



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 22 OF 2021

BETWEEN

THE REPUBLIC

AND

ABDUL MUNAF

Before:	Khan, ACJ
Date of Trial:	12, 13 and 14 April 2022
Written Submissions:	20 April 2022
Date of Judgement:	28 April 2022

Case may be referred to as: *Republic v Munaf*

CATCHWORDS: Charge – Indecent act – Circumstantial evidence – Prosecution failed to exclude reasonable hypothesis consistent with innocence.

APPEARANCES:

Counsel for the The Republic: R Talasa (DPP)

Counsels for the Accused: E Soriano and V Clodumar

JUDGEMENT

INTRODUCTION

1. On 24 December 2021 the accused was charged with one count with indecent act which reads as follows:

STATEMENT OF OFFENCE

Indecent acts in relation to a child under 16 years old: Contrary to s.117(1)(a), (b) and (c) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Abdul Munaf in Ijuw District in Nauru on 4 December 2021, intentionally touched DT on the vagina earlier, through her skin tight shorts, pulling her down her skin tight shorts, such conduct was indecent and that Abdul Munaf was reckless about that fact, and that the said DT was under the age of 16 years.

2. At the commencement of the trial on 12 April 2022 the prosecution amended the particulars of the offence in an amended information and the particulars read as follows:

Abdul Munaf, in Ijuw District in Nauru, on 4 December 2021, intentionally touched DT by lifting her pants, such conduct was indecent and that Abdul Munaf was reckless about that fact, and that the said DT was under the age of 16 years.

RELEVANT LAW

3. S.117 of the Crimes Act (the Act) states:

117 – Indecent Acts in relation to 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 of age.

4. S.117(5) provides that “touching” includes the following:

- a) Touching with any part of the body;
- b) Touching a person through clothing or another material; and
- c) Using an object to touch a person.

BURDEN OF PROOF

5. The prosecution has the legal burden of proving each and every element of the offence beyond all reasonable doubt.

FACTS

6. a) The complainant was born on 20 March 2008 and at the time of the alleged incident she was 13 years old.

- b) The accused, Abdul Munaf, is a Rohingya refugee and has been in Nauru for the last 9 years.
- c) The victim's parents had engaged Mohammed Rashid Construction (MRC) to build a new house for them.
- d) The accused was employed by MRC and had been working at the construction site for about 12 days before the date of the incident.
- e) When the new house was built the complainant, her parents and her two elder siblings aged 13 and 16 (brothers) were sleeping in a hut. She is the second child.
- f) The complainant and her brothers slept on one side of the hut and her parents slept on the other side with a TV cabinet used as a partition.
- g) The electricity for the construction of the house was drawn from a power point situated in the children's portion of the hut and MRC and its employees were given permission to enter the hut to connect the electricity cable to the power point when the parents or the children were away or sleeping, otherwise they would plug in the extension cord to the power point.
- h) To be able to connect the extension cord it had to be thrown from outside the hut (from the head side of the children's bedding); and on 4 December 2021 the accused threw the cable over the bed as the children and mother were asleep. The accused connected the cable and went out to the construction site and began working and worked until the end of the day which was around 4 or 5 pm.

COMPLAINANT'S VERSION

- 7. The complainant felt that someone had touched her vaginal area and as a result she woke up and when she woke up, she saw that the accused was connecting the cable to the power point.
- 8. She was disturbed at what had happened and could not go back to sleep and went into the kitchen and made herself some breakfast.
- 9. When her mother, Mercy Detenamo, woke up she said that she wanted to tell her something but was reluctant to do so as it may affect the building of their new house and upon the mother's insistence, she then told her that whilst she was sleeping, she felt that someone pulled her pants and when she woke up, she saw the accused was in the midst of connecting the electrical cable to the power point.
- 10. The mother told her husband and the matter was later reported to the police who carried out an investigation and took the complainant and the mother's statements.

COMPLAINANT'S STATEMENT TO POLICE

- 11. On 6 December 2021 the complainant made a statement to PC Rosalie Dediya (PC Dediya) in which she stated at [2] and [3]:

[2] At that time, I was sleeping outside the house in a hut, our house is under construction. Whilst I was sleeping I felt someone's hands on top of my vagina, I thought it was something else so I didn't bother but just then, I felt those hands trying to pull off my skin tight pants. I was in shocked, I woke up and quickly sat on my bum.

[3] A refugee guy was standing beneath me, he moved away quickly and began touching, switching on the power cords on the hut.

MOTHER'S STATEMENT

12. The mother made a statement to PC Dediya on 7 December 2021 in which she stated at [6] and [7] as follows:

[6] She stutters as she speaks and informed me that while she was sleeping, she felt a person's hand pulled her pants, and she woke up, a refugee guy who is currently working on our house construction is standing beside her, moved steps away quickly and went to the power cords then walks away.

[7] I asked her if he touches her or do anything by means of sexually. She replies and told me that he did not but she just felt hands on top of vagina and her pants being pulled.

RECORD OF INTERVIEW

13. On 7 December 2021 the accused was interviewed by PC Dediya and the accused as I said earlier was a Rohingya refugee and there were no interpreters available in Nauru and his case support officer arranged for an interpreter in Australia to interpret over the phone.

