IN THE SUPREME COURT OF NAURU
Criminal Case No 18 of 2020
AT YAREN
CRIMINAL JURISDICTION

BETWEEN

REPUBLIC

AND

TT
Defendant

Before : Fatiaki CJ.

Dates of Hearing : 26 , 27, 30 April & 3 May , 2021
Date of Verdict : 31 May , 2021

CITATION : *Republic v TT*

CATCHWORDS: "*doli incapax" ; "presumption of sexual incapacity" ; "guilty knowledge" ; "evidence in rebuttal"*

LEGISLATION : s 91 Criminal Procedure Act 1972 ; ss 347 & 348 Criminal Code 1899 ; s 116 Crimes Act 2016 ; s 29 Criminal Code 1899 ; s 41 Crimes Act 2016 ;

CASES REFERRED TO : R v Moody (1987) QLJ 102 ; C v DPP [1995] 2 ALL ER 43 ; RP v The Queen [2016] HCA 53 ; R v Davies [2008] 3 ALL ER 481 ; Lee v The Queen [1998] 105 CLR 954 ; R v Hughes [1986] 2 NZLR 129 ; Regina v Tofola [1995] SBHC 48 ; Tarachand v R [1983] 14 FLR 73 ; The King v Lee (1950) HCA 25 ; R v JA [2007] ACT5C 51 ; R (a Child) v Whitty (1993) 66 A Crim R 462.

APPEARANCES:

Counsel for the Republic : R.Talasasa (DPP)
Counsel for the Defendant : R. Tagivakatini (PLD)

VERDICT

INTRODUCTION

1. In this case the allegation against the defendant (**TT**) is that on an unknown date and month in the year 2016 , he raped the complainant (**RT**) while she was sleeping on the floor of his sister's bedroom at their family home at Ewa District when the complainant says she was just 10 years of age.

2. It is common ground that the complainant **(RT)** was born on **21 July 2006** and would have turned 10 years of age in the latter half of 2016. By the same token , the defendant (**TT**) was born on **7 August 2004** and therefore would have turned 12 years of age in 2016 when the alleged Rape occurred.

3. Notwithstanding their birthdates , the complainant (**RT**) was 15 years of age when she testified in Court. Likewise , the defendant (**TT**) was 17 years of age when he was interviewed by the Police. Plainly , neither **RT** or **TT** had the same level of understanding and physical maturity that he/she had in 2016 when the alleged offence occurred.

THE INFORMATION

4. By an Amended Information dated 18 March , 2021 the defendant (**TT**) was charged on two (2) Counts as follows :

COUNT 1

Statement of offence

Rape : Contrary to Section 347 as read with Section 348 of the First Schedule of the Criminal Code Act 1899.

Particulars of offence

TT in Nauru , between 1st January 2016 and 11th May 2016 had carnal knowledge of a girl namely or referred to as (**RT**) without her consent.

COUNT 2

Statement of offence

Rape of a Child under 16 years old : Contrary to Section 116 (1) (a) and (b) , of the Crimes Act 2016.

Particulars of offence

TT in Nauru , between 12th May 2016 and 31st December 2016 , intentionally engaged in sexual intercourse with (**RT**), a child under the age of 16 years.

5. The Amended Information is unusual in several respects. In form and effect , it charges two (2) separate and distinct offences of Rape. The first , was allegedly committed in the first half of 2016 and the second , was allegedly committed in the second half of the year. The offences are not charged as alternatives and , in my view , are improperly joined in breach of the provisions of section 91 of the Criminal Procedure Act 1972. Indeed , on the basis of the prosecution's opening there was only ever a single incident of alleged Rape , never two. Accordingly , the Amended Information as drafted , was not based on the evidence nor was it ever part of the prosecution's case.

6. The DPP explained however , that the Amended Information was drafted in that clumsy manner with two (2) counts of Rape , because the complainant was unable to pinpoint a day and/or a month in 2016 when the alleged Rape occurred and also , because the substantive law changed mid-way through 2016 from the Criminal Code 1899 to the Crimes Act 2016 on 12 May 2016.

