



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Criminal Case No. 1 of 2019

BETWEEN

Republic

v

Damoon Akibwib

Before: Khan, J  
Date of Hearing: 17 and 18 February 2020  
Date of Judgement: 20 February 2020

Case may be cited as: *Republic v Akibwib*

CATCHWORDS: Criminal law – Sexual intercourse without consent – Complainant was asleep – Where defendant denied any sexual contact – Where defendant in unsworn statement admitted to performing oral sex – Probative value of unsworn statement.

APPEARANCES:

Counsel for the Prosecution: S Serukai  
Counsel for the Defendant: R Tagivakatini

## JUDEMENT

### INTRODUCTION

1. The accused is charged with one count of rape which reads as follows:

#### Statement of Offence

RAPE: Contrary to s.105(1)(a), (b)(ii) and (ii) of the Crimes Act 2016.

### Particulars of Offence

Damoon Akibwib between 26 and 27 December 2018 at Meneng District, Nauru, had sexual intercourse with Mulan Detenamo without her consent and at such time, Damoon Akibwib was recklessly indifferent to consent of Mulan Detenamo.

2. I shall refer to Mulan Detenamo as the complainant.

### RELEVANT LAW

3. Under s.8 of the Crimes Act 2016 (the Act), sexual intercourse means
  - a) the penetration, to any extent, of or by any part of the person's genitals with any part of the body of another person; or
  - b) the penetration, to any extent, to the anus of a person by any part of the body of another person; or
  - c) the penetration, to any extent, of or by any part of a person's genitals by an object, carried out by another person; or
  - d) the penetration, to any extent, of the anus of a person by an object carried out by another person; or
  - e) oral sex; or
  - f) The continuation of an activity covered by paragraph a) to e).
4. 'Consent' is defined in s.9 of the Act where it is stated that:
  - (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 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 resistant to an act is not, by reason only of that fact, to be regarded as consenting to the act.
5. 'Oral sex' is defined as: means to bringing into contact of any part of the genitals or anus of a person with any part of the mouth (including the lips or tongue) of another person.

#### PROSECUTIONS CASE

6. The prosecutions case is that the accused had sexual intercourse with the complainant by penetrating his penis in her vagina and when the alleged sexual intercourse took place the complainant was asleep.

#### COMPLAINANT'S VERSION

7. On 26 December 2018 the complainant started drinking alcohol with her friends Patrick, Doke, Ann and Anesi and Kerry at about 1am in Boi District. They were drinking Vodka (AK47) mixed with water and they drank until 2am when they decided to move to Darcy Jeremiah's house at Meneng District. By then they had not finished drinking one bottle of vodka.
8. At Darcy Jeremiah's house they joined in Billy, Acsi, Glam, Kiere, Joshua, Daniel and B-Joy. At about 6am they decided to move to Akibwib's residence.
9. They arrived at Akibwib's residence at around 7 am. The 2-story house belongs to the defendant's mother and the defendant occupies one room downstairs. Having arrived at the Akibwib's residence they were joined by 6 others. She did not know their names except B-Joy and Billy. They did not drink much as the drink had finished and some boys went to buy more alcohol.
10. At around 10-11am the complainant's friends Ann, Anesi, Kerry, Patrick decided to leave and asked her to go with them but she refused and told them that she wanted to stay back. They told her that they will come back and fetch her later.
11. At around 10-12 noon the complainant and Billy went to Billy's house and returned on a motorbike shortly after to Akibwib's residence.
12. At Akibwib's residence they were drinking vodka and the complainant and Billy also joined in the drinking and Damoon Akibwib was there as well.

