



IN THE SUPREME COURT OF NAURU

AT YAREN
CRIMINAL JURISDICTION

Criminal Case No.21 of 2019

BETWEEN

Republic

V

Thadius Namaduk

Before: Rapi Vaai, J

APPEARANCES:

Counsel for the Prosecution: Susan Serukai
Counsel for the Accused: Francilia Akubor

Date of Hearing: 6, 7, & 8 April 2020
Date of Submissions: 17 April 2020
Date of Ruling: 29 April 2020

Case may be cited as: *Republic v Namaduk*

RULING

Introduction

1. The accused aged 21 is charged with rape of a 20 year old female (complainant) on the evening of 30th November 2019 at the Jules Night Club, Denig District, contrary to section 105 (1) (a) (b) (i) (ii) of the Crimes Act 2016. That section reads:

“105 Rape

(1) A person (the ‘defendant’) commits an offence if:
(a) the defendant intentionally engages in sexual intercourse with another person; and
(b) the other person does not consent to the sexual intercourse and the defendant:
(i) knows that fact; or
(ii) is recklessly indifferent to consent of the other person.”

2. At trial the accused conceded he had consensual sexual intercourse with the complainant.
3. Consent is defined in Section 9 Crimes Act 2016.

“9 Definition of consent

(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;*
- (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 1 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;*
- (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.”

4. The prosecution case against the accused is that the complainant did not consent to the sexual intercourse because;
 - (i) The complainant did not have the cognitive capacity to give a free and voluntary consent (Section 9(1), and
 - (ii) The complainant did not have the cognitive capacity to consent because at the time of sexual intercourse the complainant was intoxicated to the extent that she could not choose to consent or not to consent (Section 9(3)(b).

The Prosecution Case

5. On the evening of the 30th November 2019, the complainant a 20 year old married woman with two young children together with her older sister and some friends visited the Jules night club before 7pm. It was a barrel night. Patrons paid \$20.00 at the door and got free drinks of punch (juice and vodka) and beer from 6.30 till 8pm. After 8pm the customers pay for their drinks. The complainant, her sister Tina and friends started drinking punch about 6.30pm.
6. During the course of the evening the complainant and her friends moved outside to the beach and continued drinking while Tina the older sister joined some friends on the deck. The complainant drank about two cans of beer at the beach before she returned to the deck to return Tina's phone which she was using. At the deck she joined some friends at the bar and drank another can of beer there. She told the court; "I was telling stories with my friends there until my drink finished. I stayed there until I started blacking out". When she was asked to explain what she meant by blacking out she said; "I was falling asleep, I felt like I was falling asleep".
7. The events which followed her blacking out or falling asleep at the bar is relied upon by the prosecution as the basis for the rape charge. After telling the court that she felt like she was falling asleep she was then asked;
(Q) When you felt this way what do you recall happened next?
(A) I felt someone holding my hand and leading me towards the VIP section.

She knew or recalled that person to be the accused. She also told the court the accused was kissing her on the neck and face. She did not like what the accused was doing so she pushed him away. She was then asked;
(Q) So what did you do when you didn't like what he was doing to you?
(A) As he was kissing my face I must have blacked out because I don't know how he took off my clothes.
8. She told the court that she realised for the first time she was naked after she jumped from the deck of the VIP to the sand below. She was asked why she jumped. She responded she did not want him on top of her. She pushed him away because she wanted to take a breath. She was asked;
(Q) Why were you pushing him away?
(A) Because he was on top of me trying to kiss me.
(Q) So how many times did you try to push him?
(A) Twice
(Q) Did you ask him to stop at any time?
(A) No I was speechless and tired.
(Q) Did you scream?
(A) No because I was out of breath and my body was weak.
(Q) Can you explain what else you recall when you were trying to push him away?
(A) I often black out but when I jumped to the sand my memory started coming back to me.
9. When she was again asked why she jumped she said she did not want to have sex with the accused. She could not recall having sex because she often blacked out.

