



IN THE DISTRICT COURT OF NAURU

Criminal Jurisdiction

Criminal Case No. 40/2021

THE REPUBLIC OF NAURU

-V-

JACKSON PICKERING

*Before: RM. Neil Rupasinghe
Prosecutors: Ms Francis Pulewai
Defence: Mr Ravuanimasei Tagivakatini
Date of Judgment: 18th November 2022*

JUDGMENT

Catchword: *Indecent acts contrary to Section 106(1)(a)(b)(c)(I) and (II) of the Crimes Act 2016 and Being found in certain places without lawful authority or excuse, intoxication and intention or mens rea.*

1. The accused was charged with one count of Indecent acts contrary to Section 106(1)(a)(b)(c)(I) and (II) of the Crimes Act 2016 and one count of Being found in certain places without lawful authority or excuse contrary to Section 164(a)(I) and (b) of the Crimes Act 2016.

2. The accused pleaded not guilty, and the matter was fixed for hearing on 25th and 26th November 2021 and 15th December 2021. The judgment was due on notice. After that, the presiding resident Magistrate resigned. Then I was advised by the defence that they wished to have a new hearing. Therefore *trial de novo* recorded and fixed a fresh hearing for 11th to 15th July 2022.
3. However, due to covid lock down hearing was vacated and refixed for 19th September to 23rd September 2022. Ms Francis Pulewai and Mr Ravuanimasei Tagivakatini filed written submissions, and I acknowledge the same.
4. The summary of facts of count one suggested the accused, on 26th September 2021 at Bauda District of Nauru, intentionally touched Marlicia Tsitsi's nipple, which is indecent. The accused is reckless about that fact, and Marlicia Tsitsi does not consent to touch, and the accused knows that fact.
5. The facts of the second count suggested the accused, on 26th September 2021 at Bauda District of Nauru, entered a dwelling house, and the accused did not have the consent of the owner Omini Dabana to enter or remain in the place.
6. At the hearing, in supporting their case, the Prosecution called witnesses Marlicia Tsitsi (PW-1), Omini Dabana (PW-2), Mathew Dick(PW-3), Sergeant Dan Botelanga (PW-4) and Inspector Sareima Aremwa (PW-5).

The Law

7. The penal Section of two counts, which are in the Crimes Act 2016, could be reproduced as follows;

"Section: 106 Indecent Acts

(1) A person (the 'defendant') commits an offence if :

(a) the intentionally touches another person;

(b) the touching is indecent and the defendant is reckless about that fact; and

(c) the other person does not consent to the touching and the defendant:

(I) knows that fact; or

(II) is recklessly indifferent to consent of the other person.

Penalty:

- (I) If aggravating circumstances apply -20 years imprisonment
(II) In any other case -10 years imprisonment."*

"Section 164

- (1) A person commits an offence, if the person:
(a) enters or remains in any of the following places:
(I) a dwelling- house, shop, office, factory, garage, out-house or other building;
(II) an enclosed yard, garden or other area;
(III) a ship or other vessel; or
(IV) an area in which mining operations are being carried on
;and
(b) does not have the consent of the owner to enter or remain in the place.*

Penalty: 1 year imprisonment."

8. Therefore this court would list the issues to be resolved in this matter as follows;
- 1] Whether or not the accused intentionally or recklessly touched the nipple of Marlicia Tsitsi without her consent?
 - 2] Whether or not the accused entered or remained in the dwelling of Omini Dabana without his consent?.

Evidence

9. PW-1, Marlicia Tsitsi, stated that she lives with her partner Omini Daban at Bauda. They had a temporary dwelling hut as they newly moved to that place. On 26th September 2021, they drank vodka until 6 pm at Bingham's home near their dwelling hut, celebrating a football victory. There were around 20 persons, and she could recall the accused as he came to them and sat between them. She did not know the accused personally but recognised him as "Deidre's son". that was the first time she met the accused, as he was one of her neighbours and there was just chatting. There is a 2-3 minute working distance between her dwelling and party place.
10. She never invited the accused to her place. (witness identified the accused from the dock by pointing at him.) after drinking, she and her partner went to their dwelling. It was not dark when they returned. Then they went to sleep. she can not recall whether she changed her clothes before sleeping. She was on the mattress next to the wall on a wooden base. Her partner was sleeping on the wooden base next to her. During her sleep, she felt someone bit or pinch her right nipple. She worked up

and covered her breast and realised that she was naked. She kicked her partner as she thought it was him.