7. The unusual nature of the Amended Information is no better illustrated than by the DPP's answers to the Courts' questions during his closing address as follows :

*"**Q** : On the basis of the charges , if the Court convicts on Count 1 , can it convict on Count 2 ?*
***A** : No , because there was only one occasion of penetration.*

***Q** : On the basis of the evidence , which Count is supported by the evidence ?*
***A** : The victim said she was 10 years old so the year would be 2016. Victim said she slept with Stephanie who invited her to sleep and the next day (Stephanie) went with her family to Fiji and school breaks were mentioned by Stephanie."*

It is clear from the last answer that , other than the year 2016 , the complainant (**RT's**) testimony and the prosecution's evidence could not be reduced to a day or month in 2016. Asked which half of the year 2016 should the Court accept as proven ? The DPP without offering to elect or withdraw , blithely answered :

***A** : The Court can convict on either count because it* (the rape) *occurred in 2016"*

8. If I may say so , that response demonstrates a clear misunderstanding of the Courts' role in dealing with the charges in the Amended Information for which the DPP bears sole and full responsibility. It is no part of the Court's function or duty to amend or redraft an Information , much less , to elect what Count (if any) is to be pursued and which Count is to be rejected or withdrawn.

9. Notwithstanding the conundrum created by the charges and the absence of any severance application , the prosecution has the burden of proving the charges in the Amended Information beyond a reasonable doubt.

THE ELEMENTS OF THE OFFENCES

10. The elements or ingredients of the two (2) Rape charges are neither the same nor identical. Rape under the Criminal Code 1899 requires the following elements to be established beyond a reasonable doubt :

(1) **TT** intentionally ;
(2) had *carnal knowledge* (penile intercourse) of **RT** ;
(3) without her consent.
Under this charge the age of the victim (**RT**) is irrelevant and need not be proved.

11. The offence under Section 116(1)(c) and (b) of the Crimes Act 2016 on the other hand , has the following elements :

(1) **TT** intentionally ;
(2) had sexual intercourse with **RT**
(3) **RT** was under 16 years of age ;

12. In agreeing with the above elements the DPP also referred to Section 17 which provides inter alia that : *"A person has intention with respect to conduct if the person means to engage in the conduct."*

13. In addition to the foregoing elements , where the accused is between the ages of 10 and 14 years at the time of the commission of the offence , Section 41 of the Crimes Act 2016 relevantly provides :

(1) "A child aged 10 years or more but under 14 years can only be criminally responsible for an offence if the child knows that the child's conduct is wrong.
(2) The question whether a child knows that the child's conduct is wrong is one of fact.
(3) The prosecution has the burden of proving that a child knows that the child's conduct is wrong."

14. In effect , the above provision adds an extra element that the prosecution must establish in any case involving an accused who is over 10 and under 14 years , namely , that :

"..(the accused).. ***knows that***.. (his/her).. ***conduct***.. (as charged).. ***is wrong***... (not illegal)."

SEXUAL INCAPACITY

15. In addition and specifically , in regard to the Rape charge under the Criminal Code 1899 , (Count 1) , Section 29 expressly provides :

" A male person under the age of fourteen years is presumed to be incapable of having carnal knowledge."

16. This latter presumption adds a further element to Count 1 that the prosecution must establish beyond a reasonable doubt , namely , that the defendant **TT** (who was 12 years of age at the time) , was capable of having *"carnal knowledge"* (***ie.*** penile intercourse) when he allegedly raped **RT** in Count 1 as charged.