13. The complainant and Billy did not want to drink for long as they were planning to go inside the house and have sex. Damoon told them to use his room and he led them to his room.
14. When they got into the Damoon's room they found that Acsi was sleeping on the floor and after Damoon left they locked the door from inside and lay on the bed and had sexual intercourse, which according to the complainant did not take long. The complainant was still wearing her bra and shirt and she had taken off her panties and her  $\frac{3}{4}$  jeans (knee length).
15. After they had sex, both of them put their clothes on and went off to sleep.
16. Her account of what happened next is as follows:

"When I woke up Billy had left and someone else was on top of me. He was a male. He was holding on to me. I felt his penis inside my vagina. He was holding on to my chest and I tried to push him away and he was holding on to me. At this time, I was on my back and my legs were spread apart. He was on top of me holding me on to my chest. At this point in time I was wearing my shirt and bra. I don't know what happened to my panties and jeans. When he was holding me down I felt powerless. I was uncomfortable and it was not enjoyable. I felt his penis in my vagina. It was painful and I was not comfortable.

Question: Why were you trying to push him?

Answer: Because I had seen the face of the person. It was Damoon and I did not like it and I was not comfortable.

Question: Did you at any time give consent to Damoon to insert his penis in your vagina?

Answer: I did not tell him.

Question: When he was penetrating you did you scream?

Answer: No I did not as I felt powerless. Damoon was an arm length away from me. At that point in time it was sunlight and I woke up I saw the sunlight and I saw his face. Sunlight was coming from the window. It was big window. There was no curtain but a clothing material but was not properly closed – the material did not cover the whole window – it covered half the window. Sgt Seraima took photo of the window.

Question: How long was the Damoon holding on to your chest?

Answer: He held on to me until I knocked out and went on to sleep. He was holding on to my chest by pressing it down. When I woke up he was holding on to my chest and then I went off to sleep again. I don't recall who took off my panties and jeans as I was asleep.

Question: Were you able to recall how long he had his penis in your vagina?

Answer: I don't remember how long but when I woke up his penis was in my vagina until when I went off to sleep.

Question: Why did you fall off to sleep when you were uncomfortable?

Answer: I was really sleepy and I had no power to wake up. When he was on top of me he did not say anything to me. When I tried to push him I told him to stop he just continued.

Question: When you said he continued, what did he continue to do?

Answer: Continue penetration in my vagina with his penis. I told him to stop 3 times.

Question: Did he ever stop?

Answer: He did not stop.

Question: When he did not stop how did you feel?

Answer: I felt he kept squashing me and I was not comfortable and I felt helpless."

17. The complainant later was awoken by Mikeson and came out of the house and met Billy and was crying and she had told him that Damoon had sexual intercourse with her without her consent and his response was that nobody entered the room. She told him to drop her home.
18. When she arrived home, she just went off to sleep and she later contacted her friend Rose-Anna Dageoago and told her that she was scared. When she was asked what she was scared of she said that Damoon had sexual intercourse with her without her consent.
19. Later that night she was in contact with Sgt Seraima, who is a relative, and the next day she went to the police station with her mother to lodge a formal complaint.
20. She stated that she only met Damoon on that day and they had drank together for some time before the incident and interacted with each other. She was asked as to how she recognised him given that they only met for the first time and her response was:

"Because that day was a nightmare to me when I looked up and saw his face on top of me I can never forget his face that I saw."

#### CROSS EXAMINATION

21. In her cross examination she agreed that at Akibwib's house she was a bit drunk and she further said that when her friends left she told them that she wanted to stay back with Billy and not to have more drinks.

22. She was asked if the window was fully covered and her response that it was only half covered. She refuted the suggestion that she drank a lot of vodka before she went into the room with Billy and said that she knew what she was doing and she remembered having sex with Billy and then both of them went off to sleep.
23. It was suggested to her that nothing happened to her after she had sex with Billy until she was awoken by Mikeson and her response that she woke up later when someone was having sex with her and she felt squashed and uncomfortable. She denied the suggestion that she blacked out after having sex with Billy and until she was awoken by Mikeson and again she said that she was being squashed in her sleep when she woke up and she saw his face.
24. She denied the suggestion that she did not recall anything and was told later by others.
25. She was further cross examined as follows:

“Question: I am suggesting to you that on that day when you were awoken by the person on top of you, you were mistaken about his identification – it was not Damoon.

