IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 22/2020

BETWEEN

THE REPUBLIC

AND

TAEKAUWEA TAUMEA Defendant

Before: D.V. Fatiaki, CJ
Date of Hearing: 26 February and 1 March 2021
Date of Judgment: 12 March 2021

Case to be referred to as: Republic v Taekauwea Taumea

Catchwords: Indecent Act with a child ; difference between intentional touching and involuntary and unconscious movement ; Crimes Act 2016 – '*physical element'* and *'intention'*.

Appearances:

Counsel for the Republic: R Talasasa (DPP)
Counsel for the Respondent: R Tagivakatini (Public Defender)

VERDICT

1. This case concerns events that occurred in the lounge of a home at Location Compound in Denig District on the early morning hours of 4th November 2020. At the relevant time and place the victim, (hereafter 'SD') was asleep on the floor beside her aunt's bed (hereafter 'SB').

2. As a result of what allegedly happened to SD, the defendant Taekauwea Taumea was charged with an offence of Indecent Act In Relation to a Child under 16 years old contrary to section 117(1)(a)(b)(c)(i) of the Crimes Act 2016.

3. The relevant particulars of the charge reads :

"*Taekauwea Taumea ....on 4 November 2020 intentionally touched or poked another namely SD in her anus through her clothing and the touching was indecent and that Taekauwea Taumea was reckless about that fact and that the said SD was under 13 years old*."

4. There are several features of the charge that requires some comment. The allegation is that SD was touched or poked in the anus while still fully clothed; that the contact was intentional and SD was under 13 years of age at the time. This last allegation is not part of the offence charged and should not have been included.

5. Having made those comments, I remind myself that this being a criminal trial, the prosecution has the burden of proving the defendant's guilt by calling evidence which establishes each and every element or ingredient of the charge to the criminal standard of proof namely, beyond all reasonable doubt.

6. The defendant is presumed innocent until proven guilty and need not call evidence to establish or prove his innocence. Indeed the defendant could have remained silent and said nothing in his defence but, in this case, he chose to give sworn evidence which will be considered and evaluated like that of the prosecution's oral evidence which comes solely from SD.

7. The essential elements or ingredients of the offence that the prosecution must establish are:

a) The defendant touched SD as described in S 117 (5) ;
b) The touching was intentional;
c) The touching was indecent by ordinary community standards ; and
d) SD was under 16 years (not 13 years) of age at the time

8. Elements (a), (c) and (d) are not seriously disputed, if at all, and may be accepted as common ground and admitted facts.

9. The only seriously disputed element is (b) namely, that the touching of SD was "*intentional*". In this regard Section 17 of the Crimes Act 2016 helpfully provides interalia:

"*17* ***Intention***

(1) A person has 'intention' with respect to conduct if the person means to engage in the conduct."

10. To establish this disputed element the prosecution relies primarily on the evidence of SD who testified that on the night in question she had gone to sleep on the floor beside her aunt SB's bed in the lounge of her aunt's home at Location Compound.

11. SD testified that while she was sleeping she felt someone "*playing around*" or "*teasing her*". She was initially reluctant to say how or what it was, but, eventually after some

urging, she said "*The person touched my anus*" asked **Q**: "*who* ?" she **A**: "*Taekauwea*" (the defendant).

12. SD said after being touched by the defendant, she woke and went to the kitchen, then she returned and lay on the bed beside her aunt who woke up and started dressing for work. Significantly, SD did not make any complaint to her aunt SB at the time as might be expected nor did she ask her aunt to remain home and not go to work, given her claims of being afraid of the defendant after what he had done to her. Instead, SD said, after her aunt left she locked herself in the bathroom because she was afraid of the defendant. SD identified the defendant in court. She had known the defendant before the incident because he too, was living at SB's house at Location Compound.

13. Although they lived together and slept in the same lounge area, SD said that the defendant had a separate and different sleeping place from hers. SD was not asked the size or dimensions of SB's lounge nor exactly where in the lounge was their respective sleeping places and how far apart. She accepted however that people sometimes roll or move around in their sleep and small children also fall off beds while asleep. She was unaware if the defendant had moved in his sleep. She admitted she was dressed in a T-shirt and shorts when she went to sleep that evening.

14. In cross examination SD frankly admitted that her aunt had talked to her about her flirty behaviour and her manner of dressing and sleeping with her legs spread apart. She denied spreading her legs and claimed : *"(to) know how her legs are when fast sleep*". SD denied flirting with the defendant or wearing sexy see-through clothes in front of him. SD denied that the defendant had touched or held her on "*the waist*". She agreed her aunt had spoken to her about her behaviour and SD admitted that her aunt had chased her out of the house because of her behaviour.

15. In re-examination SD confirmed that the defendant had touched her anus and when she had woken up and looked at him, he laughed.