11. Nevertheless, he worked up and said, "what's up with you?". At the same time she heard a male voice saying "marlicia I am sorry, put on your clothes".when she looked back there was someone, but she could not recognise him at that time as the inside lights were off. So she got up and jumped to the floor to grab something to wear.
12. Then, the person lying on the mattress went to the door. Then she asked him to stop, and he stopped outside. Then she managed to see the accused's face as there was light. She asked, "how could you do this to us?" the accused replied, "I am sorry". She punched the accused's face, and he fell. Then he threw a kick at her. she went inside the dwelling. When she returned, the accused had left. Then, Mathew came to her and asked what happened. she just said, "Deidre's son," and Mathew replied, "Jackson". She said, "I don't know the name; go and get him". later, the accused came with Mathew on his motorbike.
13. When the accused got down, she assaulted him again. Then, her partner came, and she told him what had happened. Again, her partner assaulted the accused. Finally, Mathew took the accused away. Then PW-1 called the police. She recognised photos of the inside and out of side her dwelling taken by a police officer the next day and marked them from PEX-1 to PEX-27.
14. PW-1 stated that she did not hear anyone calling them or knocking on their door from outside when she was sleeping. The accused always said, "I am sorry" when they assaulted him. He did not deny any allegations. She felt disgusted when she realised that she was naked and what had happened. At cross-examination, she denied taking the accused's phone to the hut after borrowing it. However, since the accused did not run away, she met him outside the house.

15. According to photos, the hut's roof is low, and whoever is laying on the mattress must bend when coming out and can not stand as the gap between is less than 4 feet. That has lights outside. Anyone in the garage could see what was happening at the door of PW-1 's hut. There is a plywood board as a temporary door to the house.

16. Omni Dabana (PW-2) stated that he lives with his (PW-1) partner. He has a dwelling at Bauda. He recognised the marked photographs PEX-1 to PEX-27. On 26th September 2021, they were drinking at Brigham's place. He knew the accused but not personally. He cannot recall how many hours the accused was with them. In the evening, They went home; it was still daytime. On their way, he noticed Mathew and others playing cards in the garage. However, he did not speak to them. They switched on the outside light and slept as soon as they arrived. PW-1 was on the mattress, and the witness slept on the wooden base below the mattress.

17. PW-2 added that PW-1 kicked him when sleeping. As he thought she was playing with him, he asked, "what's up with you. are you crazy?". He sat on the base and saw PW-1 jump, passing and going towards speakers. Then another person bent and snaked out. However, PW-2 did not see the face of that person. PW-2 was in underwear whilst sleeping. Then he ran to Mathew's house and asked whether they had seen anyone come to their house. They replied that they did not see any. However, his partner was outside, and she told someone was inside and pinched her nipple, and it was Jackson. PW-2 added that at the time of the incident, PW-1 was pregnant and later had a miscarriage. He said Mathew brought the accused and assaulted him as he was frustrated.

18. PW-2 stated at the cross-examination that he did not invite the accused to join them at the party, but he came to them. He cannot recall using the accused's phone. When they returned, they did not have any phones. He said that he heard PW-1 shouting that someone was at the house. He can not recall anyone calling them from outside when they were sleeping. Later one returned his lost phone.