17. In this latter regard , I gratefully adopt the dicta of Griffiths CJ in R v Moody (1897) QLJ 102 where in striking out a *"guilty"* plea and changing it into a *"not guilty"* plea and ordering a trial of the accused for an offence of permitting a young boy of 11 years to have carnal knowledge of him (the accused) , the learned Chief Justice said in words that are directly applicable to Count 1 at (p.103) :

In my opinion , the law with respect to offences of this character is that sexual capacity – that is , the absence of impotence – is an essential element of the offence. If that element is not present , there cannot be an offence. It is a presumption of law that that element does not exist in the case of a boy under 14 years…In the present case , therefore , it is a presumption of law that the act alleged to have taken place could not have taken place."

18. The DPP , did not address this presumption at all in his submissions , which appear to be based entirely on **RT's** testimony that **TT** had pushed his penis inside her vagina and presumably , therefore , the presumption in section 29 had been rebutted. Unfortunately , the DPP did not ask the doctor any questions about male puberty and sexual impotence but in any event the presumption has been described as : *"… an irrebuttable common law presumption that boys under 14 are incapable of offences involving sexual intercourse on their part."* The irrebuttable nature of the presumption is clearly reinforced by the provisions of the Sexual Offences Act 1993 (UK) which abolished : *"..The presumption of criminal law that a boy under the age of fourteen is incapable of sexual intercourse (whether natural or unnatural)…"*

DOLI INCAPAX

19. In light of the foregoing , and given that **TT** was 12 years of age when Count 1 allegedly occurred , the irrebuttable presumption of sexual incapacity in Section 29 means that inspite of **RT's** evidence , the law presumes that **TT** was incapable of *"carnal knowledge"* at the relevant time , and accordingly , he must be and is hereby acquitted of the offence of Rape contrary to Section 347 and 348 of the Criminal Code 1899 as charged in Count 1.

20. No such presumption of sexual incapacity arises in regard to Count 2 which is charged under the Crimes Act 2016. In this instance however , there is a rebuttable presumption of *"doli incapax"* (meaning incapable of crime) under section 41 of the Crimes Act. (op. cit)

21. In C v DPP [1995] 2 All ER 43 the House of Lords in reaffirming the existence of the presumption in favour of a child between the ages of 10 and 14 , **Held :**

".....the prosecution was required to prove , according to the criminal standard of proof , that a child defendant between the age of 10 and 14 did the act charged and that when doing the act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief and the evidence to prove the defendant's guilty knowledge could not be mere proof of the doing of the act charged , however horrifying or obviously wrong that act might have been."

22. In this latter regard Lord Lowry in discussing the nature of the evidence required to establish "*guilty knowledge"* said at p 62 j :

".....the cases seem to show , logically enough , that the older the defendant is and the more obviously wrong the act , the easier it will generally be to prove guilty knowledge. The surrounding circumstances are of course relevant and what the defendant said or did before or after the act may go to prove his guilty mind. Running away is usually equivocal, ... , because flight from the scene can as easily follow a naughty action as a wicked one....

and later at p 63c :

" In order to obtain that kind of evidence , apart from anything the defendant may have said or done , the prosecution has to rely on interviewing the suspect or having him psychiatrically examined (two methods which depend on receiving co-operation) or on evidence from someone who knows the child well , such as a teacher , the involvement of whom adversely to the child is unattractive."

23. Again , the DPP did not call any expert or independent evidence to rebut the presumption of *"doli incapax"* which is an element of Count 2 , preferring instead , to rely on the victim (**RT's**) evidence and (**TT's**) police caution interview answers and drawing inferences therefrom. I shall have more to say about this later in the judgment.

24. In RP v The Queen [2016] HCA 53 the High Court of Australia examined the presumption of *"doli incapax"* and noted :

"....The presumption cannot be rebutted 'merely as an inference from the doing of the act , no matter how obviously wrong the act(s) may be'.....The prosecution must rely on more than the circumstances of the offence , and adduce evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct".

PROSECUTION EVIDENCE

25. The prosecution's evidence in support of the alleged Rape in Count 2 is almost entirely based on the victim (**RT's**) , sworn testimony. She commenced her evidence by identifying her Birth Certificate **[Exhibit-P(1)]** which discloses her date of birth as : **21 July 2006**. She recalled an incident that occurred to her when she was 10 years of age while attending Grade IV at Kayser College. Assuming the accuracy of her age , the incident would have occurred after July 2016 which further undermines Count 1.

