REPUBLIC OF NAURU

IN THE SUPREME COURT AT YAREN

CRIMINAL JURISDICTION
CRIMINAL CASE NO. 3/91

T H E R E P U B L I C
INFORMATANT

v

I N A K S C O T T Y
DEFENDANT.

The accused stands trial on 2 charges

(1) Attempting to commit an Unnatural Offence contrary to section 209 of the Criminal Code.

(2) Unlawful assault contrary to section 246 of the Code.

the charges arise out of actions allegedly directed

against a boy Nickos Simon by the accused on the 19th May 1991. At the trial extending over two days the prosecution adduced evidence of the complainant and 8 other witnesses, the accused elected to call no evidence as was his right.

As I have been reminded by counsel, the burden is on the prosecution to prove the charges beyond reasonable doubt. It is on the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence.

As to the charge under section 209. It is necessary for the prosecution to prove:

1. There was an attempt to commit an unnatural act on the complainant.

2. The accused was the person who committed the attempt.

The evidence adduced established that the complainant, a boy of about 12 years old, was walking at about midnight in the vicinity of the house of a Mrs. Cain at Yaren by the Airstrip when a Landrover drove past. It proceeded a short distance then turned around and came back to where he was, it stopped and the driver called to him. He went over to the vehicle, the driver pulled him by his wrist into the vehicle and drove off with

him. No words were spoken. The driver was not known to the boy. The vehicle was driven around the Airport area and finally ended up in a bush area behind what is known as Reynaldo's. The only action until then by the driver in relation to the boy was to give him a can of beer to hold. The car lights were left on after the vehicle come to a stop the driver then asked the boy if he could "fuck his arse" which, of course, means have carnal knowledge of the boy. The boy refused at which the man grabbed him by the front of his shirt and threatened to hit him if he did not submit to his will. The man then took off his trousers and pulled off the boy's pants. He then asked the boy to have oral sex with him and pushed the boy's head down to his penis the boy complied with the request. The man then told the boy to lie in the other direction as he proposed to have anal intercourse with him. The boy did as he was told. He looked back, saw the man using baby oil to lubricate his penis. The boy asked for some and was given it by the man who then proceeded to put the bottle down. At this point the boy jumped through the open window of the vehicle and ran towards the road. He was naked. Near the road he found a cardboard box which he used to cover himself. He then went across the Airstrip to the Police Station which was almost opposite to where he had been.

At the Police Station he was seen by Sergeant

Kapua. He was, according to the officer, agitated and frightened and naked apart from the covering of the cardboard. Told the Sergeant he had been sexually assaulted by a man. He described how he had been picked up by the man and related what subsequently happened. His account was identical with that which he gave in evidence in this case. He gave the Sergeant a description of his assailant whom he did not know by name. He also described the motor vehicle in which he travelled. As a result of what the complainant told him the Sergeant ordered a car patrol to search for both the assaillant and the vehicle. It could not find the vehicle but suspected it could be that owned by the accused. The patrol consisted of Constables Deireregea and Star as well as a Police Cadet. It returned to the Station. After seeing the boy, the two constables went to the accused's house with him. Constable Star went to the house and called the accused. There was no answer. The house was in darkness. He returned to the car, obtained a torch and then went to a window he believed to be the accused's room, shone the lit torch into the room and saw the accused. He called to Const. Deireregea who came over with the boy who looked through the window the torch being shone through it. The accused was lying on a bed with his face to the window. The boy said "that's the man and he is wearing the same clothes". The clothes were said by the boy to be dark brown long trousers and brown belt. The

accused was not wearing a shirt. The policeman communicated with Sergeant Kapua at the Station seeking permission to arrest which was refused. They returned to the Station.

At about 6 p.m. the same day a posse of policemen went to the accused's house and surrounded it. Sgt. Norio on being advised about 8:10 p.m. that a person was seen walking up and down in the house, went there and at the front door called the accused by name. There was no response. He then directed Constable Farmo to break into the house which he did by putting his hand through an open louver and opening the door. Farmo proceeded to the bedroom and then to the bathroom where he found the accused brandishing a spear. A short skirmish occurred and the Constable's hand was slightly cut. The accused was arrested without warrant. I held that he should not have been so arrested and evidence of the consequences of the arrest are not admissable. The only other evidence adduced was worthless. "Out of the Blue" Const. Star produced some 20 photographs of a motor vehicle and an area of bush. As Mr. Aingimea submits the photos of the vehicle prove nothing. Likewise those of the area. (explain why). The evidence is worthless.

Counsel for the accused submits that the accused should be acquitted of the charge under section 209.

He submits:

1. If the evidence of the accused's action in relation to the complainant is accepted, then it does not constitute an attempt. He relies on Jones v Brooks & Anor (1968) 52 C.A.R. 614. The headnote correctly states the position

> Where the act alleged to constitute an attempt to commit a crime is equivocal, evidence of the intention of the defendant is relevant in order to establish towards what object the act was directed. Once the intention of the defendant has been proved, it still remains for the prosecution to prove that the act itself was sufficiently proximate to amount to an attempt to commit the intended crime.

