IN THE COURT OF APPEAL OF NAURU
AT YAREN
APPELLATE JURISDICTION

Criminal Appeal No. 3 of 2021
Supreme Court Criminal Case No. 23 of 2020

BETWEEN

THE REPUBLIC

AND

APPELLANT

ERJ

RESPONDENT

BEFORE: **Justice Dr. Bandaranayake, Acting President**
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **25 August 2022**

DATE OF JUDGMENT: **15 September 2022**

CITATION: **The Republic v ERJ**

KEYWORDS:	Rape of a child under 16 years old, wished to consent, admissibility of medical reports, defences under Division 7.3 of the Crimes Act, aggravating circumstances for sexual offences, sexual history evidence, corroboration in sexual offences, gender stereotypes, CEDAW, appeal against acquittals, orders in appeals against acquittals
LEGISLATION:	Article 10(7) of the Nauru Constitution; s.29(3) of the Nauru Court of Appeal Act; s.53(6) of the Nauru Supreme Court Act; s.9, 101, 102(1), 116(1)(a) &(b), 127, 129, 137 of the Crimes Act 2016; s.176 of the Criminal Procedure Act 1972
CASES CITED:	R. v. Ewanchuk [1999] 1 S.C.R. 330; Rao Harnarain Singh v. the State A.I.R. 1958 Punj. 123; DPP v Morgan [1975] 2 All ER 347; Mohini Lata v The State (2000) FJHC 108; R v Sekhon 85 Cr. Ap. R. 19; Langford v R [1974] FLR 11; Naepe v State [2020] PGSC 144; Republic v Baguga [2022] NRSC 10; Republic v Kam [2020] NRSC 18; Subramaniam v Public Prosecutor [1956] 1 WLR 965; Navaki v State [2019] FJCA 194; Davern v Messel [1984] HCA 34; State v Sang [2008] FJHC 11; R v Bain [2004] 1 NZLR 638; Police v Faasolo [2001] WSCA 6; Vertigo v The Philippines - CEDAW Communication No. 18/2008

APPEARANCES:

COUNSEL FOR the Appellant:	**R. Talasasa**
COUNSEL FOR the Respondent:	**R. Tagivakatini**

JUDGEMENT

1. The Respondent was charged under section 116(1)(a) and (b) of the Crimes Act 2016 with one count of rape of a child under 16 years old. The Respondent was tried by the Supreme Court in Criminal Case No 23 of 2020 and was acquitted

by the former Chief Justice sitting as the trial judge, in his Honour's judgement dated 25 June 2021.

2. The Director of Public Prosecutions filed this appeal against the acquittal. The jurisdiction to determine appeals against acquittals is derived from Section 29(3) of the Nauru Court of Appeal Act 2018.

   Section 29(3)-The Director of Public Prosecutions may appeal against a judgment, decision or order of the Supreme Court;

   (a) Where a person is acquitted on a question of law or a question of mixed law and fact or;

   (b) In relation to the leniency or appropriateness of the sentence.

3. The grounds of appeal advanced by the Appellant as per the Notice of Appeal are as follows:

   1. The learned Chief Justice erred when he acquitted the Respondent of Rape, in that an alternative verdict for indecent act in relation to a child under 16 year old, could have been arrived at.
   2. The learned Chief Justice erred when he acquitted the Respondent in that he disregarded the evidence of a non-consensual sexual intercourse as was clearly articulated by the victim.
   3. The learned Chief Justice erred when he acquitted the Respondent in that the evidence of the victim that she did not consent overrides the term "wished to consent".
   4. The learned Chief Justice erred in his interpretation of the term "wished to consent".

4. At the appeal hearing the learned DPP counsel informed the court that the first ground of appeal will be abandoned. Therefore, I would only consider the other three grounds of appeal. In addition, the parties filed further submissions on the definition of "wished to consent", entering a conviction instead of ordering a retrial and tendering medical reports in trials. As the three other appeal

grounds substantially overlap each other and revolve around the same issue of "wished to consent", I will consider those three appeal grounds together.

Prosecution case

5. The Complainant, ART was born on 05 December 2004. The Respondent was born on 07 June 2004. ART and the Respondent were girlfriend and boyfriend for two months in 2016 when she was in Form 1 at school. On 16 November 2020 ART was returning home after playing basketball. She met the Respondent and his friend, MA at a place called Aiwo Courts. They asked her to go with them to a place called Tiger's Oval to have a chat. When they were talking the Respondent asked her when they can meet up again. ART responded, 'next year'. The Respondent then asked why they couldn't meet up on that night. ART ran away without responding. But she was followed by the Respondent and pulled her from her hair. He dragged her to a room in the Clubhouse. He pushed her against the wall and tried to undress her. ART started crying and tried to push him away. The Respondent threatened her, asking whether she wanted to go home naked. He slammed ART on the floor. When MA came near them, the Respondent asked him to leave the room. The Respondent managed to take off ART's pants and had sexual intercourse with him. After the Respondent finished having sexual intercourse, he left the room. When ART got dressed MA came and pulled her by hair and asked her to forgive the Respondent. MA also asked ART to kiss him and to have sex with her. ART told him that she wanted to go home. MA released her and told her not to tell anyone about what happened. The Respondent was still sitting outside the door when she left crying. On her way back, someone asked her what happened as she was dirty and crying. She did not tell him anything and went to her aunt's place without going home as she was scared of her father. She told her aunt that she was raped.