10. Under cross examination the complainant denied speaking to the accused all night. She denied asking him for a drink and cigarette, she denied dancing with the accused, she denied kissing the accused at the bar or on the dance floor. She also denied it was her idea to go with the accused to the VIP area. She denied telling the accused to open the VIP door; she denied kissing, undressing and lying down on the VIP floor. She also denied that after sexual intercourse at the VIP the accused told her that he will wait outside.
11. Mr. Taleka a 53 year old married man in charge of the DJ area at Jules saw the complainant running away from the VIP area. He told the court;
(Q) And can you explain to the court what time you saw this person running, do you recall what she was running from?
(A) I don't know why she was running.
(Q) And what else did you see when you saw her running?
(A) She was trying to get down or jump from the upper part of Jules.
12. Mr. Taleka was questioned under cross examination if he saw the accused the same evening. Mr Taleka told the court that after the complainant fell he saw lots of people were with the accused. Mr Taleka asked the accused how he could do such a thing and the accused responded: "She wanted him".
13. Tina Cain, the complainant's older sister went to check on the complainant after she fell. She confronted the accused after one of the complainants friends told Tina that the accused was with the complainant. Tina assaulted the accused by whacking him with her handbag and slapping him on the face. The accused told Tina he was not at fault.
14. Both Tina and the complainant did not want the Jules management to call the police. They wanted to go home instead.

The Defence Case

15. The accused testified. He was drinking beer with his brother and uncle at Jules. During the course of the evening on his return from the bathroom he met the complainant. They talked and he bought her a beer and a punch which she requested. He then joined his brother and continued drinking.
16. At one stage during the evening he walked over to the DJ to arrange for some music and on his way back to the bar the complainant who was standing by the music box on the dance floor pulled his hand towards her, kissed him and asked him for a cigarette. He gave her a cigarette which she smoked. She later asked him to follow her while she was holding his hand. They went upstairs to the VIP door which was locked. He opened another door and they both went inside the VIP room. He followed her inside.
17. Inside the VIP room she held him and they started kissing. She then lay down on the floor where they continued kissing. She then proceeded to undress herself; he also got undressed and proceeded to have sex.
18. When they finished he got dressed. He then handed her clothes to her and told her he will wait outside. He did wait outside. He then descended the stairs and was confronted by the

security who questioned him if he was with the complainant and he responded "Yes". It was then he discovered that the complainant was on the sand below the VIP balcony.

19. He was on his way to see the complainant when he met Tina, who not only accused him of rape but also proceeded to assault him. He told Tina he did not rape the complainant.
20. When he realised the police have arrived, he went outside and walked to a nearby store where the police came and arrested him. He told the court he walked to the store because he did not want the police to arrest him inside the night club.
21. The manager of Jules on duty also testified. Veronica aged 42 was on duty; she gave the police a written statement when requested by the police as to the events of the evening in question. She was not invited by the prosecution to testify.
22. Veronica testified that her duties after the bar opened at 6.30pm and commenced serving drinks included going round the tables collecting empties, ensuring patrons are not behaving aggressively, check on bartenders and the likes. She recalled noticing the accused and the complainant in one of her rounds about 7pm. The two were sitting together as if they were acquainted. At that time she didn't know who they were. She thought at that time they were like a couple from the way they were sitting close together, dancing, and the way the complainant was holding onto the accused.
23. After the complainant had jumped onto the sand, Veronica; after attending to the complainant and notifying the police inquired as to the perpetrator of the incident and she was quite surprised when the accused who was standing not far away was identified as the offender. She said to the person who identified the accused, "What, Aren't they together? She was asked to explain why she thought the complainant and the accused appeared well acquainted, She responded;

"They were really holding onto each other at stage where they were kissing, she was her arms and on to him. But he wasn't even pushing her away. I thought otherwise I would have, you know, asked my bouncers to check that out about her, because sometimes we do that at work. We know who is drunk and who is being taking advantage of. But this, I've thought that they were acquainted, a couple."

24. When Veronica attended to the complainant after she fell onto the sand, the complainant and her sister Tina were both angry. Tina was slapping the complainant and telling her she wanted or words to that effect. Veronica pushed Tina away. She then questioned the complainant who told her two guys raped her, and then changed her story, one guy raped her. The complainant said no when Veronica told her she will ring the police.

Discussion

25. It is common ground that the complainant has been consuming alcohol and was intoxicated when she had sexual intercourse with the accused at the Jules VIP room. The prosecution case is that the complainant was in such a state of intoxication that she was incapable of granting consent. The defence on the other hand contends that although the complainant was intoxicated, she was not so intoxicated that she could understand what was happening

and she was capable of giving consent and she instigated or encouraged the sexual intercourse.