Here the evidence is certainly not equivocal. The accused tells the boy he is going to have anal sex and requires him to get into the position for it: He anoints his penis with oil. It is my view, these actions of the accused clearly indicated an intention to have carnal knowledge with the boy. What happened next namely the telling of the boy what he was to do and the preparation to do it clearly that the actus

reus necessary to commit the offence was immediate - there was no remoteness. This submission is untenable.

2. As to identification, counsel submits the evidence of the boy was unsatisfactory in that he could not have been able to recognise the accused at the time of the incident as it was dark and that the subsequent identification through the window was the result of the suggestion to him by the police officer.

In any case evidence of the second identification should be disregarded as it was obtained as a result of the police unlawfully entering the premises of the accused.

I should state here that I am completely satisfied that the complainant boy was a truthful witness. He gave his evidence in a manner which was commendable. As to the submission that his identification of the accused through the window was not the result of his own observation but as a result of the identity being suggested to him, I reject it. His spontaneous answer to the question put to him in re-examination by Mr. Audoa left me in no doubt that the identification of the accused was his alone

umprompted by any outside suggestion. The question was "Can you remember the words policeman used when he took you to the house?" Answer "He said, 'hey come and have a look at this man, I said yes its him". But apart from that I have no doubt whether the boy was telling the truth when he said he was able to see the accused when they were in the Land Rover. There were lights on and it was a considerable time during which they were together. I accept the boy's identification of the accused as reliable.

Insofar as the submision that the second identification of the accused shall be disregarded as inadmissable because of the manner in which it was obtained, it is the law that except in the case of confessions or analogous matters. The method by which evidence is obtained is strictly irrelevant. In Jeffrey v Black(1978) 1 All E. R. 555 the position is stated by Lord Widgery C.J. at pp. 558 (line J2) to 559 (line c.1)

> It is firmly established according to English law that the mere fact that evidence is obtained in an irregular fashion does not of itself prevent that evidence from being relevant and acceptable to a court. The authority for that is Kuruma Son of Kaniu v Reginam, and I need only refer to one passage to make good the proposition which I have already put forward:
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> > 'In their Lordships' opinion, the test to be applied in

> considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. While this proposition may not have been stated in so many words in any English case, there are decisions which support it and, in their Lordships' opinion, it is plainly right in principle.'
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> There one has that pronouncement from the Privy Council, and I have not the least doubt that we must firmly accept the proposition that an irregularity in obtaining evidence does not render the evidence inadmissible. Whether or not the evidence is admissible depends on whether or not it is relevant to the issues in respect of which it is called.
>
> I am satisfied the evidence here is admissable.

I allow it.

3. Finally, he submits, in cases of this kind, it is necessary there be corroboration which supports the evidence of the complaint. Independent testimony which implicates the accused, which confession in some material particular not only the evidence that a crime has been committed but that the defendant committed it. He submits there is no corroboration and stresses that a complaint is not corroboration citing R v Evans (1925) 18 Cr. A. R. p. 125 and other authorities thereon. It is true a complaint by the

complainant cannot corroborate his evidence but facts surrounding the complaint can. In Redpath v R (1962) 46 C.A.R. 319 Lord Parker C. J. at pp. 321-2 said:

> Mr. Harper has argued that the distressed condition of the complainant is no more corroborative than the complaint, if any, that the complainant makes, and that while the latter merely shows that the story is consistent and is not corroborative, so the distressed condition is not corroborative. This court is quite unable to accept that argument. It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as

> corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly the jury should be told that they should attach little, if any, weight to that evidence, because it is all part and parcel of the complaint. The girl making the complaint might well put on an act and simulate distress. But in the present case the circumstances are entirely different.

See also R v Richards (1965) Q. S. R. 354

The conditions surrounding the complaint are, in my view already corroborative. The boy escapes, his first reaction is to go to the Police whose who enforce the law not only to complain but to ensure that they apprehend the accused. Sgt. Kapua says he was agitated and frightened. He was naked. I am satisfied that condition of the complainant is capable of amounting to corroboration of his evidence that the offences named were committed. Furthermore, the evidence of the

policemen of the identification by the complainant of the accused at his house is confirmation of the boy's evidence that he recognised the accused. Finally significance must be given to the conduct of the accused when the police tried to talk with him at his home. He was inside, he was asked to come out. He would not respond to the police calls. When he was confronted he met the police officer with a spear. His failure to come out in response to the Police request, his endeavour to conceal himself and his subsequent conduct I consider is consistent with that of a person who has reason to avoid the police because of some wrongdoing. It is not consistent with one who has nothing to hide.

On weighing all the evidence being satisfied that there is sufficient corroboration of the complainant's evidence and considering the submissions made to me I am satisfied beyond reasonable doubt that

1. There was an attempt within the meaning of section 4 of the Criminal Code to commit carnal knowledge of the complainant against the order of nature.

2. The accused was the person who committed that attempt.

I accordingly find him guilty of the offence as charged under section 209 of the Criminal Code.

He is convicted and remanded in custody for sentence on Thursday 23rd August at 10 a.m. A Report from the Probation Officer is ordered.

Insofar as the charge under section 246 of the Code is concerned that must be considered in the alternative and I give leave to withdraw it.

CHIEF JUSTICE

16th August 1991

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