6. When the learned trial judge asked what was meant by meeting up in next year, ART stated she meant 'having sex next year'. ART's aunt, the doctor who examined ART, MA and a police officer also gave evidence for the prosecution.

Defence case

7. The Respondent was with MA when they met ART. While having a chat with her at the Clubhouse the Respondent asked ART if he can have sex with her. ART replied, 'next year'. She said she wanted to go home, and tried to run away. They chased her and MA pulled her by her hair and took her to the bathroom area. The Respondent followed them and asked again if he can have sex with ART. She said yes, but she was shy because of MA. MA was outside and ART agreed to have sex. She started undressing and the Respondent helped her to undress. The Respondent then had sexual intercourse with her on the bathroom floor of the Clubhouse. When he finished, MA was waiting at the entrance. MA also asked ART if he can have sex with her. After MA talked to ART, she went home crying and the Respondent and MA went on their way.

8. The defence case was that the Respondent had consensual intercourse and the respondent and ART were within 2 years age gap.

Wished to Consent

9. As mentioned before, the grounds of appeal are based on the interpretation of the term "wished to consent" found in the statutory defence provided in section 127(3) of the Crimes Act 2016.

    Section 127(3) - It is also a defence to a prosecution for the offence, if the defendant proves that at the time of the alleged offence:

    a) The defendant was within 2 years of age of the other person; and

    b) The other person **wished to consent** to the relevant conduct.

10. However, there are two other qualifications for this defence as well. Section 127(1) provides that "this section applies to an offence against section 116,117 or 118 if; (a) the person in relation to whom the offence was committed was **at least 13 years old**; and (b) none of the aggravating circumstances mentioned in section 102(1) apply to the offence.

11. It is clear that the statutory defence stipulated in 127(3) is subject to the qualifications set out in section 127(1). However, I will discuss section 127(1)(b) later, after discussing the main issue argued in this appeal. There is no dispute that the Respondent had sexual intercourse with ART. The learned trial judge decided that ART had consensual sexual intercourse with the Respondent as his Honour noted at para 71 of the judgment; "Likewise although, the complainant denied agreeing to sexual intercourse with the defendant in the bathroom she frankly admitted agreeing to have sex with him 'next year' barely minutes before the alleged incident occurred". That statement speaks for itself, as his Honour decided that agreeing to have sexual intercourse in next year was sufficient to satisfy that ART "wished to consent" to have sexual intercourse with the defendant. As such, his Honour concluded that the statutory defence under section 127(3) is available to the Respondent.

12. Arriving at the above conclusion, his Honour disbelieved ART's version and accepted the evidence of the Respondent. It would be pertinent to look at the reasons given by his Honour in finding that ART's evidence lacked credibility. In para 65 of the judgment, it is noted: "I too was taken aback by the complainant's flippancy. She struck me as sexually knowledgeable in her answers and I have no doubt that she was attracted to ERJ her "ex-boyfriend" when he saw him at the Aiwo bridge and willingly accompanied him to the dark abandoned Clubhouse when she was supposed to be heading home at that late hour." With respect it must be noted that even if ART was 'sexually knowledgeable' that should not have been given any regard at all, to assess her credibility. The law is very clear that "sexual history evidence is not admissible

to support as inference that the complainant is the kind of person who is more likely to have consented to the sexual activity which the charge relates": see section 137, Crimes Act. As per section 129 of the Crimes Act sexual history evidence means evidence that relates to or tends to establish the fact that the complainant:

a) was accustomed to engaging in sexual activities; or
b) had freely agreed to engage in sexual activity, other than that to which the charge relates, with the defendant or another person.

13. I am of the view that the learned trial judge erred when sexual history evidence was considered to support the conclusion that she "wished to consent" to sexual intercourse.

14. The learned trial judge was of the view that "the complainant's (ART) and the defendant's (ERJ) evidence of the events of the evening closely mirrors each other", until the point where complainant unsuccessfully attempted to run away from the Respondent and his friend MA. His Honour further noted in para 68 of the judgment "although parts of the complainant's evidence was corroborated by MA such as her being thrown onto the floor of bathroom ... **MA was not asked at all about what he saw when ERJ and the complainant were having sex on the bathroom floor**". It is clearly discernible that these remarks are shrouded with the learned trial judge's stealthy quest for corroboration. Further, in para 70 of the judgment his Honour noted "the complainant sustained no visible mark or injuries to her naked body or genitals". It clearly reflects that his Honour appears to have looked for injuries to corroborate ART's evidence.