Answer: From what I remember he was the person I saw his face.

Question: I am further putting to you that the person who you saw when you woke up was someone else.

Answer: No it was not someone else – it was Damoon.”

#### ROSE-ANNA DAGEOAGO

26. She stated that on 27 December 2018 she received a message from the complainant that she was scared (whereas the complainant states that she contacted Rose-Anna on the 26 December 2018). She called her back. She asked her what was her stay like at Meneng District and the complainant told her that she and Billy had sex in a room. She asked as to what was she scared of and the complainant told her that she was asleep and she saw and felt someone entered the room and disturbed her in her sleep. She asked who this person was and the complainant told her that it was Damoon. She again asked her as to what was she scared of and the complainant's response was that something was not right as she had a stomach ache and her vagina was very painful.

#### CROSS EXAMINATION

27. In her cross examination she agreed that she went with the complainant to the police station and saw her go to the public health care. She agreed that there was rumour on the facebook about the complainant and that she read it after her conversation with the complainant. She was asked whether the complainant told her that she could not remember the name of the person who did that to her and her response was she saw Damoon's face.

### MIKESON AKIBWIB

28. He was at Akibwib's house on 26 December 2018 after daybreak at around 7am with others including Patrick, Joshua, Acsi, Billy, B-Joy, Mulan, Kerry and 3 or 4 others of their friends whose names he does not know.
29. As they started drinking Damoon came and joined them. Sometime later the complainant asked B-Joy 'to take her'. This is the exact words that he used and B-Joy did not want to take them and Billy told her that he will take her, so that she could use the toilet.
30. When Billy took her to the toilet Damoon was still outside and he did not recall how long they were away for. Billy came back later but the complainant did not return.
31. He did not know that Damoon had left their group to go inside the house.
32. He went inside the house to wake up the complainant as she had been sleeping for a long time. When he entered the room, Billy was outside.
33. As he entered the room, he saw the complainant sleeping on the floor next to the door and she was wearing her pants (jeans) and shirt.
34. He had difficulty waking her up so he sat her up and asked her to come out so they could have more drinks.
35. He described the window to be 5.8 x 3.8 in size and the top louvers were missing and there was no curtain. He said it was covered by a blanket except the top portion. He said if the sun was out then it will light up the whole room.
36. The complainant did not speak to him and she just looked in his eyes and it appeared to him that her mind was elsewhere when he was speaking to her.
37. She did not come out and he went back to his house to sleep.

### CROSS EXAMINATION

38. In his cross examination he said that they drank about 10-12 bottles of vodka (AK47 700mls) and he agreed that despite the blanket the sunlight can still come through and light up the room; that there is no electric light fittings in the room, although it is not as bright as the light in the courtroom (which is really bright).
39. He said that when Billy took her to the room she appeared to be normal, however, when he sat her up she was very drunk.

## DEFENCE CASE

40. At the close of the case for the prosecution the defendant elected to give an unsworn statement and in his unsworn statement he stated:

“I don’t even know what to say. I did not have sex with the girl – I only had oral sex with her – only that.”

## CONSIDERATION

41. The charge against the defendant is that he had sexual intercourse with the complainant and that at the material time he was recklessly indifferent to the consent of the complainant.

## CONSENT

42. Consent is defined in s.9 of the Act which means free and voluntary agreement with cognitive capacity. S.9(3) provides that a person does not have cognitive capacity to give consent if the person is asleep.