26. Consent of course is a state of mind. In the context of the law of rape the authorities and the statutes have established that consent must be free and voluntary.
27. The question of whether a complainant consented is a question of fact. In jury trials the issue of consent is a question of fact for the jury to decide.
28. There is no special rule applicable to drink and rape. In *R v Lang*¹ the English Court of Criminal Appeal said; “we have no doubt that there is no special rule applicable to drink and rape. If the issue be as here did the woman consent? The critical question is not how she came to take the drink, but whether she understood her situation and was capable of making up her mind”.
29. In “*R v Francis*”² in a joint judgment of Davies and Dennack to which Macrossan CJ concurred it is said at page [305]: “It is not correct as a matter of law that it is rape to have carnal knowledge of a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that that at least includes the case where the carnal knowledge is consensual notwithstanding that the consent is induced by excessive consumption of alcohol. The critical question in this case was whether the complainant had by reason of sleep or a drunken stupor been rendered incapable of deciding whether to consent or not”.
30. Mere submission in consequence of force or threat or for any other reason is not consent. In “*R v Olugboja*”³ The English court of Criminal Appeal considered a statutory offence of rape comparably worded to Section 105 of the Crimes Act 2016. The Court after outlining the general directions which trial judges should make to the jury on the issue of consent commented at 449;

“In addition to the general directions about consent which we have outline, the jury will probably be helped in such cases by being reminded that in this context consent does not comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Whereas it is to be drawn in a given case is for the jury to decide, applying their combined good sense, conscience and knowledge of human stature and modern behaviour to all relevant facts of that case.”

31. Was the complainant so grossly intoxicated that she was unable to comprehend what was occurring and so was unable to grant consent? The answer to this issue is not difficult to extract from the evidence. Both the accused and the complainant were observed by the bar manager during the course of the evening. They were dancing, talking and kissing as if they were a couple. Their conduct did not cause concern to the management of excessive drinking which would have required management to take appropriate steps. The bar

¹ [1976] Crim App. Report 50

² (1993) 2 Qd R300

³ (1981) 3 All ER 443

manager was not only sober; she also has no connection to either the complainant or accused.

32. By her own testimony the complainant remember being pulled by the hand and she walked from the bar to the VIP area. She remembers being kissed inside the VIP.
33. The court is deeply troubled by the complainant's testimony as to the events of the evening. The independent testimony of the bar manager tends to boost the credibility of the accused's account of events. As a result the complainant's account which was tendered to boost her agenda that she was grossly intoxicated, she lacked the understanding of her situation necessary to enable her to make a choice, can be confidently classified as thin unreliable and illogical. She was not grossly intoxicated.
34. Experience of human nature and good sense must be applied when considering the conduct of both the complainant and accused who were both under the influence of liquor. This is particularly important when the issue of whether given her state of intoxication was she able to comprehend the events of the evening and so be able to decide whether or not to consent. Good sense and experience tells us that people are affected by alcohol even to the point of being drunk and the way in which their behaviour can change. And so it is often the case that people may do things when intoxicated that they would not do when sober. When the complainant gave account of the evening at Jules she looked back to that night with sober eyes unaffected by alcohol. She obviously regretted what she saw and would probably have preferred to act differently and that undoubtedly affected her testimony.
35. Moreover her conduct before the visit to the VIP room was as earlier alluded to was observed by a sober mature night club manager. She obviously acted in a suggestive and forward way which encouraged sexual activity. The bar manager thought and genuinely believed the accused and complainant were a couple. Her state of intoxication regrettably caused her to behave irresponsibly in a way she never would have done if she was sober.
36. In *R v Bree*⁴ The English and Wales Court of Criminal Appeal dealt with the issue of consent in a situation where the complainant who lost consciousness as a result of excessive assumption of alcohol regained consciousness at the time the appellant was having sexual activity with her. The complainant alleged she did not consent, Lady Justice Hallet said at [26]:

"In cases which are said to arise after voluntary consumption of alcohol, the question is not whether the alcohol made either or both less inhibited than they would have been if sober, nor whether either or both might afterwards have regretted what had happened, and indeed wish it had not. Moreover it is not a question whether either or both may have had very poor recollection of precisely what had happened. They may be relevant to the reliability of their evidence. Finally and certainly it is not a question whether either or both were behaving irresponsibly. As they were both autonomous adults the essential question for decision is as it always is, whether the evidence proved that the appellant had sexual intercourse with the complainant without her consent."


⁴ (2007) EWCA Crim 804,

37. The evidence as alluded to above discloses conduct of a complainant who was a willing participant in the sexual activity on the evening of the 30th November 2019 at the Jules night club. As a consequence the count of rape against the accused should be dismissed and is dismissed.

Result

The count of rape alleged against the accused is dismissed.

Dated this 29 April 2020


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Rapi Vaai
Judge