15. It should be noted that in this jurisdiction evidence of corroboration is no more required for sexual offences. Section 101 of the Crimes Act reads: "A law is abolished if the law provides that the corroboration of the evidence of a witness is required for a conviction for an offence under this part". In the circumstances

I decide that the learned trial judge erred when lack of corroboration was taken into account to disbelief ART and thereby arriving at the conclusion that she "wished to consent" to have sexual intercourse.

16. Be that as it may, the main issue in this appeal is based on the definition of the term "wished to consent". The learned trial judge appears to have attempted to find the meaning of the term "wished to consent' and his Honour eventually decided to employ the literal meaning. The following excerpts from the judgement are self explanatory:

    11. In construing this uncommon phrase "...wished to consent..." I am also assisted by the Cambridge Dictionary of English which explains one use of "wish" as a verb can mean a sense of regret or to feel sorry about a particular action in the past. In this latter regard, if one is regretting in the present what has in the past then one would say : "I wish..." for eg., "I wish he had told me he wasn't coming today because I wouldn't have come if I'd known." Conversely, if one has regretted something in the past then one would say: "I wished... (I had said and done differently)."

    12. In the present context using the statutory phrase, ERJ would have to establish on a balance of probabilities that ART "wished to consent" to sexual intercourse with him at the relevant time even though consent is <u>not</u> a defence to the charge. In other words, ERJ need <u>not</u> prove actual consent as defined in s.9 of the Crimes Act 2016, besides, ART does <u>not</u> have the legal capacity to give such "consent" to sexual intercourse even if she wished to. I also construe this second element subjectively according to ERJ"s perspective and burden.

    13. In my view given that the term used in s.127(3)(b) Is not "consented", but ....."wished to consent", in order to establish the defence on a balance of probabilities, the defendant would need

to establish not actual consent on the complainant's part, but an honest and reasonably held belief, that the complainant (ART) wanted to have sexual intercourse with him, or at the very least, ERJ must raise a reasonable doubt as to the existance or presence of the "wish" or willingness on the complainant's part to participate in the relevant act.

17. As far as the offence of rape is concerned, whether it is in relation to a person under or above the age of 16, I am of the opinion that no distinction should be drawn in the state of mind required for willing participation in sexual intercourse. On the other hand, it would be preposterous to assume that the legislature intended to attach a lesser degree of state of mind to the term "wished to consent" as it could cause grave prejudice to sexual autonomy of a person under 16 years of age, as opposed to a person over 16 years of age. Undoubtedly, paving the way for such disparity could not be the intention of the legislature when the statutory defence under Section 127(3) was introduced. The intention of the legislature is very clear as per the Explanatory Memorandum at the Bill stage;

> "The Bill provides separate offence for rape and indecent acts where the victim is a child. These offences have more serious penalties than equivalent offences involving adults, including even higher penalties if the child is under 13 years of old.
>
> Importantly for offences involving sexual conduct below the age of consent (set for males and females at 16), it is not a defence to prove the child **consented**, **unless** the offender was within 2 years of age of the victim. This supports compliance with the Convention of the Rights of the Child, which considers conduct between children with a significant age difference to be abused, while protecting consenting teenagers from the detriment of a criminal record and allowing the issue to be addressed through means other than criminal punishment."

18. Therefore, it appears that nothing less or more was intended by the legislature in relation to the status of mind when the terms "consent "or "wished to consent" were introduced, as both terms ascribed to the same state of mind.

19. Definition of consent is set out in Section 9 of the Crimes Act 2016;

(1) 'Consent' means free and voluntary agreement by a person with the cognitive capacity to give that agreement.

(2) Without limiting subsection (1), a person's consent to do an act is not freely and voluntarily given if the consent is obtained by any of the following:

(a) force;

(b) threat or intimidation;

(c) fear of harm;

(d) exercise of authority;

(e) false, misleading or fraudulent representations about the nature or purpose of that to which the person consents; or

(f) mistaken belief induced by another person.

(3) Without limiting subsection (1), a person does not have the cognitive capacity to give consent to an act if one of the following applies:

(a) the act occurs while the person is asleep or unconscious;

(b) the act occurs while the person is intoxicated to the extent that the person cannot choose to consent or not to consent; or

(c) the person is unable to understand the nature of the act.

(4) Without limiting subsection (1), (2) or (3), a person who does not protest or offer actual physical resistance to an act is not, by reason only of that fact, to be regarded as consenting to the act.

