IN THE COURT OF APPEAL OF NAURU
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 1/2021

BETWEEN

Supreme Court CC No. 18/2020

THE REPUBLIC

APPELLANT

AND

TT

RESPONDENT

BEFORE: **Justice Dr. Bandaranayake,**

Acting President,
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **22/08/2022**

DATE OF JUDGMENT: **10/02/2023**

CITATION: **The Republic v TT**

KEYWORDS: Rape, carnal knowledge, *doli incapax*

LEGISLATION: Criminal Code 1899, Crimes Act 2016

CASES CITED: **R** v **Greenfield** [1973] 1 WLR 1151, **R** v **Swallow** (1798) 8 TR 258, **R** v **Holland** (1794) 5 TR 605, **R** v **Morley**

(1827) 1 Y&J 222, **Jones** v **Sherwood** [1942] 1 KB 127, **B** (1979) Q.D.R. 417, **R** v **Adams** (1882) 1 NZLR 311, **R** v **Brooks** [1945] NZLR 504, **R** v **Rapira** [2003] 3 NZLR 794, **RP** v **The Queen** (2003) 6 VR 276

APPEARANCES:

COUNSEL FOR **APPELLANT**: **R. Talasasa**

COUNSEL FOR **RESPONDENT**: **R. Tagivakatini**

JUDGMENT

1. This is an appeal from the Judgment of the Supreme Court dated 31/05/2021. By that Judgment the respondent was acquitted of the offence of Rape. The Appellant came before the Court of Appeal against that decision.

2. The Appellant was charged for the offence of Rape which had been committed in the year 2016. It had been one single incident that had occurred inside Stephanie's room, where the victim was sleeping. Stephanie was the cousin of the victim.

3. The victim was unable to recall the month or the date of the alleged incident, but could only recall that at the time the incident took place she was 10 years of age. She could also recall that, at that time, she

was attending Grade IV at Kayser College and that she turned 10 years of age in 2016, as she was born on 21/07/2006. The Appellant was born on 07/08/2004.

4. The victim had been 15 years of age at the time she testified before Court and the Appellant had turned 17, when he was interviewed by the Police.

5. Learned Counsel for the Appellant, took up the following as Grounds of Appeal:

    a. GROUND 1 - The learned Chief Justice erred in law and in fact when he stated as he did regarding the Information and the prosecution case, in paragraph 5 of the judgment. The Appellant says that the counts captured the entire period of 2016 during which two laws were applicable: however, only one incident occurred. That gave rise to the Information containing the two Counts. It was made clear to the Court during submission that the counts were alternatives. The prosecution had opened its case by stating that there was only one incident of Rape charged and that should have been considered by the Trial Judge, His Honour the Chief Justice

    b. GROUND 2 - The learned Chief Justice erred in fact when he stated as he did in paragraph 6 of the Judgment which resulted in an erroneous reference by the Trial Judge that the Information was drafted in a clumsy way. The word 'clumsy' was never stated by the prosecuting Counsel

c. GROUND 3 - The learned Chief Justice erred in law and in fact in his Judgment when His Honour misconstrued section 29 of the Criminal Code Act 1899, in that section 29 clearly stipulates the requirement to prove otherwise, i.e. . . . unless it is proved that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission. **This is a rebuttable presumption**; and also that **the presumption that a boy under fourteen years of age is incapable of having carnal knowledge, is also a rebuttable presumption. There was evidence to show that the Respondent penetrated the vagina of the victim**

d. GROUND 4 - The learned Chief Justice erred in law and in fact in his Judgment when His Honour did not act only on the evidence adduced by the prosecution, including the evidence of the victim (victim's testimony) to rebut '*doli incapax*'

GROUND 1

6. *The learned Chief Justice erred in law and in fact when he stated as he did regarding the Information and the prosecution case, in paragraph 5 of the judgment. The Appellant says that the counts captured the entire period of 2016 during which two laws were applicable; however only one incident occurred. That gave rise to the Information containing the two Counts. It was made clear to court during submission that the counts were alternatives. The prosecution had opened its case by stating that there was only one incident of rape charged and that should have been considered by the trial judge, His Honor the Chief Justice.*