19. Mathew Dick (PW-3) stated that he stayed at Bauda. He knows PW-1 & PW-2. On 26th September 2021, he played cards with some of his friends in the garage. He identified PEX-15 as the garage. There was a drinking party, but he did not participate. He didn't see PW-1 and PW-2 returning to their hut. The accused came to them and asked to use his phone as PW-1 & PW-2 took it. Witness noticed the accused was drunk. Then the accused rang several times, but no response. Then the accused said he would go to PW-2's hut and left. PW-3 heard the accused shouting outside the house as "marlicia" and "omini". Then he saw the accused entering the hut. He cannot recall how long the accused was inside, but it must be around ten minutes.
20. The witness said he heard screaming "fuck" and "who is this" from the hut. Then they looked at the house and heard two people fighting. He thought that it was PW-1 and PW-2. Then Jackson came out and went away; he followed him. Witness knows the accused as he is one of his childhood friends. Witness identified the accused by pointing. PEX-18 was given to PW-3, and he recognised the place and said that he could see the accused's activities near the hut since the outside lights were on.
21. Witness added that he met the accused at a nearby shop and asked, "what have you done?". The accused replied, "I fucked up. I was down beside both of them. Then the accused asked PW-3 to take him to PW-1 to apologise. He took the accused to the PW-1. When they arrived, the accused said "sorry", and PW-1 replied "is that is how you treat your family? You come up to me?". The accused apologised again. Then PW-2 came out and assaulted the accused. He did not retaliate. PW-3 took the accused and dropped him at the hospital for treatment as he suffered injuries. Witness added that when he met PW-1, she just said, "somebody came in, and he is gone." He said she did not mention any name, and she did not see the accused or ask him to get her the accused.
22. At the cross-examination, the witness, said that the accused, PW-1 and PW-2, were drunk that night, but he noticed that the accused and PW-1 were behaved consciously.

PW-3 did not know what happened inside the hut, but on the day of arresting the accused, PW-1 said everything.

23. In his evidence, Sergeant Dan Botelanga (PW-4) stated that he took the photographs marked as PEX-1 to PEX-27 on 27th September 2021. Further, he drew the sketch map of the crime scene and marked it as PEX-28. However, when he met PW-1, she did not mention anything as they were cousins.

24. Inspector Sareima Aremwa (PW-5) said she investigated the incident and charged the accused. She added that it was about pinching or biting the nipple of the victim after entering the dwelling without permission. PW-5 marked the medical report of the victim as PEX-29 and the victim's statement as PEX-30. She interviewed the accused in the Nauruan language. Later, she translated it into English. The accused has been given breaks during the interview and allowed to talk with the mother and lawyer. The accused refused to sign the interview record, and the witness marked it as PEX-31.

25. At the cross-examination, PW-5 stated that when she translated PEX-31, she interpreted the Nauruan word "Kabadery ur" as sexual assault within the context. It was suggested that she had translated it wrong as it meant "annoying, disturbing", but she denied it. She further marked two statement answers to the charge form as PEX-32 and PEX-33. Then the Prosecution closed their case.

26. The court ruled that there was a case to answer. The defence called the accused Jackson Pickering (DW-1) and Roxsen Dageago (DW-2) witnesses.

27. The accused (DW-1) stated that he was at the party drinking. There, he met PW-1 and PW-2. They were drinking vodka all day from 26th September 2021. At the party, he gave his phone to PW-1 as they did not have a phone then. However, they did not return his phone as he knocked down. When he regained consciousness at night, PW-1 and PW-2 have gone.

28. Moreover, he was told that PW-1 & PW-2 had taken his phone. So he went to the hut of the PW-2. He can not recall what time it was but night.
29. When DW-1 arrived, some people played cards in Mathews's garage. He went to them and borrowed Mathews's phone and rang his number. It was ringing but did not answer. Then Mathew suggested he go and check, and he went to the PW-2's hut. he called both of their names from outside. He entered the hut as there was no answer from inside. DW-1 went in, pulling the temporary door. It was the first time he had gone to the hut, and it was dark inside as the lights were off. He looked for his phone. He could recall standing there. After that, he can not remember what happened as he had a blackout.
30. When DW-1 regained consciousness, he was lying on the mattress next to PW-1. he heard a woman screaming, "get out". He stood up, said, "I am sorry", and went out. He said that despite his intention to find his phone, he ended up on the mattress made him feel embarrassed. He added that PW-1 told him "never come back again". So he went to a nearby store and thought about the embarrassment. Then he started to smoke, and Mathew came and asked, "what have you done". Then he replied, "I fucked up by laying on the mattress". He asked PW-3 to take him to PW-1 to make an apology. When he reached the hut, PW-1 punched his face and said, "how could you do this to your relative?". He just replied, "I am sorry", as there was no other word to say. He did not retaliate as she was a woman. Then PW-2 came out and assaulted him. Then he fell, and Mathew took him to the hospital as he suffered injuries.
31. At the cross-examination, DW-1 stated that since he disagreed with Nauruan word "Kabadery ur" as sexual assault, he refused to sign the interview record. He agreed that he was given breaks. As he wanted to finish it, he did not want to make any changes to PEX-31. He testified that at the party, he went to PW-1 to get to know them. He did not like PW-1, and there was no invitation to go to the dwelling of PW-1. Since he wanted his phone, he went to the hut. Even though the inside was dark, he felt he could find the mobile phone despite being unfamiliar with the things inside. He admits entering without consent was wrong, and even under blackout, he managed