20. To give effect to the intention of the legislature, as well as to avoid any prejudice caused to persons under 16 subjected to sexual offences, I am of the view that

the term "wished to consent" should be defined in the same context as "consent" and if not, intention of the legislature to ensure greater protection to children would become futile as far as sexual offences are concerned. Thus, in view of sections 9 and 127 of the Crimes Act it can be deduced that "wished to consent" means free and voluntary agreement by a person between the ages of 13 – 16 with the cognitive capacity to give that agreement. Similarly, if a person between the ages of 13- 16 "wished to consent" as a result of force, threat, fear of harm, exercise of authority, false, misleading or fraudulent representations about the nature or purpose of that to which the person between the ages of 13-16 consents or mistaken belief induced by another person it should not be considered that the person between the ages of 13-16 freely and voluntarily agreed or wished to consent to the sexual act. It would be senseless if the other conditions contained in Section 9(3) and 9(4) are also not applicable in determining if a person between the ages of 13 - 16 "wished to consent". Needless to say, that if the term "wished to consent" is loosely interpreted without having regard to similar considerations enshrined in the definition of consent, as in the case under appeal, the prejudice caused to a child would be beyond imagination and certainly that would undermine the very objective of the legislature to guarantee safety and protection of children.

21. I appreciate the submissions made by the learned Public Defender, Mr. Tagivakatini that "the intention of the Parliament was to protect 'consenting teenagers' within a 2-year age gap from the detriment of a criminal record". Indeed, I could not agree more with that proposition. That would be the most persuasive premise that the term wished to consent could be contextualized in a meaningful manner. But on the contrary the learned DPP submitted;

> "That the phrase 'wish to consent' arises when there is no express statement about 'consent'. In other words, an accused person could imply from conduct or other forms of gesture or communication that he could make out from the victim's response.

But where there is an expressed response or action from the victim, the element of 'wish to consent' does not arise."

22. Regrettably, I am unimpressed with that contention. Consent is the state of mind legally identified in relation to sexual offences such as rape, so as "wished to consent", in cases where the person subject to the offending is between the ages of 13-16 and the defendant is within two years age gap. However as per section 126 of the Crimes Act consent is not a defence to an offence under Division 7.3 of the Act, which sets out sexual offences relating to children. Therefore, only for legal purposes, it can be plausibly assumed, that the same state of mind is given two distinct terms as 'consent' and 'wished to consent'. That leaves room for courts to consider the same state of mind of a complainant who is between the ages of 13 -16 in cases where the defendant is within the age gap of two years, in determining applicability of the statutory defence. Simply, it avoids ambiguity in legal terminology, as consent in its legal definition is not a defence for sexual offences involving children, across the board.

23. May it be consent or wished to consent, there should be affirmative communication by a person of that person's willingness to participate in the sexual act by words or by conduct. Moreover, that willingness should be a free and voluntary agreement to participate in the sexual act. May it be a child between the ages of 13-16 or an adult, willingness to participate can be withdrawn at any time once given and it is an ongoing state of mind throughout the sexual intercourse. Expression of willingness to participate in sexual intercourse in the future or expression of willingness in the past to participate in sexual intercourse is irrelevant, unless it is clearly communicated by words or conduct at the time the sexual intercourse occurred. In short, statutory defence stipulated in section 127(3) is not available to a person if there was no free and voluntary agreement by the other person to willingly

participate in sexual intercourse at the time and during the sexual act, even if the two persons were in a boyfriend and girlfriend relationship and were within two years age gap.

24. In R. v. Ewanchuk [1999] 1 S.C.R. 330 the Supreme Court of Canada held that; "the accused cannot rely on the complainant's silence or ambiguous conduct to initiate sexual contact. Moreover, where a complainant expresses non- consent, the accused has a corresponding escalating obligation to take additional steps to ascertain consent." Further in Rao Harnarain Singh v. the State A.I.R. 1958 Punj. 123 the Indian High Court (Punjab Haryana) stated that; "A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent". I am of the view that the same approach should be adopted in determining the state of mind of a person, in cases where the term 'wished to consent' is involved as well.

25. The learned trial judge ought to have considered the evidence of ART running away, defendant pulling her by her hair to bring her back, threats to send her home naked, ART going home crying and complaining to her aunt soon after the incident, objectively to assess her state of mind. I am of the view that the learned trial judge failed to assess the probative value of evidence, which clearly reflects lack of free and voluntary agreement, in a more dispassionate manner and to accord appropriate weight. Instead, the learned trial judge accorded superfluous weight to the complainant's agreement 'to have sexual intercourse next year' and to other irrelevant considerations tainted with obvious gender stereotypic assumptions. His Honour erroneously concluded that agreeing to have sexual intercourse on a future date is a free pass to have

sexual intercourse at any given time, irrespective of the state of mind relating to free and voluntary agreement of the complainant in that particular moment and during the act. Further it appears that his Honour was of the opinion that since the defendant and the complainant were in a boyfriend girlfriend relationship in the past, it justified the act of the defendant as it was noted "I have no doubt that she was attracted to ERJ her "ex-boyfriend" when she saw him on the Aiwo bridge and willingly accompanied him to the dark abandoned Clubhouse when she was supposed to be heading home at that late hour". The learned trial judge, in my opinion failed to appreciate all the other evidence which suggests continuous resistance to sexual intercourse prior, during and after the alleged incident, without a cogent reason to disbelieve ART.