7. The main contention of the learned Counsel for the Appellant with regard to this count was on the premise that the learned Chief Justice had based his decision on the erroneous position that the Prosecution's case was based on two incidents. In order to substantiate his position, learned Counsel for the Appellant referred to paragraph 5 of the Judgment of the Supreme Court, which had stated thus:

> *"Indeed on the basis of the prosecution's opening there was only ever a single incident of alleged Rape, never two".*

Learned Counsel for the Respondent claimed that although there was only one incident of Rape the Amended Information gives two separate counts of Rape as opposed to alternative counts. The Respondent's position was that the Prosecution did not elect which count it preferred out of the two and wanted the Court to decide to which the learned Trial Judge had correctly disagreed.

8. Learned Counsel for the Appellant strenuously contended that, it was never the case before the Supreme Court and at the opening of the Prosecution's case, reference had been made only to one incident. The victim, whilst testifying, had referred only to one incident and at the end of the submissions of the Trial, again reference was made only to one incident. Therefore the submission by the learned Counsel for the Appellant was that, throughout the Trial before the Supreme Court, the case was based only on one incident and therefore by considering the matter as one that was based on two incidents, the Trial Judge had clearly erred.

9. Learned Counsel for the Appellant further contended that the Information given to Court regarding the incident of Rape contained particulars that related only to one incident. It was however admitted by the learned Counsel for the Appellant that, in the given Information, two counts had been drafted and that had been done due to a specific situation that had occurred in the year 2016. According to the learned Counsel for the Appellant, there had been two laws that were applicable in the year 2016. Accordingly until 11/05/2016, the Criminal Code of 1899 was in operation and with effect of 12/05/2016, the Criminal Act had come into effect. It is to be noted that there had been no dispute over this issue as the Trial Judge had admitted this fact and he had correctly pointed out in paragraph 6 of his Judgment that,

> *" . . . . the substantive law changed mid-way through 2016 from the Criminal Code 1899 to the Crimes Act 2016 on 12 May 2016".*

10. A perusal of the proceedings before the Trial Court clearly indicates that on 18/03/2021, learned Counsel for the Appellant had filed Amended Information before the Supreme Court. In that the learned Counsel had stated that the Responded is charged with the following offences:

> "**COUNT 1 Statement of offence Rape**:
>
> Contrary to Section 347 as read with Section 348, of the **First Schedule of the Criminal Code Act 1899. Particulars of Offence TT**, in Nauru, between the 1st January 2016 and 11th

May 2016 had carnal knowledge of a girl, namely or referred to as **VV**, without her consent.

Count 2 Statement of Offence Rape of a child under 16 years old:

Contrary to 116(1) (a) and (b) of the Crimes Act 2016 **Particulars of offence TT**, in Nauru, between the 12th May and 31st December 2016, intentionally engaged in sexual intercourse with **VV**, a child under the age of 16 years".

11. Learned Counsel for the Appellant was quite clear in his submissions that there had been only one incident of Rape that had taken place in the year 2016. In fact the victim had given evidence of only one single incident that occurred. However, it is not disputed that the Appellant's claim that only one incident had taken place in the year 2016, is not supported by the Amended information. It is not disputed that in the Amended Information, two separate Counts of Rape are given, as opposed to Alternative Counts.

12. Learned Counsel for the Appellant contended that he is relying on what has been stated in Blackstone's Criminal Practice (1995, paragraph D8.16, pg.1164) that speaks of Duplicity Generally. He referred to the following section of that paragraph, which states thus:

"Each count in an indictment must allege only one offence (see Indictment Rules 1971, r. 4(2), which requires that, where more than one offence is alleged in an indictment,

each offence 'shall be set out in a separate paragraph called a count')".