## RECKLESS INDIFFERENCE TO CONSENT

43. Reckless indifference is defined in s.20 of the Act as:

1) A person is ‘recklessly indifferent’ to consent of another person if:

a) The other person’s consent is required in relation to an act; and

b) 1 of the following applies:

i) The person is aware of the possibility that the other person might not consent to the act but decides to act regardless of that possibility;

ii) The person is aware of the possibility that the other person might not consent to the act but fails to take reasonable steps to ascertain whether the other person does in fact consent to the act;

iii) The person does not give any thought as to whether the other person consents to the act.

Consent is defined in s.9.

2) The question whether a person is recklessly indifferent to consent is one of fact.

44. The Minister for Justice Honourable David Adeang MP on the second reading of his speech of the Crimes Bill 2016 stated as follows on ‘Reckless Indifference To Consent’

“Clause 20 provides that a person is reckless to consent if, in the circumstances where another person’s consent is required for the person to do an act, the first person is aware of



the possibility that the other person might not consent and either decides to do the act any way or fails to take reasonable steps to find out whether the other person consents, or does not give any thought as to whether or not the other person consents.

‘Consent’ has the same meaning given in Clause 9. Sub-clause (2) makes it clear that whether a person is recklessly indifferent to consent is a question to be determined by the decider of fact on the evidence. Clause 105 [rape], provides an example of a fault element of ‘reckless indifference to consent’. That offence arises when a person intentionally engages in sexual intercourse with another person, the other person did not consent, the offender was recklessly indifferent to the consent of the other person. Applying the definition in Clause 20, this means that the offender is aware of the possibility that the other person might not consent to sexual intercourse and either decides to engage in sexual intercourse any way or fails to reasonable steps to find out whether the other person consents, or does not give any thought as to whether or not the other person consents.”

45. In *Banditt v The Queen*<sup>1</sup> it was stated at [13], [14], [77] and [78] as follows:

[13] The appeal to this Court does not turn upon any of these provisions relating to the property offences. Rather, it turns upon the inter-relation between the sexual assault provisions in s.61I and s.61R(1). For purposes which include those of s.61I, and s.61R(1) states:

“[A] A person who has sexual intercourse with another person without the consent of the other person and *who is reckless as to whether the other person consents to sexual intercourse* is to be taken to know that the other person does not consent to the sexual intercourse” (emphasis added)

[14] In the course of his summing up, trial judge Freeman (DCJ) stated the substance of s.61R(1) and continued

“So if you just go ahead and do it willy-nilly, not even considering whether the person is consenting or not, you are reckless and the law says you are deemed to know that the person is not consenting.”

[77] In summing up, the trial judge explained that on Crown case the appellant had penetrated the complainant ‘when she was asleep and consequently no consent can arise.’ His Honour put the alternative Crown case based on s.61R(2)(a)(i), that if the jury thought there was a period during which the complainant was in a waking state but not fully conscious, and appeared to be but was not, consenting to intercourse with the appellant, although she may have been prepared to have intercourse with another person who she believed the appellant to be, there could be no valid consent.

[78] Next, His Honour explained the element of knowledge of absence of consent as it related to this case: that if the complainant’s evidence were accepted, the appellant must be taken to have known that the complainant was not consenting, because he had penetrated the complainant before she had woken up.”