26. It should be noted that being in a relationship is not an excuse to have sexual intercourse unless there is free and voluntary agreement by the other person to such act. Nauru is one of the few countries in this region which even acknowledges marital rape in its criminal law. Section 104 of the Crimes Act states that "for the avoidance of any doubt, this Division applies even if the person alleged to have committed the offence is married or a de facto partner of the person in relation to whom the offence is committed" regarding sexual offences. Therefore, I cannot agree with his Honour, as no sanctity can be attributed to sexual offences just because the parties were in a boyfriend-girlfriend relationship in the past.

27. The evidence does not suggest that the defendant took any reasonable steps to ascertain the willingness of the complainant to engage in the sexual intercourse despite continuous resistance by her. A belief by the defendant that the complainant wished to consent is not a defence. Besides, mistake of fact is not a defence as per the Explanatory Note to Section 116(3). The learned trial judge fell into error when his Honour relied on DPP v Morgan [1975] 2 All ER 347 where it was held; "The crime of rape consisted in having intercourse with a woman with intent to do so without her consent or with indifference as to

whether or not she consented. It could not be committed if that essential mens rea were absent. Accordingly, if an accused in fact believe that the woman had consented, whether or not that belief was based on reasonable grounds, he could not be found guilty of rape." With respect, it must be noted that this authority has no applicability or relevancy whatsoever, in child rape cases in this jurisdiction.

28. In the circumstances I am of the view that the learned trial judge misconceived the term "wished to consent" and thereby erred in deciding that ART "wished to consent" to sexual intercourse.

29. Although it was not argued in the appeal, I am obliged to note another important issue, that was perhaps overlooked by the parties in my opinion. As mentioned before, section 127(1) provides two qualifications to be satisfied to rely on the statutory defences stipulated in 127(2) and 127(3). It reads:

> 127. Defences for certain offences under Division 7.3
>
> (1) This section applies to an offence against section 116, 117 or 188 if:
>
> a) the person in relation to whom the offence was committed was at least 13 years of old; and
>
> b) none of the aggravating circumstances mentioned in section 102(1) apply to the offence.

30. Therefore, it is very clear that the statutory defences available under section 127(2) and 127(3) are available only if the complainant is between 13-16 of age **and** no aggravating circumstances stipulated in section 102(1) apply to the offence. Section 102(1) reads as follows:

> **102. Aggravating circumstances for sexual offences**
>
> (1) Where an offence under this Part provides for a penalty if aggravating circumstances apply, that penalty may be imposed if the

conduct constituting the offence occurs in any of the following circumstances:

(a) a person suffers physical harm as a result of, or in the course of the commission of the offence and the defendant is reckless about that fact;

(b) the defendant intentionally threatens to inflict physical harm with an offensive weapon or instrument on another person;

(c) the defendant intentionally breaks and enters into a building with the intention of committing the offence or any other offence punishable by imprisonment of 1 year or more;

(d) the defendant intentionally deprives the person in relation to whom the offence is committed of the person's liberty for a period before or after the commission of the offence;

(e) the defendant intentionally gives the person in relation to whom the offence is committed alcohol, a drug or other intoxicating substance;

(f) the defendant is intentionally in the company of another person; or

(g) either of the following facts applies and the defendant is reckless about that fact:

(i) the person in relation to whom the offence is committed has a serious physical disability; or

(ii) the person in relation to whom the offence is committed has a mental impairment.

31. In view of the evidence discussed by the learned trial judge there is no doubt that the aggravating factor stipulated in section 102(1)(f) should be applicable in this case as there was no dispute that the defendant was intentionally in the company of MA during the commission of the offence. It should be noted that merely because the second person was not watching the entire episode of sexual intercourse does not necessarily mean that the offence was not committed, intentionally in the company of another person. The evidence has

to be constructively considered in full context, and in this case the defendant clearly was in the company of MA prior, during and after the alleged incident and the defendants conduct clearly demonstrates that he was intentionally in the company of MA. Accordingly, I am of the view that the statutory defence under section 127(3) has no applicability in this case.

32. Be that as it may, it would not be complete if I do not put one other important matter on record. Although it was not argued in this appeal, I am regrettably compelled to comment on the harmful gender stereotypes and assumptions reflected throughout his Honour's judgement. I have no doubt that these gender biases have influenced the final outcome of the judgement to a great extent. Every court has a duty to avoid harmful gender stereotypes and assumptions about victims of sexual violence. Nauru acceded to Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) on 23 June 2011 and thereby the State is obliged to take all measures "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on **stereotyped roles for men and women**"(see Article 5A.)

33. It would be pertinent to mention the much-celebrated Vertigo decision by the CEDAW committee[1], which led to unprecedented dialogue on harmful gender stereotyping, myths and assumptions in sexual offences, as I have clearly observed similar references in His Honour's judgment under appeal. In the Vertigo decision majority of the CEDAW committee affirmed that CEDAW requires State parties to "take appropriate measures to modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women". It further stressed that: "Stereotypes affects women's right to a fair and just trial and that **the judiciary must take**

[1] CEDAW Communication No. 18/2008
https://juris.ohchr.org/search/details/1700

caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general".