13. Learned Counsel for the Appellant further contended that there is reference made in the same paragraph to the decision in **R** v **Greenfield** ([1973] 1 WLR 1151), where it had been stated that,

> *"Shortly before the trial started, the defence counsel asked prosecuting counsel to deliver particulars of the conspiracy count, but was told that the prosecution opening would give the defence all the particulars they needed. In the opening speech, it was made clear that the prosecution alleged only one conspiracy in which all the accused named in the count had joined".*

14. Relying on this paragraph, learned Counsel for the Appellant submitted that when the Trial was taken up in the Supreme Court, at the opening of the prosecution case, it was clearly stated that Rape was being alleged against the Appellant and that there was only one incident involved. Accordingly the submission of the learned Counsel for the Appellant was that, there was consistency in the Prosecution case, which only referred to one incident at the opening by the Prosecution, at the end of the Trial and that the victim had testified to only one incident. Moreover he submitted that the Information contained particulars that relate to one incident and the two Counts in the Information was drafted to reflect the two laws that were in existence in the year 2016.

15. It is to be noted that learned Counsel for the Appellant has admitted that although there are two Counts, that there had been only one incident. He further contended that the Prosecution has the liberty either to proceed with one Count and withdraw the other or to proceed with both Counts. Having said that, the learned Counsel for the Appellant further contended that there was no election by the Prosecution and had proceeded with both Counts.

16. In support of this position learned Counsel relied again on a passage in Blackstone's Criminal Practice (supra at pg. 1400) on Duplicity of the Information, where it is stated that,

> *". . . the prosecution can cure an information bad for duplicity after the trial had started. If such a defect is spotted during the trial, the court must call on the prosecutor to elect on which offence he chooses to proceed. The other offences will be struck out and the court will proceed to try the information afresh, subject to the need to consider an adjournment if the accused requests one and it appears that he has been unfairly prejudiced. If the prosecutor fails to elect, the information must be dismissed".*

17. Referring to the aforementioned paragraph, learned Counsel for the Appellant strenuously contended that in the Supreme Court, the Chief Justice erred by combining two different dates with one incident on one Information.

18. Originally at common law, several offences could have been included in one Information. For instance in **R** v **Swallow** ((1799) 8 T.R. 258) Lord Kenyon C.J. upheld a conviction for three gaming offences contained in one Information, stating that it was the common practice. However, due to statutory intervention, this practice changed and several decisions (**R** v **Holland** (1794) 5 T.R.607, **R** v **Morley** (1827) 1 Y & J 222, **Jones** v **Sherwood** [1942] 1 K.B. 127) had indicated that the principle of rejecting duplicitous Informations was well established. Accordingly the rule against duplicity requires that one offence only be included in each Information.

19. In fact, considering the submissions made by the learned Counsel for the Appellant, citing Blackstone's Criminal Practice (supra), it is clear that the Prosecutor could cure an Information bad for duplicity by electing the offence that he chooses to proceed. As referred to earlier, the learned Counsel for the Appellant had cited that,

> *"If such a defect is spotted during the trial, the court must call on the prosecutor to elect on which offence he chooses to proceed".*

His contention was that the Supreme Court erred with regard to the drafting of the Information filed in this matter.

20. A perusal of the proceedings before the Supreme Court indicates that the Court had considered the Information that was before the Court. The following are some of the questions directed by the Chief Justice and the answers given by the learned Counsel for the Appellant before the Supreme Court

Q: *The charge is Rape?*

A: *Yes, the charge is Rape*

Q: *Is it not under the Act?*

A: *One is under the Criminal Code 1899 and the other is under the Crimes Act 2016.*

Q: *On the basis of your Information if the Court finds and convicts on Count 1 can the Court convict on Count 2?*

A: *No because there was only one*

Q: *Not asking you to elect it, you should actually elect.*

A: *You can convict on either*

Q: *I want to know which one?*

A: *You can convict on either*

Q: *On the basis of the charges, if the Court convicts on Count 1, can it convict on Count 2?*

A: *No, because there was only one occasion of penetration.*

21. The line of questioning by the Court clearly indicates that an opportunity was given to the learned Counsel for the Appellant to elect and it is obvious that he has not done so.

22. In such circumstances, as pointed out by the learned Counsel for the Respondent, the Information would have to be dismissed. Accordingly it is clear that the first Ground has to be decided in the negative.