26. **RT** testified about sleeping in her cousin Stephanie's bedroom at her uncle Brian's house at Ewa District. She was sleeping on the floor beside Stephanie's bed. The bedroom door was locked but she claims for the very first time in her testimony in chief , that it could be opened from outside by putting a hand through a hole in the door. The hole was not photographed nor was its diameter measured.

27. She testified that while she was asleep she felt someone on top of her having sexual intercourse with her. The person's penis penetrated her vagina and it was painful. She woke and the person having sex with her got up and left the room. She was able to identify the person from the light coming from outside , and , she saw it was her cousin , the defendant (**TT**).

28. She had <u>not</u> consented or agreed to (**TT**) having sexual intercourse with her <u>nor</u> was she aware how her short pants and underwear were removed and left lying beside her on the floor. She had <u>not</u> called out <u>or</u> resisted him <u>nor</u> did she complain to Stephanie who , during the incident , was sleeping on her bed in the same room. **RT** did not tell anyone about the incident because she feared : *"..the story would go around."*

29. In cross-examination , **RT** denied that the sleeping arrangements at her uncle's house at Ewa, was for all cousins to sleep together in the lounge and she maintained that she slept with Stephanie in her bedroom. She maintained it was (**TT**) on top of her when she opened her eyes. The complainant (**RT**) was then asked about her police statement given from memory on 27 August 2020 [***<u>ie.</u>*** 4 years after the alleged incident] and she confirmed it was her "*full story"* of what had allegedly happened to her on the fateful night. She had given her statement in Nauruan and had a guardian with her throughout. She identified her signature on the bottom of each page and at the last page of her statement.

30. The singular paragraph in **RT's** police statement about **TT** reads as follows (in English) :

".... can't remember the exact date but I remember that I was 10 years old. I was at Ewa District sleeping with my cousin Stephanie .... ***It was at night Stephanie and I were sleeping in one room and the door was locked and the lights was off*** *I* ***was on the floor sleeping and Stephanie was on the bed. While I was sleeping I felt that my body was moving and someone was on top of me. I opened my eyes to see when immediately this male person remove himself from on top of me and walked away. I can clearly identify him that he was (TT) my cousin*** *(Stephanie's brother) and I was shocked because my pants were not on me but it was next to me but I remember my pants were on me before I go to sleep."* (my highlighting)

Significant by its absence , is any mention of sexual intercourse <u>or</u> of (**TT**) pushing his penis into (**RT's**) vagina <u>or</u> how (**TT**) might have opened the locked bedroom door. Neither was a further statement recorded from (**RT**) to clear up these significant omissions.

31. The complainant (**RT's**) cross-examination about her rather sparse police statement in comparison to her testimony in court includes the following , after she confirmed that the statement was her complete "…*story about **TT***" :

<u>FIRST POLICE FAILURE TO RECORD</u>
<u>Q</u> *: You did not tell police about **TT** putting on his towel and leaving* (the room) *?*
<u>A</u> *: I did tell them ;*
<u>Q</u> *: So the police didn't write it down ?*
<u>A</u> *: Yes ;*

SECOND POLICE FAILURE TO RECORD

***Q** : You didn't tell police about **TT** inserting his penis into your vagina ?*
***A** : I did also tell them ;*
***Q** : They didn't write it down ?*
***A** : Yes ;*

FIRST OMISSION TO TELL POLICE

***Q** : You didn't tell police about the light from outside ?*
***A** : No I didn't tell them ;*

THIRD POLICE FAILURE TO RECORD

***Q** : You didn't tell police you felt pain in your vagina ?*
***A** : I did tell them*
***Q** : So they didn't write that down ?*
***A** : Yes ;*

