leads me to conclude that PW1 was again being an 'untruthful person' about the allegation against the accused.

32. Mr Tagivakatini also raises the issue that the ‘motive of a witness can be used to weigh the credibility of a witness.’ Counsel refers to *Armagas Ltd v Mundogas S.A. (The Ocean Frost)*, [1985] 1 Lloyd’s Rep. 1, p 57. Lord Goff said:
‘It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of great assistance to a Judge in ascertaining the truth.’
33. Although the above was a fraud case, I believe that considering the ‘motives’ of PW1 is equally applicable in this case.
34. Counsel submits, at **paragraph [24]** – ‘ the court should carefully consider the motives of the key witnesses- PW1 and the accused.’
35. **At [25]**, Counsel submits-‘One particular evidence is that PW1 was disciplined by the Accused when he cut her hair after she was caught smoking. This occurred during the same week she complained to her mother, PW2, about the accused. The proximity of timing between these incidences are telling and should raise suspicion.’
36. **At [26]** Counsel adds- ‘Another important evidence is that PW1 gave two options to her mother PW2: which is to talk to the accused; or report the matter to police. The giving of these options should raise the question on the authenticity of her complaint, given the lapse of time and the seriousness of the allegation.’
37. **At [27]**- ‘The question of motive must be considered by the Court, especially since there are claims of abuse by PW1 and PW2. PW1 considers being growled at when using the phone; being growled at when she goes with friends; and getting scolded for no reason, as abuse. All other claims of abuse against the Accused relate to disciplinary measures and violent outbursts, not of indecent behaviour.’
38. I have considered carefully the above submissions by Mr Tagivakatini. They are valid. Persuasive too. I agree with his contentions.
39. I refer to Section 25 of the Crimes Act 2016. It provides;
- (1) The prosecution has a legal burden of proving each element of the offence.
 - (2) The prosecution also has a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.
 - (3) The legal burden of proof on the prosecution shall be discharged beyond reasonable doubt, unless the written law in which the offence is set out specifies a different standard of proof.
40. What does this standard of proof- ‘beyond reasonable doubt ‘mean?’

41. In *Keely v Brooking* (1979) 143 CLR 162;25 ALR 45 Barwick CJ said (at 169; 48):
'Adherence to the well understood standard of proof in the trial of criminal offences is quite adequate to protect the individual charged summarily with contempt of court. To be satisfied beyond all reasonable doubt is, for the purposes of the law, to be certain.'
42. I therefore ask myself- Am I certain that the accused inserted his finger in PW1's vagina as per her allegation?
43. Considering the totality of all the evidence, assessing the credibility of PW1, and the accused by measuring them against the questions extracted from the *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 at p 431 case, the written submissions by Counsels, and the demeanours of the witnesses in court, I am not certain, that the accused inserted his finger in PW1's vagina as per the charge.

CONCLUSION

44. I therefore find the accused not guilty as charged and acquit him accordingly.

DATED this 19th day of November 2024.


Kiniviliame T. Keteca
Acting Chief Justice



The seal of the Supreme Court of Nauru is circular, featuring a central emblem with a shield and a crown, surrounded by the text 'SUPREME COURT OF NAURU' and 'ESTABLISHED 1970'. Two stars are positioned on either side of the central emblem.