23. Since the first Ground has been decided in the negative, although this Appeal could be dismissed on that basis, in the interest of justice, the remainder of the Grounds also would be considered.

GROUND 2

24. *That the learned Chief Justice erred in fact when he stated as he did in paragraph 6 of the judgment, which resulted in an erroneous reference by the trial judge that the information was drafted in a clumsy way. The word 'clumsy' was never stated by the prosecuting counsel.*

25. It is not disputed that the word 'clumsy' was not used by the learned Counsel for the Appellant, but only by the learned Chief Justice in his Judgment of the Supreme Court. That again was in reference to the Amended Information that was submitted by the learned Counsel for the Appellant. It is however to be noted that, there is no contention raised regarding a legal argument, by the usage of the word 'clumsy'. In such circumstances, this Ground of Appeal would fail.

GROUND 3

26. *The learned Chief Justice erred in law and in fact in his judgment when His Honour misconstrued section 29 of the Criminal Code 1899, in that section 29 clearly stipulates the requirement to prove otherwise, i.e. . . . unless it is proved that at the time of doing the act or making the omission, he had the capacity to know that he ought not to do the act or make the omission. This is a rebuttable presumption; and also that the presumption that a boy under fourteen years of age is incapable of*

having carnal knowledge, is also a rebuttable presumption. There was evidence to show that the Respondent penetrated the vagina of the victim.

27. The main contention of the learned Counsel for the Appellant was that the learned Chief Justice had gone on the basis that the presumption stipulated in section 29 of the Criminal Code Act, 1899 is an irrebuttable presumption and that His Honour was selective in his assessment of the evidence.

28. Section 29 of the Criminal Code Act 1899 reads as follows:

> *"A person under the age of seven years is not criminally responsible for any act or omission. A person under the age of fourteen years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. A male person under the age of fourteen years is presumed to be incapable of having carnal knowledge".*

29. The learned Chief Justice, in his judgment had clearly stated that the learned Counsel for the Appellant had not addressed this presumption at all in his submissions and had only stated, based entirely on RT's testimony that, 'TT had pushed his penis inside her vagina and presumably, therefore, the presumption in section 29 had been rebutted'.

30. In order to rebut the presumption stipulated in section 29 of the Criminal Code Act, 1899, it is clear that it is necessary to establish that the Accused had 'carried out the act' by adducing evidence, direct or circumstantial. This position had been endorsed by the Court of Criminal Appeal in Queensland in **B** ((1979) Q.D.R. 417). In that case Campbell, J., emphatically had stated that, the

> *"rebuttal of the presumption may only be done by the calling of proper and admissible evidence" (supra, pg 425).*

31. A careful examination of the proceedings before the Supreme Court clearly indicates that the prosecution had not taken any steps to call any proper or admissible evidence. Although a Medical Officer was called to give evidence there had been no line of questioning regarding male puberty or the sexual potency of the accused at the time of the alleged incident. It is also to be noted that the prosecution had not addressed the issue of the presumption other than merely referring to RT's statement that TT had pushed his penis into her vagina, and had relied only on that statement to state that the presumption has been rebutted. Moreover, there is not even an iota of evidence to show that the prosecution had proved that the accused had the capacity to know that he ought not to have done the alleged act.

32. Learned Counsel for the Respondent referred to the questions raised by the Police when they questioned the Respondent regarding the time he had learnt about sexual intercourse, where he had stated that it had been when he was about 14 years of age. The proceedings clearly indicated that the Respondent had turned 14 in 2018. That had been

two years after the alleged incident, which had apparently taken place in 2016.

33. On a consideration of all the circumstances, it is abundantly clear that the Prosecution had not rebutted the presumption referred to in section 29 of the Criminal Code, 1899.

34. In such circumstances, Ground 3 of the Appeal fails.

35. Ground 4 - *The learned Chief Justice erred in law and in fact in his judgment when His Honor did not act only on the evidence adduced by the prosecution, including the evidence of the victim (victim's testimony) to rebut 'doli incapax'.*

36. Learned Counsel for the Appellant contended that the victim's evidence on the alleged incident alone was sufficient for His Honour the Chief Justice to find the presumption of *doli incapax* to be rebutted.