SECOND OMISSION TO TELL POLICE

***Q** : You didn't tell police Stephanie locked the bedroom door ?*
***A** : I didn't tell them ;*

Note : (**RT**) did tell the police however , that *"the* (bedroom) *door was locked".*

FOURTH POLICE FAILURE TO RECORD

***Q** : You didn't tell police about the hole in the wall and how you could open the bedroom door from outside ?*
***A** : I did tell them ?*
***Q** : They didn't write that down ?*
***A** : No ;*

32. I interpose here to record that at no stage in the prosecution's case or evidence was it accepted or disclosed that police were aware of and had conducted a thorough investigation into the so-called hole in Stephanie's bedroom door or into the actual possibility of the hole being used to open the locked bedroom door from the outside as claimed by **RT**. Nor was **TT** ever questioned about it as might be expected in his record of interview.

33. Despite the absence of any requirement for corroboration (*see* : s 101 Crimes Act) , proof that Stephanie's bedroom door could be opened from outside using the hole in the door , would have gone a long way in enhancing (**RT's**) credibility which is crucial to the prosecution's case and which evidence only came to light in (**RT's**) testimony in chief.

34. Be that as it may , **RT's** cross-examination ended with the following exchange :

***Q** : So police didn't write down 4 things at least which you told them and 3 things you didn't tell them ?*
***A** : No , I told them.*

***Q** : Did you go through your statement after giving it ?*
***A** : Yes ;*
***Q** : You were happy with statement ?*
***A** : Yes , that's why I signed it."*

35. In re-examination , (**RT**) was asked and then improperly led to her unhelpful final answer :

***Q** : You said some stories you forgot to tell police. What about your story now to Court ?*
***A** : Nothing*
***Q** : The story you told Court , is it true or not ?*
***A** : true."*

So much then for the prosecution's prime witness.

THE CONFRONTATION REQUEST

36. The prosecution also produced , without objection , (**TT's**) police caution interview **[Exhibit-P(2)]** which contained no inculpatory admissions. It does however , contain a specific request by **TT** for a confrontation with the complainant when he requested in :

A 45 *: **I want to see her face to face so she can tell me what I have done."***

37. The House of Lords in R v Davies [2008] 3 All ER 481 recently affirmed the existence of :

"... a long established principle of English common law that the defendant in a criminal trial should be confronted by his accusers in order that he might cross-examine them and challenge their evidence."

38. More particularly , Lord Carswell said at p 482 para 47c :

"Ensuring fairness is a fundamental obligation of judges presiding in criminal trials , as the means of achieving their ultimate objective of achieving justice , whatever other factors or demands they have to balance..."

39. Later , his Lordship said after discussing the principle of *"open justice"* at para 49h :

"To that long established principle of the common law must be added a cognate one , the right of an accused to confront his accuser. The force of these two principles is such that it requires a clear case of countervailing necessity to allow the admission of any inroad.

40. In rejecting the intimidation of witnesses which was a basis of DPP's objection to a (**TT/RT**) confrontation , as a possible *"countervailing necessity"* , Lord Rodger of Earlsferry said ibid. at p 481 para 44f :

"..... , it is axiomatic that the common law is capable of developing to meet new challenges. But threats of intimidation to witnesses and the challenge which they pose to our system of trial are anything but new. In theory , the common law could have

responded to that challenge at any time over the last few hundred years by allowing witnesses to give their evidence under conditions of anonymity. But it never did even in times , before the creation of organised police forces , when conditions of lawlessness might have been expected to be far worse than today."

41. In similar vein , the High Court of Australia said in Lee v The Queen [1998] 195 CLR 954 at p 502 :

"Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial."

42. Unfortunately , **TT's** request was not granted and the DPP took exception to the question that illicited a negative response from the witnessing officer , and , he even doubted the propriety of allowing a confrontation between **TT** and his accuser **RT** which would have been conducted within the control and under the auspices of senior police officers.