to get to the mattress climbing the base, bending his head, without knocking on the low roof.

32. The accused said, "I think she was already naked when I entered". When asked to justify replied, "I heard she is wearing clothes after she said to get out". It was he was lying on the mattress. He denied touching the breast of PW-1. He can not recall asking PW-1 to put up her clothes or seeing she was wearing clothes. DW-1 added that since his mind was on the issue, he did not mention his phone at PEX-33/32 nor explained failing to mention his phone to the police. He lost his hearing ability in the right ear due to assault by PW-2.

33. (DW-2) Roxson Dagego stated that he was at the party with the accused and victim (PW-1) and others. He said the accused gave the phone to the victim. The accused was knocked down due to drinking and looked for the phone when he worked up.

Analysis

34. Both parties are not disputing meeting at the party and drinking. Furthermore, the accused admitted that he entered the dwelling of the PW-2 without his consent. Therefore, I will not analyse evidence which connects to issue number 2. Therefore, the only issue before me is whether or not the accused intentionally or recklessly touched the nipple of Marlicia Tsitsi without her consent.

35. The accused agreed that he was on the mattress with the PW-1. But he states that he had a blackout. Therefore, he can't recall what happened. The accused said he went to get his phone. PW-3 confirmed it. Consequently, this court would accept that the accused went to the hut to recover his phone. But I would take the evidence suggesting that a person visiting a dwelling for the first time at night would try to find his phone in the dark or without the help of the owners.

36. The accused said he looked for his phone on the side even though no light was on. This fact that there was sufficient light. PW-2 said he was in underwear that night. The victim can not recall whether she changes her clothes or not. Even the accused told the victim was already naked. Therefore the victim might have been naked.

37. As the defence suggests, it is impossible to reach the mattress by climbing the wooden base without stepping on both PW-1 and PW-2. They were lying across the accused's way to get the spot of the bed next to PW-1 and further knocking his head on the low roof, less than 3 to 4 feet above the mattress, if there was an actual blackout. Additionally, it isn't easy to accept how he managed without hitting the things inside. This court would agree that one could do his habitual actions under intoxication within a blackout. But everything in the dwelling was new to the accused. Further sexual acts such as biting or pinching nipples would be considered a deliberate act to gain or give pleasure that cannot occur under a blackout mindset. I find these suggestions unrealistic.

38. P-W 3's evidence and accused himself of trying to call his number, calling the victim, and PW-2 from outside confirmed that the accused was in a mindful status. Therefore I find that the accused had the conscious mind to know action and its consequences throughout the incident. Furthermore, the accused's conduct reflects it by apologising rather than wondering what happened. All the witnesses stated that the accused did not retaliate when assaulted. The accused asked PW-3 to take him back to the victim to make an apology. I think this is due to the guilty conscious and shock the accused had within himself.

Conclusion

39. After considering the evidence, this court addressed issues numbered (1) and (2) of this trial as affirmative. Therefore since the prosecution proved all the elements of both offences without reasonable doubt, this court ruled the accused guilty of both counts as charged and convicted accordingly. Both parties may file submissions on sentencing within two weeks from today.

40. Defendant has 21 days to appeal this decision.