37. It was not disputed that the prosecution had called several witnesses to give evidence, but the defence had not called any. It was also not disputed that the main issue that had to be considered was based on *doli incapax*.

38. The presumption of doli incapax has been recognized at common law for centuries for the simple reason of protecting immature children from criminal responsibility. This presumption cannot be taken as a defence in a criminal case and is only a part of the offence, which the prosecution has to prove beyond reasonable doubt. Referring to the applicability of *doli incapax* in **R** v **Adams** ((1882) 1 NZLR 311, it was

stated that the Crown had not supplied the necessary 'very strong and pregnant evidence' that the child had the requisite subjective awareness of wrongdoing. In **R** v **Brooks** ([1945] NZLR 584), a 13 year old boy, who was mentally unsound, had killed his mother and his sister. There had been medical evidence that the child suffered from a mental illness, and the Court was of the view that the presumption was not rebutted. On the other hand in **R** v **Rapira** ([2003] 3 NZLR 794) with regard to a charge of manslaughter the presumption of *doli incapx* in regard to a 12 year old was successfully rebutted on the basis of the evidence of a Police Officer and a teacher regarding his behaviour and the evidence as to his reactions after the incident.

39. Among the cases that had considered doli incapax, the Australian High Court decision in **RP** v **The Queen** ([2016] HCA 53), highlights many important aspects pertaining to the rebutting of the presumption. In this case, where there had been charges of aggravated indecent assault as well as aggravated sexual assault, the sole issue at the Trial was whether the prosecution had rebutted the presumption that RP was *doli incapax*.

40. The majority decision in **RP** v **The Queen** (supra), referring to the rationale for the presumption of *doli incapax* had stated that, a child who is aged under 14 years, ' is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea' (supra). It was considered that the said presumption may be rebutted by evidence, but the Court was of the view that,

"No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts" (supra).

41. The reasoning in **RP** v **The Queen** (supra) indicates that in order to rebut the presumption of *doli incapax*, it is necessary to call for coherent, potent and relevant evidence regarding a child's capacity to understand the wrongness of his behaviour at the time of the incident. It also clearly shows that it is necessary to ascertain the child's home environment, his performance in school as well as his behavioural complexities during the time in question. Such type of information would have to be gathered not only from his parents, but also from his siblings, as well as teachers, sports coaches, treating doctors, religious mentors, school counsellors, to name a few.

42. It is therefore clear that in order to rebut the presumption of *doli incapax*, it is necessary to have clear, very strong and corroborative evidence. Having the importance of the presumption in mind, especially as it deals with young offenders, it would be of immense help if there are guidelines given to the investigating officers, to be used when they are carrying out such investigations.

43. As stated earlier the submission of the learned Counsel for the Appellant was that the victim's evidence over the incident was sufficient for the Chief Justice to find the presumption being rebutted as it is a rebuttable presumption. There was no other evidence adduced in order to rebut the presumption of *doli incapax.*

44.It is therefore quite clear that the Prosecution had not rebutted the presumption and therefore Ground 4 of the Appeal would also fail.

45.For the reasons aforesaid, the Appeal is dismissed and the Judgment of the Supreme Court dated 31/05/2021 is affirmed.

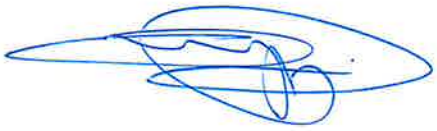
46.I wish to place on record appreciation for both learned Counsel for the Appellant and the Respondent for their assistance rendered to this Court.

Shirani A. Bandaranayake

Justice Dr. Shirani A. Bandaranayake
Acting President of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree



Justice of the Court of Appeal

Justice Colin Makail

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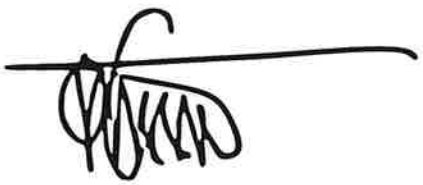

Justice of the Court of Appeal