43. If I may say so, the reaction is somewhat exaggerated and misplaced. The personal right of an accused to be confronted and to question a witness called against him/her, is clearly recognized in Article 10(f) of the Constitution which states interalia : *"...*(an accused) *shall be afforded facilities to examine in person or by his legal representative the witnesses called before the Court by the prosecution…."* More generally in my view , the right to confront one's accuser is an essential requirement of a *"fair hearing.."* [***see*** : Article 10(2)] as was said by Richardson J in R v Hughes [1986] 2 NZLR 129 at p 149 : *"…..the right to confront an adverse witness is basic to any civilised notion of a fair trial."*

44. In this regard too , the judgment of Palmer J. (as he then was) in Regina v Tofola [1995] SBHC 48 is instructive. *see also* : the judgment of the Fiji Court of Appeal in Tara Chand and others v R [1968] 14 FLR 73 and The King v Lee (1950) HCA 25 where confrontations occurred during the recording of caution interviews and in Lee's case , at the request of the accused.

45. The prosecution also called the defendant's elder sister in whose bedroom the Rape is alleged to have occurred. Unfortunately , she too , was unable to assist with a specific day or month when the alleged incident occurred other than to link it to a *"school holiday"* period and a "*trip"* she and her mother took to Fiji.

46. In-chief , Stephanie confirmed that her bedroom door was lockable from inside by turning the door knob , and once locked , it could not be opened from outside. She agreed the door did have a hole below the existing door knob where an old door knob had been removed but she wasn't sure if her locked bedroom door could be opened from outside , using the hole nor had she tried to do so or seen anyone unlock her bedroom door from outside.

47. The final prosecution witness is **Dr Angela Segimami** a specialist in Obstetrics & Gynaecology (O&G) who works mainly in the Maternity Unit at the RON Hospital and who is also Acting Director of Medical Services. She refreshed herself from a contemporaneous Medical Report she prepared at the time of examining (**TR**) on 25

August 2020 (4 years after the alleged Rape). She described (**TR**) as matured for her age and last had sex 3 days earlier on 22 August 2020. Her examination findings were :

" Hymen not intact and vagina dilated and not that of a 14 year old." She also found: *"..no evidence of injury and vagina too dilated....."* and **..***spermatozoa was not seen."*

48. Considering the alleged year of the offending , defence counsel asked :

*"**Q** : Any sexual activity 1 year prior to examination would be difficult to detect ?*
***A** : Yes we couldn't tell. The girl (**RT's**) vagina exhibited signs of multiple penetration in the past."*

49. Plainly , the doctor's evidence did not implicate **TT** in any way and could not corroborate **RT's** evidence which was required to link the *"multiple penetrations"* observed , to **TT** being one of the perpetrators.

50. At the end of the Doctor's evidence in-chief , the DPP sought to tender her Medical Report as a prosecution exhibit. The Court doubted the propriety of such a course and when asked, the DPP said he relied on Section 176 of the Criminal Procedure (Amendment) Act 2020 which permits the tendering by the prosecution , of amongst other items : *"... an expert report....and such other professional reports without requiring the maker of such report.....to personally appear in the Court to testify..."*

51. The *"proviso"* to the Section requires the fulfilment of two (2) pre-conditions before permission to tender the report may be given , namely :

(a) "a notice in the prescribed form is served (by the prosecutor) *to the accused person or his or her legal representative twenty one (21) days before the date fixed for the trial ;* and
(b) the accused person or his or her legal representative did not issue a notice in the prescribed form to the prosecution requiring.....the person to be available for cross examination 14 days before the commencement or continuation of the trial"

52. A cursory reading of the Section indicates that it is clearly intended to apply to the situation where the maker is not required *"to personally appear in Court to testify" ,* which was not the situation in this case. (*see also* : section 101 of the Criminal Procedure Act 1972).