16. After a weekend adjournment the prosecution's remaining witnesses were unavailable or could not be located and, after standing the case down for 2 hours with no prosecution witness appearing, the Prosecutor closed his case after the defendant's police caution interview record dated 9 November 2020 was admitted by consent as **Exhibit P(1)**.

17. In his opening address, Defence Counsel stated that the defence challenges the nature of the touching, as well as, the "*intentional*" aspect of the act of touching alleged against the defendant and Counsel advised that the defendant had elected to give sworn evidence in his defence.

18. The defendant testified with the assistance of the Court interpreter, that he is 21 years, in a steady de-facto relationship with 2 children. He usually resides at Yaren District but at the time of the alleged incident, he and his family were living with SB in her house at Location Compound.

19. On the night of the alleged incident, his de-facto partner slept at the Blue Light kava bar where he was drinking kava until the early morning hours. He had started drinking kava from 9 pm the night before and after 8 hours of drinking he was fully doped with kava

when he left for SB's house to sleep. The house was about 50 metres away from the kava bar and he had vomited on his way.

20. On arriving at SB's house he was "*very doped*". He entered and went to sleep in the lounge where all the occupants in the house usually slept. He did not recognise anyone sleeping in the lounge nor was he paying any particular attention. He went to a corner and fell asleep on the lounge floor.

21. While sleeping he didn't know whether or how he had rolled around or moved in his sleep, but he felt a human body which he pulled towards himself and that caused him to wake. When he woke the defendant said he expected to see his partner but, instead, he saw SD and feeling ashamed and embarrassed at his mistake he laughed, changed his position, and pretended to sleep.

22. In cross-examination he agreed that when he had gone to SB's house to sleep, his partner was sleeping at Blue Light kava bar. He agreed that he entered SB's house alone and went to sleep. He agreed his usual sleeping place in SB's lounge was at a corner but if the lounge was full then he slept in the middle of the lounge which is "*smaller than the court room*". He was not asked to estimate the dimensions of the lounge or how far his sleeping place was from SB's bed.

23. The defendant was specifically asked in cross-examination :

"**Q**: *Where you usually sleep is not next to (SD*) ?"

The defendant answered:

"**A**: *We sleep next to each other. Once when I woke up (SD) was next to me. I don't know how I ended up next to her* (on the night in question)."

He admitted thinking that the person he touched and pulled towards him was his de-facto partner. He denied several times touching SD in the anus.

24. Cross examined about his caution interview answer at **Q&A : 19** and **Q&A : 36**, the defendant objected to the police's English translations that incorrectly contained the words: "*corner*" and "*far end of the wall*" in **Ans : 19**. Likewise there was no mention of "*2 adults*" in his Nauruan **Ans : 36**.

25. For present purposes I shall accept and adopt the English translations of the court interpreter to the objected answers which are reproduced below :

Ans 19 : (describing what the defendant did while sleeping in SB's lounge.)

"*When I went in I did not look at anyone near me or next to me when I lay down. I just know that I knocked out when I was sleeping I don't know how I reached near or next to the person that was next to me facing the wall. When I was sleeping I felt I was holding a person next to me I pulled the person closer and it felt comfortable and I remember my hand is on the person's buttocks (obin). I pulled the person and when I woke up I just looked at the person and it was the young person (SD) and then I continued trying to sleep but I wasn't feeling good I was unhappy cause I had just got a place to stay with (SB) who welcomed me and then this happened.*"

Ans 36 : (what he saw on entering SB's lounge)

"*I just saw people sleeping but I didn't really look who they were because I was really doped*."

26. The defendant maintained that he had always used the Nauruan word "*obin*" meaning buttock or bum, in his answers and he had consistently denied using or accepting the Nauruan term "*yan obin*" meaning anus or middle of the buttocks which the interviewing officer had used while questioning the defendant.

27. He denied that he knew and intentionally touched SD or that he purposely slept beside her in the lounge knowing full well that his partner was not sleeping there in SB's lounge. He denied lying about holding his partner, and when pressed, he angrily denied "*giving an excuse*" and asserted he had come to court "*to tell the truth*".

28. As to his state of "*knowledge*" and "*intention*" when he entered SB's lounge, the defendant maintained that he was fully-doped with kava and just wanted to sleep. He did not see or recognise anyone sleeping in the lounge. He said he had been drinking kava since he was 13 years of age. In his own words the defendant described the effects of being doped with kava in the following way :

" *...When you reach dope stage you'll really want to rest. With grog dope you can just fall asleep... grog will make you very sleepy … you could even sleep anywhere on the road like a pig. ..*"

The defendant consistently denied poking or touching SD in the anus.

29. I am satisfied that the defendant's evidence was not a recent invention or an "*excuse*" as suggested to him in cross examination. Indeed, the defendant's answers in his caution interview to **Qns : 18, 19, 27, 28**, and **29** read collectively, is entirely consistent with his sworn evidence in Court even to the extent of confirming SD's evidence that when she turned and saw the defendant, he laughed because as the defendant explained, he was "*embarrassed and ashamed*".

