

IN THE DISTRICT COURT OF NAURU

Criminal Jurisdiction

Criminal Case No. 21 of 1978

THE REPUBLIC

v.

DOUGAL ALIKLIK

CHARGE:

1. Being in a Dwelling House without Lawful Excuse: C/S 424A(a) of the Criminal Code Act 1899, as adopted.
2. Indecent Assault on Females: C/S 350 of the Criminal Code Act 1899 of Queensland - The First Schedule.

JUDGMENT:

The case for the prosecution is that the accused was in the dwelling house of one Mainod Akua without lawful excuse on the 1st December, 1977 and on the 21st October, 1977 the accused unlawfully and indecently assaulted one Sarah Heinrich.

I will first deal with Count 2.

According to the complainant, when she was asleep in the early hours of the 21st October with her sisters Lina and Julia, she felt somebody lie on her. He had his leg on her person and climbed on top of her. At that stage, she woke up and told him to go but he did not do so. When her sister woke up, the accused went. She also stated that she did not invite him to her house nor did she have any prior arrangement to meet the accused elsewhere.

The evidence of the complainant indicates that the accused climbed on top of her without her consent. If I were to accept her evidence, it is difficult to bring her sister Lina's evidence in line with hers. I have examined very carefully the evidence of her sister, witness Lina,

and I find that although there is corroboration as regards the accused's presence that night, her story is somewhat different to that of the complainant. According to witness Lina, she first saw the accused lying by the side of her sister and she goes further and states that sometimes he was lying on top of her, sometimes beside her. In the entirety of her evidence, she does not state that at any stage the complainant resisted by way of action or raised cries or tried to wake up the others sleeping close to her.

If the complainant did not consent to the actions of the accused, it is most unnatural conduct on her part not to have raised cries or done something to attract the attention of the others who were sleeping very close to her. On the contrary, witness Lina has stated that she heard "mumbling" for about five minutes and the impression I had on questioning her is that the accused and the complainant were talking to each other. The question does pose itself as to whether this is the normal conduct of a person placed in the position of the complainant. The answer to this question is that it is not the normal conduct of a person placed in such a situation. It is pertinent to note that the accused left the premises because witness Lina asked him to get out. At first, the accused replied that he wanted to talk to the complainant. Therefore, a great deal of doubt arises in my mind as to whether or not the accused acted against the will of the complainant. The prosecution has only established the presence of the accused and that the accused at some stage or the other was on top of the complainant. It is the duty of the prosecution to negative consent and there is only the evidence of the complainant regarding this fact. It is difficult to reconcile the evidence of witness Lina with that of the complainant.

In these circumstances, the accused is entitled to the benefit of the doubt and I find him not guilty and acquit him on Count 2.

As regards Count 1, there is the evidence of Akua, who was informed by his wife at about 10.00 p.m. on the

1st December, 1977 that she saw somebody walking about in their store wearing something yellow. He went to the store, which is immediately adjoining the house, and saw nobody inside. But when he took his torch and went outside, he saw somebody move about Sohrab's house. It was the accused and he was wearing a yellow shirt. He grabbed his arm and took him to his house and called the police. He told the accused, "You are the person who went into my store", and the accused then asked him to forgive him.

Apart from the fact that the accused asked for forgiveness, there is the fact that the accused was wearing a yellow shirt. The complainant's wife saw a person wearing a yellow shirt inside the store. This evidence, in my view, establishes beyond all reasonable doubt that it was the accused and no other who was inside the store of the complainant and who was seen by the complainant's wife. I, therefore, find the accused guilty on Count 1 and convict him.

9th February, 1978.

R. L. DE SILVA  
Resident Magistrate