34. Perusal of his Honour's judgment clearly manifests that it is tainted with following harmful gender stereotypes and assumptions which should have been avoided, for that matter by any court:

> 65. I can confirm the demeanour of the complainant in the witness box is accurately described by defence counsel and referred to in the DPP's examination in chief. I too was taken aback by the complainant's flippancy. **She struck me as sexually knowledgeable in her answers and I have no doubt that she was attracted to ERJ her "ex-boyfriend" when she saw him** on the Aiwo bridge and willingly accompanied him to the dark abandoned Clubhouse when she was supposed to be **heading home at that late hour.**
>
> 69. It is noteworthy that **the complainant's so-called upset state did not result in her heading straight home** nor did it overcome any concern she might have had at her predicament or her fear of her father's wrath should she arrive home disheveled and dirty at that late hour between"9 to 10 pm". Indeed, **even the complainant's mother wasn't "very sympathetic"** when told about what had happened to her daughter by the aunt whom the complainant had gone to seek refuge after the incident.
>
> 70. In this case, despite the complainant's sworn testimony of pushing, resisting and even kicking the defendant before and during intercourse, as well as being pushed up against a concrete brick wall and being slammed onto a dirty floor, **the complainant sustained no visible**

mark or injuries to her naked body or genitals. Her clothes although forcibly removed against her resistance also remained intact and was not torn in anyway.

71. Likewise, although, the complainant denied agreeing to sexual intercourse with the defendant in the bathroom **she frankly admitted agreeing to have sex with him "next year" barely minutes before the alleged incident occurred.**

35. Nauru is again one of the few countries among Pacific island nations that has introduced rape as well as other sexual offences as gender neutral offences. Those offences are structured with the word "person" instead of restricting those offences to any particular gender. Not only the laws, but also the courts should avoid discrimination based on gender biases. It is also imperative for the courts to refrain from integrating harmful gender stereotypes and assumptions in the decisions, particularly in sexual violence cases. It is not for the court to assume what a victim would do or would not do when confronted with sexual violence, based on the judge's personal beliefs, stereotypes and myths. A judge should not dissect a victim of a sexual offence looking for characteristics and responses expected of an "ideal victim" more often than not, based on the gender biases in the judge's mind. Courts should, at all times abstain from making remarks based on harmful gender stereotypes in order to avoid prejudice to victims in cases involving sexual offences.

Admissibility of Medical Reports

36. The learned counsel for the Respondent requested that this court may make a determination on whether medical reports can be tendered after the maker of the report has given sworn evidence. Both parties filed written submissions on this issue. In the instant case the learned trial judge held that the medical report

may not be produced as a prosecution exhibit in addition to the doctor's oral testimony.

37. There is a clear distinction between memory refreshing documents and expert reports. Although in practice medical witnesses may refresh their memory by referring to the contents of a medical report, in essence the primary purpose of a medical report in a criminal case is to provide an expert opinion based on the findings by an expert on the subject, namely a medical doctor. Medical witnesses may sometimes refer to bedhead tickets and other records made contemporaneously in respect of a person that they have examined, as memory refreshing documents. But those documents will not be generally tendered in court and will not be readily admissible as evidence. However as earlier said a medical report which is specifically prepared to inform the expert opinion based on the makers findings is not an aide-memoiré or a memory refreshing document for legal purposes.

38. I have considered the authorities cited by his Honour in arriving at the conclusion. Though reluctantly, it must be said that his Honour is misconceived of the distinction between expert reports, business documents and memory refreshing documents.

39. The reasoning in Mohini Lata v The State (2000) FJHC 108 which is referred to in the impugned judgment, in my view has not taken into account the full context of the authorities mentioned. In that case R v Sekhon 85 Cr. Ap. R. 19 is referred to where a police officer had used a log entry to refresh memory. I do agree that such notes are not admissible to prove the truth of the contents. It will be admissible only to show consistency if fabrication of evidence by the witness is alleged. However, it appears that the excerpts quoted from the authorities relied on in Mohini Lata are mostly out of context and are not relevant to expert reports.

40. Similarly, the other authority relied on in Mohini Lata from Fiji, Langford v R [1974] FLR 11 also appears not directly relevant to expert evidence. In that case it was held that "Although the reports, if contemporaneous, could certainly have been used to refresh their makers' memories, they should not have been produced in evidence unless they came within the exceptions under Criminal Procedure Code (Cap 14) s.184A".

41. Numerous authorities in Fiji demonstrate that it has been the longstanding practice in Fiji for medical doctors or other experts to tender their reports during their oral evidence in court and therefore I am not convinced that the decisions in Langford v R [1974] FLR 11 and Mohini Lata v The State (2000) were ever followed in that jurisdiction to exclude medical reports or are relevant to the issue under consideration in the instant appeal.