30. In the final analysis, this case is one of "*..she (*SD*) said, he (*the defendant*) said..*" Most of the evidence in this case is common and uncontested even the "*touching*" is undenied, except as to where on SD's body the defendant had touched. SD says she was poked in the anus and the defendant maintained he touched SD's buttock area and held and pulled her around the waist towards himself.

31. It is common ground that the defendant, SD and SB all slept together in the lounge of SB's home. SB slept on a bed in the lounge and the defendant and SD slept on the floor. Although there was a suggestion that SD's and the defendant's normal sleeping places in the lounge are different, there is no reliable evidence or estimate of the actual dimensions of SB's lounge or the floor area used for sleeping. That was an unfortunate lacuna in the prosecution's evidence nor is it known how far apart (in meters) SD's and the defendant's normal sleeping places are in the lounge.

32. Mindful that this was a case of an alleged sexual assault where complaints are easily made and difficult to disprove, I paid close attention to the evidence of SD and the defendant both in-chief and under cross-examination. I was satisfied that both were doing their best

to recall what occurred between them on the night of 4 November 2020. I am satisfied that they were both fast asleep when their fully clothed bodies first came into contact. I am also satisfied that the defendant had rolled or moved in his "*grog doped*" sleep and his hand had come into contact with SD's buttock area and that he had held and pulled SD around the waist towards himself. That was when they both woke up.

33. I do not believe SD's claim that the defendant had touched or poked her "*in the anus*". In my view that was an exaggeration and an embellishment to make the touching appear more serious than it was and to explain the fear she claimed she felt. SD's evidence about her birth date was also unreliable and was marked by vacant smiles and silent pauses. Likewise she could not assist with distances and the set-up of the sleeping places in SB's lounge.

34. In chief, she described what happened to her that night as someone "*fooling around*" or "*teasing me*". With that somewhat harmless description, I find that SD exaggerated the fear she claims she felt when the defendant touched her. Her exaggeration extended to a claim under cross examination of not spreading her legs and knowing the exact position of her legs when she is fast asleep.

35. In cross-examination, SD frankly admitted that her aunt SB had cautioned her about flirting with males in the household and her aunt had eventually chased SD out of her house because of SD's behaviour which included sniffing gas and staying out till after midnight.

36. The defendant on the other hand, gave his evidence in a clear and forthright manner. He did not exaggerate his evidence and frankly admitted that his partner had not accompanied him to sleep at SB's lounge and that he had laughed at SD when she turned and saw him. He was unshaken in cross-examination and provided a more credible narrative than SD.

37. With the foregoing in mind, I turn finally to consider whether the prosecution have established beyond a reasonable doubt that the defendant's touching of SD was "*intentional*". In this regard Section 17 of the Crimes Act 2016 provides that :

    "*A person has intention with respect to conduct if the person means to engage in the conduct*."

    Additionally, in the present case, reference may be made to Section 14(2) which relevantly states :

    "C*onduct can only be a physical element if it is voluntary*."

38. In other words, if the defendant's conduct is involuntary or an unconscious movement or the result of automatism or is coerced, then such actions cannot constitute a culpable "*physical element*".

39. The DPP in answer to the Court's question about what evidence there was of "*intentional touching*" pointed to SD's testimony that she was touched or poked "*in the anus*" and that caused her to turn and see the defendant. It also caused her to become fearful of him. The DPP submitted that the precise nature and location of the touching indicates it was targeted and focussed and not an involuntary accidental contact on the defendant's part.

40. The DPP also points to the defendant's reaction when seen by SD who said he laughed at her without an apology which the DPP submits is indicative of wrong-doing. Defence counsel on the other hand, points to the defendant's sworn explanation that he laughed because he realised it was a case of "*mistaken identity*" and he was "*shy*" and "*embarrassed*" at what had happened and turned towards the wall and pretended to sleep. He had also said he felt "*ashamed and stupid*" in his caution interview. I am satisfied that the defendant's laughing is neutral in effect. However, given the defendants claim of mistaken identity it might well be that Section 44 of the Crimes Act 2016 might make him "*not criminally responsible*". This was not directly raised by Defence Counsel and may be left to one side.

41. After carefully considering all of the evidence including the defendant's sworn denials and caution interview answers and, mindful of SD's several exaggerations and poor demeanour, I am not satisfied that the prosecution has proved beyond a reasonable doubt that the defendant touched or poked SD in the anus as alleged or that the touching that occurred was intentional and voluntary.

42. Accordingly, the defendant is found not guilty and is acquitted of the charge. He is ordered to be released forthwith.

Dated this 12th day of March, 2021

D.V.Fatiaki
Chief Justice