53. Whatsmore , despite the absence of any *"prescribed form"* for the tender of the professional report or for requiring the maker of the report to attend for cross-examination , it is sufficiently clear that the duty to disclose interalia *"...expert reports...as soon as practicable after the accused is charged and appears in Court..."* is not the same as the duty imposed under the above-mentioned '*proviso*'. Notwithstanding , the Court retains the discretion *"...to allow admission of any evidence as it deems fit".*

54. After a brief discussion with the DPP and defence counsel and given the limited relevance of the findings in the doctor's report , the application to tender the Medical Report was withdrawn.

DEFENCE CASE

55. I turn next to the defence case which was very brief. Defence Counsel first indicated that he would not be making a *"no case"* submission and , after taking instructions , he advised: *"my client wishes to remain silent and we are not calling any witnesses for the defence."* In other words , by his plea of *"not guilty"* the defendant was relying on the *"presumption of innocence" ;* the right not "…(to be) *compelled to give evidence at the trial"* [***see*** : Arts.10(3)(a) and 10(7) respectively , of the Constitution] and the rebuttable presumption of *"doli incapax."*

CLOSING ADDRESSES

56. The DPP began by reminding the Court of **RT's** evidence of **TT** having sexual intercourse with her without her consent. She clearly identified him in the light coming from outside. **RT** also claimed that TT also had the opportunity to unlock the bedroom door by putting his hand through the hole. Although the doctor couldn't confirm actual penetration of **RT** had occurred in 2016 , her vagina showed signs of multiple penetrations and **TT** is charged with being one of those who penetrated the victim albeit not the latest and assuming **RT** is believed.

57. The DPP accepted that the presumptions in S.29 of the Criminal Code 1899 and S.41 of the Crimes Act 2016 applied in the case but both were rebutted by the prosecution's evidence. As for the presumption of *"sexual incapacity"* , DPP submitted that **RT's** unshaken evidence that **TT** penetrated his penis into her vagina coupled with **RT's** sexual awareness and some of **TTs** answers in his police caution interview conclusively established **TT's** *"sexual capacity"* despite he being 12 years of age at the time. I have already rejected this submission and acquitted **TT** on Count 1 and nothing more needs to be said on that.

58. As for the presumption of *"doli incapax"* , DPP submitted that all of the prosecution's evidence had to be considered – from **RT** , **TT's** record of interview , the doctor and other civilian witnesses. DPP highlighted four (4) features of the evidence , including the locked bedroom door being opened ; it was **TT** having sexual intercourse with **RT** ; **RT's** lower garments were removed ; and **TT** left the room quickly when **RT** awoke and DPP asked rhetorically : "***Q*** *: Would a person doing that act not know that what he was doing was wrong?* ".

59. As for the record of interview answers , DPP pointed out that **TT** was asked directly in Nauruan , about the allegation and about sexual intercourse and **TT's** (unidentified)

answers clearly shows an understanding of the particular nature of the act as well as its wrongfulness.

60. DPP also submitted that **RT's** evidence should be believed in the absence of any contrary sworn testimony.

61. Defence counsel states otherwise and highlights the several significant details omitted from **RT's** police statement which she claims she told the police but was not recorded nor corrected by her when she agreed the statements contents and signed. These omitted details included : **TT** penetrating his penis into her vagina and causing her pain ; the existence of a hole in Stephanie's bedroom door which could be used to open the locked door ; and **TT** putting on his towel and exiting the room when **RT** woke up.

62. Defence counsel submits that the omission of these substantive details was due to **RT** not mentioning them at all to the police and when caught out in cross examination , she unfairly and falsely blamed the police of failing to record them. In particular , counsel submitted that the existence of the hole in bedroom door was a desperate exaggeration on **RT's** part to try and explain how the locked bedroom door came to be unlocked from the outside , so that **TT** could enter the bedroom and commit the alleged offence. Significantly, **TT** was never questioned about this in his record of interview nor was he asked about the locked bedroom door.