14. In the record of interview the allegation put to the accused was at question 9 as follows:

Question 9: Abdul Munaf, it is alleged on the date Saturday 4th day of December 2021 you allegedly touched the complainant over her skin tight clothes over her vagina area and also pulled down her skin tight pants. Do you understand?

Answer: Yes I understand.

15. The record of interview was as follows as questions 20, 21, 22, 23 and 24:

Question 20: What was the complainants doing when you entered the dwelling?

Answer: They were sleeping at that time three brothers and the mother and while I was in there also cable touches the three brothers.

Question 21: Why did you touch over the complainant's skin tight shorts which are over the vagina area?

Answer: That's not true that a lie.

Question 22: Why did you pulled down the complainant's skin tight shorts?

Answer: Do they have proof I did that? They are all lying. I didn't do that.

Question 23: What was your intention for touching the complainant on the vagina area?

Answer: I have no intention why would I do that. That all a lie and I have an issue with my health and I have always gone to the hospital for my injection.

COMPLAINANT'S AMENDED STATEMENT TO POLICE

16. On 4 April 2022 the complainant made an amended statement to PC Dediya in which she stated:

"I couldn't recall the date but I remember the time was around 800 to 900 hours. I was at home sleeping along with my two brothers.

At that time, I was sleeping whereas I felt my pants being lifted up slowly, I woke up and sat on my bum and saw Mr Abdul Munaf, turns away quickly and turns to the wire cable plugging the wires to the cable."

COMPLAINANT'S EVIDENCE

17. In her evidence the complainant stated that the string to the pants was pulled and it was knee length string pant and not a skin tight pant as she had stated in her first statement.

18. In her re-examination she was asked as to how she knew that the string were pulled and her response was:

"I was sleeping, I was dreaming, I felt somebody was pulling my pants."

ACCUSED'S EVIDENCE

19. The accused gave evidence and denied touching the complainant or pulling the string of her pants and said that he threw the cable over the bed and that in that process the cable may have been felt by the complainant.

CONSIDERATION

20. The accused was interviewed by PC Dediya on the basis of him touching the complainant over her skin tight clothes over her vaginal are and also pulling down of her pants; and later she gave an additional statement in which she said that she felt that her pants were being lifted up; and in evidence she stated that only the string to her pants was pulled.

21. The complainant has given different versions of how the incident had occurred, and no explanation was offered as to why she changed her versions so much. The last version is that the string to her pants were pulled and that will come within the definition of touching in s.117(5) of the Act; and she later contradicted herself when she said in her re-examination that she may have been dreaming that somebody was pulling her pants.

CIRCUMSTANTIAL EVIDENCE

22. When the complainant felt that her pants were pulled, she was asleep and when she woke up, she saw the accused connecting the cable to the power point.
23. In view of the complaint's own evidence I am left in considerable doubt as to whether the incident ever took place, however, if the complainant is telling the truth, then the whole case turns on circumstantial evidence.
24. As stated earlier, the accused was lawfully in the premises (hut) as he was employed by MRC to work on the new house and after connecting the cable he stayed back and worked right through that day until the end of the day. This is in itself is an important consideration in the determination of the case against the accused.
25. In *R v Doyle*¹ it is stated at [29] and [30] as follows:

[29] In my respectful opinion this submission misunderstands the well-established proposition that, in a circumstantial case, in order to secure a conviction the Crown only has to exclude every reasonable hypothesis consistent with innocence. It is important to appreciate that the word "reasonable" does not mean "logically open in theory". Many inferences might be open as a matter of theoretical logic but which, in truth, are entirely unrealistic. Various terms have been used to describe such unreal, but theoretically possible, inferences. They have been called "light" or "rash"² and they have been described as "mere conjecture"³. An alternative hypothesis must be reasonable one in the sense that it rests on something more than a theoretical possibility or, if one prefers, upon "something more than mere conjecture". It must be based upon evidence.

[30] In *Peacock v King O'Connor* J said:

"In drawing an inference of guilt, or in declining to draw it, the jury must act upon the facts established in evidence, and if the only inference that can reasonably be drawn from the facts is the prisoner's guilt, it is their duty to draw it. They cannot evade the discharge of their duty because of the existence of some fanciful supposition or possibility not reasonably to be inferred from the facts proved."

26. In this case the complainant was sleeping with her 2 brothers next to her and the pulling of the string took place whilst she was asleep. It is a reasonable hypothesis that the string could have been pulled by either of the 2 brothers and the prosecution has not called any of them as witnesses to exclude that hypothesis that they did not pull the string which is a "reasonable" hypothesis consistent with the innocence of the accused.

¹ [2018] QCA 303; Sofronoff and Fraser JA and Douglas J 6 November (2018)

² *Peacock v King* [1911] HCA 66; (1911) 13 CLR 619 at 651

³ *Peacock*, *Supra* S661.

CONCLUSION

27. In the circumstances I cannot draw the inference that it was the accused who pulled the string of the complainant's pants, and also for the reasons outlined above, and I find that the prosecution has failed to prove its case beyond all reasonable doubt against the accused and he is acquitted of the charge.

DATED this 28 day of April 2022



Mohammed Shafiullah Khan
Acting Chief Justice