42. I have considered the legal position in the other jurisdictions in the Pacific region as well. It would be pertinent to quote the following paragraphs of Naepe v State [2020] PGSC 144; SC2072 (25 August 2020) of the PNG Supreme Court:

> 11. A medical report is admissible evidence under s. 37 of the Evidence Act, as a record of scientific examination, or as a business record under s. 61 through the author of the public document or through a second person having the custodian of the record. As the learned authors of Carter's Criminal Law of Queensland Tenth Edition, relevantly stated at p. 620:
>
> "In modern times it is no longer always possible for an official charged with recording matters of public import in a document for public use to have personal knowledge of their accuracy. It is sufficient if the function originally performed by one man has been fulfilled by two different officials, the first having knowledge of the facts and being under a statutory duty to record that knowledge and

forward it to the second who in his turn is under a duty to preserve the document for public inspection".

12. It has been accepted practice in this jurisdiction, a medical report can be tendered through a person having some knowledge of the matters to which the writing relates or the circumstances relating to its preparations, or a person who can testify as an expert witness on the contents of the medical report.
13. In, State v Bade (2011) N4460, a medical report was tendered through the supervising doctor under s. 61 of the Evidence Act. In, The State v Leo Kua (1995) N1331, the doctor who conducted the medical examination was no longer available to give evidence.

43. Needless to say, that it has been the accepted practice in Nauru to tender medical reports through the maker of the report: see Republic v Baguga [2022] NRSC 10; Criminal Case 18 of 2019 (26 April 2022), Republic v Kam [2020] NRSC 18; Criminal Case 22 of 2019 (28 May 2020).

44. Over the years, in common law jurisdictions hearsay rule has evolved and has been relaxed to cater to various situations thereby expanding the scope of admissibility of hearsay evidence. As such Section 176(3) of Nauru Criminal Procedure Act 1972 stipulates an exception to the rule against hearsay. Accordingly, it provides for experts reports, forensic accounts etc to be tendered as exhibits without calling the maker or the keeper of such records subject to the conditions enshrined in Section 176.

45. The overriding duty of a judge in a criminal trial is to assess probative value of evidence more objectively without limiting avenues for receiving crucial evidence while ensuring that both parties are on equal footing. I do not comprehend any valid reason as to why medical reports should not be allowed to tender as evidence when the medical witness is called to give evidence. An expert report is admissible regardless of the author of the report gives evidence

or not. However, if the maker of the report is not called to give oral evidence the prosecution must comply with Section 176(3) of the Criminal Procedure Act 1972.

46. For the sake of completeness, I would also discuss admissibility and the use of "history given by the patient" recorded in a medical report as well. In this regard I would like to quote the following passage from Subramaniam v Public Prosecutor [1956] 1 WLR 965 where the scope of hearsay was discussed: "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made".

47. In Navaki v State [2019] FJCA 194; AAU0087.2015 (3 October 2019) Fiji Court of Appeal discussed this issue as follows:
"The recorded history is, therefore, not the result of the doctor's medical examination or expertise. History is what he had heard from the victim. If the history is not confirmed by the person who said it and by the person who heard it, it remains hearsay and cannot be admitted in evidence. However, without fulfilling these requirements if such a statement is admitted in evidence it should be disregarded by the judge ..."

48. History given by the patient is clearly hearsay evidence unless the person who was so examined gives evidence to the effect that the history was relayed to the doctor and the doctor gives evidence eliciting the same. Yet it cannot be used as corroboration of other evidence and it can only be used to strengthen the consistency and credibility of the witness who was examined by the doctor. In any event if the history given by the patient is adduced in evidence without it being properly elicited thorough the person who was so examined and by the

doctor, the history given by the patient must be disregarded by the judge as hearsay evidence, but not the entire medical report.

Remedies in appeals against acquittals

49. It has been long established that a defendant who has been acquitted once should not be sent back to be tried again unless there is a substantial wrong or a miscarriage of justice has occurred. Particularly, the Constitution of Nauru qualifies this bedrock principle in Article 10(7) that "no person who shows that he has been tried by a competent court for an offence and either convicted or acquitted shall again be tried for that offence, except upon the order of a superior court made in the course of appeal or review proceedings relating to the conviction or acquittal."

50. Although some common law jurisdictions consider that an acquittal by a court is sacrosanct, over the years most common law jurisdictions have introduced provisions to appeal against acquittals. The High Court of Australia in Davern v Messel [1984] HCA 34; (1984) 155 CLR (18 May 1984) noted that: "the consistent trend of legislation, both in England and Australia, has been towards allowing the prosecution to appeal against an order of a magistrate or justices dismissing a charge and empowering the court on appeal to quash the order and to direct that the defendant be convicted."