---

<sup>1</sup> [2005] 224 CLR 262

46. The complainant's evidence is that she was asleep after having sex with Billy and she felt squashed and uncomfortable and woke up when she found a person was on top of her with his penis in her vagina. She recognised him as Damoon the defendant; whereas the defence case is that she is mistaken as to his identity. The defence submits that she saw a person but it was not Damoon and it was someone else.
47. Since the issue of identity of the defendant has been raised I must address myself as to the guidelines set in *R v Turnbull*<sup>2</sup> and it was discussed in *Carters Criminal Law*<sup>3</sup> where it is stated at page 616 as follows:
- “Where a case against a defendant depends wholly or substantially on the correctness of one or more identification of the defendant which the defence alleged to be mistaken, the direction to the jury should include a warning of the special need for caution before convicting the defendant and the reasons for such caution. Secondly, the quality of the identification should be considered and the jury should be directed to examine closely the circumstances in which identification was made. Where the quality of the identification is good the jury can safely be left to assess the value of the evidence, but when the quality is poor, the case should be withdrawn from the jury unless there is other evidence capable of supporting the identification. The judge should direct the jury on the evidence that is capable of supporting the identification.”
48. In this matter there is evidence that the sunlight was coming through the uncovered portion of the window; and further the complainant and the defendant drank together for quite a considerable period of time; and that it was the defendant who led the complainant and Billy to his room, so he was not a stranger to her although, they only met on that day.
49. The defendant has suggested to the complainant that she had identified or got the wrong person and yet in his unsworn statement he admits to having oral sex with her. This puts the defendant's credibility in issue and strengthens the case for the prosecution; in particular the complainant's version.
50. The defendant had sexual intercourse with the complainant when she was asleep and her attempt to push him back and even telling him 3 times to stop but he did not do so until she went off to sleep again. The case falls within the ambit of the summing up in [14] of *Banditt* where it is stated and I repeat:
- “So if you just go ahead and do it willy-nilly, not even considering whether the person is consenting or not, you are reckless and the law says you are deemed to know that the person is not consenting.”
51. The defendant was indeed recklessly indifferent to the consent and went ahead and had sexual intercourse with the complainant.

---

<sup>2</sup> [1977] QB 224; [1976] 3ALL ER 549

<sup>3</sup> Seventh Edition – RF Carter

## UNSWORN STATEMENT

52. The defendant in his unsworn statement admitted to performing oral sex on the complainant.

## WHAT IS THE PROBATIVE VALUE OF THE UNSWORN STATEMENT

53. In an article titled 'Silence and Unsworn Statement'<sup>4</sup> he stated at page 17 as follows:

"... an unsworn statement is to be treated as probative material which the jury has to consider along with other evidence in the case, giving such weight to the unsworn statement as they think appropriate. The point arose in the High Court case of *Peacock v R*<sup>5</sup>. The accused was a medical practitioner who was alleged to have performed an unlawful abortion on a young woman. As the result of the abortion the woman contracted septicaemia and died. The accused was charged with murder on the basis of felony murder rule as it then understood. The accused did not give evidence but made an unsworn statement. The trial judge directed the jury that they might treat such statement as evidence and act upon it if it is not in conflict with any other evidence in the case, but where it is in conflict with any other evidence, the jury should disregard it and act upon the sworn evidence. The trial judge further directed the jury that the evidence connecting the accused with the removal of the deceased woman's body from the hospital where the operation was performed and the concealment of it amounted to evidence conflicting with the accused's unsworn statement. The accused was convicted and appealed to the High Court of Australia. It was held that the trial judge mis-directed the jury. Griffith CJ stated:

"The proper direction to be given it seems to me is this:

That the jury should take the prisoner's statement as prima facie a possible version of the facts and consider it with sworn evidence, giving it such weight as it appears entitled to in comparison with the facts clearly established by evidence. Instead of that the jury were advised that if they connected the accused with the concealment with the body they might infer that the appellant killed the deceased woman, that if they drew that inference, they might disregard his statement altogether. That was manifestly the wrong direction and the conviction cannot stand."

54. The defendant's unsworn statement is an admission of a sexual act which on its own can constitute the offence of rape as 'oral sex' comes within the definition of 'sexual intercourse' in s.8 of the Act.

---

<sup>4</sup> By Mr Williams B.Juris., LLB(Hons.) (Monash) BCL.(Oxon), Barrister and solicitor

<sup>5</sup> [1911] 13 CLR 619

CONCLUSION

55. I am satisfied that the prosecution has proved its case beyond all reasonable doubt and I find the accused guilty of the charge of rape.

DATED this 20 day of February 2020



Mohammed Shafiullah Khan  
Judge