63. As for **TT's** *"guilty knowledge"* of the wrongfulness of his actions , defence counsel submits that **TT's** police record of interview does not demonstrate that the police were fully aware of or conversant with the requirements of the presumption in section 41 (op.cit) which applied in **TT's** case. There is also no real consciousness in the interview , of the 4 year gap between the alleged incident and the date when the interview was conducted. Nor did the questions make clear what **TT's** relevant state of knowledge was in 2016 when he was 12 years of age.

64. This latter feature is no better illustrated counsel submits , than in the supposedly damning answers that **TT** gave in Q & As : 40 to 44 , as follows (in English) :

*"Q 40 : It is alleged while you were doing sexual intercourse with **RT** and that you walk away when **RT** woke up? Do you agree or what can you say?*
A 40 : No she's lying"

*"Q 41 : Can you recall how old is **RT** when you penetrated her ?*
A 41 : I don't know"

"Q 42 : Where did you learn this sexual act from ?
A 42 : My friend taught me"

"Q 43 : On the year 2016 do you have knowledge on sexual intercourse ?
A 43 : I learn when I was about 14 years old.

*"Q 44 : I put to you that on the unknown date in between 1st January 2016 to 31st December 2016 you allegedly raped **RT** at Ewa district ? What can you say ?*
A 44 : I haven't rape in my life."

(my highlighting)

CONSIDERATIONS AND DECISION

65. Notable by its total absence in **TT's** record of interview , is the Nauruan version of all material questions between *Q12* about **TT** attending school to *Q45* which invited **TT** to give his version of the allegation. This omission is highly unusual and should not have been left unexplained. It also unfairly denies the Court and defence Counsel , the opportunity to verify the English translations of the questions , against the original and more relevant Nauruan versions.

66. In the above sequence of questions and answers there appears to be an awareness that the relevant year of offending is *"**2016**"* , but , **TT's** recorded answer to *Q43* is :

*"**I learn when I was about 14 years old**."*

TT would have attained this age in 2018 which was 2 years after 2016 ! It was therefore not within his knowledge when he was 12 years of age which is when the alleged incident occurred. In simple terms , the answer is irrelevant to the date charged and could not give rise to an inference that **TT** had that knowledge at age 12.

67. Even if it was within his knowledge at the time of the incident , (which is repeatedly denied *see* : **Ans 34 to 37**) without more questioning or other evidence , such knowledge is not evidence or proof that **TT** appreciated the *"wrongfulness"* of his actions.

68. In the present case it must not be lost sight of , that it is **TT's** level of understanding and knowledge as a 12 year old , of the wrongfulness of engaging in sexual activity with a younger female relative , that must be separately established by the prosecution beyond mere proof of the charged act having occurred. **TT's** knowledge or understanding at 16 years of age when the interview was conducted and the charges were laid is irrelevant and in the present case , it is important to avoid the possibility of conflating the different dates.

69. As was said by the Court in R v JA [2007] ACTSC 51 at para 69 :

"It is apparent that 'wrongness' includes an appreciation of the nature and effect of the prohibited act. It is not sufficient that the child knows that there would be 'disapproval' of the act by a parent or even police."

or by Harpes J. in R (a child) v Whitty (1993) 66 A Crim R 462 : where he held that to rebut the presumption of *'doli incapax'* the prosecution must (at p 463) :

"..show that when the child committed the act in question , he or she knew that what was being done was not merely wrong but seriously wrong"

70. After carefully considering all of the evidence including **TT's** police record of interview answers and counsel's submissions , and there being no expert , historical , or scholastic evidence as to **TT's** level of understanding or knowledge as a 12 year old of the serious wrongfulness of engaging in sexual activity with a younger female relative , and mindful of the prosecution's burden of proof , I am constrained to hold that the prosecution has failed to rebut the presumption of *"doli incapax"* beyond a reasonable doubt.

71. Accordingly , the defendant **TT** is also acquitted on Count 2 on the charge of : Rape of a Child under 16 years old. **TT** is directed to be released forthwith.

Dated the 31 day of May 2021

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D.V.FATIAKI
CHIEF JUSTICE