51. Section 29(3)(a) of the Nauru Court of Appeal Act 2018 clearly stipulates that the Director of Public Prosecutions may appeal against a judgment, decision or order of the Supreme Court where a person is acquitted on a question of law or a question of mixed law and fact. However, the Act is silent in respect of the orders that can be made by the Court of Appeal when appeal against acquittal is allowed, unlike in circumstances where appeal against conviction is allowed. Therefore, it can be assumed that the legislature has left room for the exercise of discretion by the Court of Appeal to make appropriate orders in the interest of justice.

52. At the request of this court both the Appellant and the Respondent made submissions on the issue of what orders that can be made in instances where an appeal is allowed against an acquittal. I have considered their submissions. It appears that predominantly courts have ordered retrials when acquittals are quashed. But there are instances where appellate courts have set aside acquittals and substituted convictions in other common law jurisdictions. In some common law jurisdictions, it can be seen that respective legislations clearly provide for such orders. Fiji Court of Appeal Act was amended by Act No 7 of 1990 to include a provision to address the remedies available for appeals against acquittals and Section 23(2)(b) of the Fiji Court of Appeal Act reads: "Subject to the appeal provisions of this Act the Court of Appeal shall if they allow an appeal against acquittal, either set aside the acquittal and direct a judgment and verdict of conviction to be entered, or if, the interests of justice so require, order a new trial".

53. Moreover, it appears that the High Court of Fiji in in the course of judicial decisions has been exercising its power to substitute acquittals with convictions. In State v Sang [2008] FJHC 11; HAA127.07 (1 February 2008) the Fiji High Court quashed an acquittal and entered a conviction while remarking:

> "In this case, that defence does not appear to be available. ... Having found that the learned Magistrate was in error in the test he applied, this appeal must succeed. I quash the acquittal entered, and substitute a conviction."

54. It also appears that in jurisdictions where trial by jury operates the appellate courts have shown absolute reluctance to substitute acquittals with convictions and have preferred retrials over convictions. The rationale behind this position seems to be that the appellate courts of those jurisdictions are of the view that the determination whether an accused person is guilty or not guilty is for a jury, not for the trial judge or appellate judges: see R v Bain [2004] 1 NZLR 638.

55. It is my considered view that in this jurisdiction the position is clearly distinguishable. In Nauru trial is by judge and not by jury. Further section 53(6) of the Supreme Court Act 2018 throws some light on the issue as it provides for the Supreme Court to enter convictions in appeals against acquittals. It can be more buttressed by the fact that Nauru Court of Appeal Act 2018 provides that the Court of Appeal can substitute a conviction of guilt in cases where the Court of Appeal is satisfied that the findings of the Supreme Court prove a person is guilty of some other offence as per Section 33(2). If the Court of Appeal is vested with power to enter a conviction based on the evidence in special cases for offences other than what the defendant was charged for pursuant to section 33 of the Nauru Court of Appeal, I do not find any reason as to why a conviction cannot be entered for the same offence that the defendant is charged for, in an appeal against an acquittal. As such I am of the opinion that nothing precludes the Court of Appeal from substituting a conviction in an appeal against an acquittal where circumstances so demand.

56. However, the discretion to order a retrial or to enter a conviction must be exercised only if the interest of justice so requires in the circumstances. Whether it should be a retrial, or a conviction of guilt must be decided on case by case basis. As the Respondent's counsel quite rightly noted the discretion must be used sparingly and only upon careful consideration of circumstances of each case. In Police v Faasolo [2001] WSCA 6 (23 November 2001) the Court of Appeal of Samoa stated that any process which seeks to challenge an acquittal of a person who has been tried for any offending must be strictly adhered to in all its facets.

57. In light of above discussed authorities, I will now consider whether a retrial or a verdict of conviction is appropriate in the appeal under consideration. It is crystal clear that the elements of rape as per Section 116(a)and (b) are well-established in this case and the offence is proven beyond reasonable doubt. Further I have decided that the learned trial judge erred in interpreting the term

"wished to consent" and no statutory defence is available to the defendant. In that backdrop ordering a retrial would certainly be an otiose exercise. Besides, I do not see any reason as to why the Complainant should go through the ordeal of testifying again in court on understandably a traumatic incident. As it was earlier noted the learned trial judge fell into error in applying the defence set out in Section 127(3) of the Crimes Act 2016. It is purely a question of law and it would not serve any purpose if the case is remitted back to the Supreme Court for retrial. Although the Appellant sought an order for retrial, I am of the view that the most appropriate recourse would be to enter a verdict of conviction in the interest of justice.

58. In conclusion, I must appreciate the assistance rendered by the learned counsel appeared for the Appellant and the Respondent.

59. **Orders of Court:**

i. Appeal is allowed.

ii. The acquittal is set aside. A conviction is entered for the offence of rape of a child under the age of 16 contrary to section 116(1)(a) and (b) of the Crimes Act.

iii. The matter is remitted back to the Supreme Court for sentencing.

Dated this 15th day of September 2022

Justice Rangajeeva Wimalasena

Justice of Appeal

Justice Dr. Shirani A. Banadaranayake

I agree.

Acting President of the Court of Appeal

Justice C. Makail

I agree.

Justice of Appeal