



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 21 OF 2021

BETWEEN

THE REPUBLIC

Prosecution

AND

NIMROD MWAREOW

Defendant

Before:	Khan, ACJ
Date of Hearing:	18 and 20 October 2022
Closing Submissions Filed by Defence:	4 November 2022
Closing Submissions Filed by Public:	4 November 2022
Date of Submissions:	23 January 2023
Date of Judgement:	2 February 2023

Case to be known as: *Republic v Nimrod Mwareow*

CATCHWORDS: Charge of taking imaging of private part of another person without consent contrary to s.112 of the Crimes Act 2016 – Where the pictures were posted in the Facebook chat group – Whether the pictures were taken with the consent of the complainant.

APPEARANCES:

Counsel for the Prosecution:	S Shah
Counsels for the Defendant:	R Tagivakatini

JUDGEMENT

INTRODUCTION

1. The accused is charged with the offence of taking images of private part without consent contrary to s.112(1)(a), (b)(i), (c) of the Crimes Act 2016 (the Act).
2. In the information filed on 26 November 2021 the particulars of the offence state:

“Nimrod Mwareow on 10 November 2021, at Yaren District in Nauru, intentionally took an image of Roshilda Akubor and that Roshilda Akubor did not consent to the photos being taken and that Nimrod Mwareow knows that fact and in the circumstances a reasonable person would reasonable expect that an image of other person’s private parts would not be taken.”
3. During the trial on 18 October 2022 the particulars of the offence were amended that the images were taken between 1 June 2021 and 31 August 2021.
4. It is not in dispute that images were taken by the accused not only of the complainant but of both of them which was taken in the complainant’s bedroom at Yaren.
5. The circumstances of how the images were taken is in dispute. The defendant’s version is that the pictures were taken on his mobile phone with the complainant’s consent; whilst the complainant’s version is that she never consented to the photographs being taken, and claimed that when the photographs were taken she was asleep and therefore did not give consent. The complainant was fully naked and the pictures show her breasts and the pubic hair which comes within the definition of private part as defined in s.8 of the Act.

LEGISLATION

6. S.112 of the Act states:

“Taking images of private parts without consent

- 1) A person (the “defendant”) commits an offence if:
 - a) The defendant intentionally takes an image of another person’s private parts, whether or not the other person’s private parts are covered by underwear;
 - b) The other person does not consent to the image being taken and the defendant:
 - i) Knows that fact; or
 - ii) Is recklessly indifferent to the consent of the other person.
 - c) In the circumstances, a reasonably man would reasonably expect that an image of the other person’s private parts would not be taken...”

7. The penalty for this offence is 15 years imprisonment of which term at least half is to be served without parole or probation.

BURDEN OF PROOF

8. Under s.25 of the Act the prosecution bears the burden of proof of proving each element of the offence beyond all reasonable doubt.

EVIDENCE

9. The complainant had been employed by Capelle and Partners since 2019 as a supervisor. The accused was born in Nauru and left for Kiribati when he was a baby and does not speak the Nauruan language properly.
10. The complainant and the accused met in the Facebook messenger and started chatting and met for the first time in June 2021 at the Grog Bar in Location District.
11. After their first meeting their relationship developed and the complainant spent some time with the accused at his house in Location District which he shared with his mother and he used to visit her at her house in Yaren quite often.
12. The complainant stated that their relationship ended in August 2021 but the defendant stated that the relationship continued until October 2021. The complainant accepted that he used to visit her during that relationship almost every day and would stay at her place for 2 to 3 nights in a week.
13. Whilst the accused was in this relationship with the complainant he also started to have an affair with her sister.
14. According to the complainant she only got to know about the pictures when one of her colleagues informed her about the pictures, which the accused had posted on 9 November 2021 on a Facebook Group called "Capelle and Partners Security Hot Group".
15. On 11 November 2021 the complainant made a statement to the police and she stated that the pictures showed that she was fast asleep and that she had no idea as to when the pictures were taken and she never gave consent to the accused to take those pictures.
16. On 17 November 2021 the defendant participated in a record of interview conducted by Sgt Sereima Aremwa and she put the following allegations to him:

"It is alleged that on date unknown between 1 June to 31 August 2021 you allegedly took photo images of Roshilda Akubor while she was sleeping where she was totally naked and posted it on the Capelle and Partners Security Hot Group on Facebook, do you understand?"
17. The accused was formally charged on 18 November 2021 and in the charge form it is stated:

“Is charged with the following offence of: taking images of private parts without consent contrary to s.112(1)(a), (b)(i) and(ii) of the Crimes Act 2016.

PARTICULARS

Nimrod Mwareow on the date unknown between 1 June 2021 to 31 August 2021 at Nauru intentionally takes an image of the private parts with the pubic and breasts of another person namely Roshilda Akubor and the said person’s image being taken and Nimrod Mwareow did know fact or was recklessly indifferent to.”

18. In the charge it is stated that he took photographs of another person when in fact he took photographs of both of them being together.

19. In the complainant’s examination in chief, Mr Shah asked her the following questions:

“Question: Were you awake or asleep when the photos were taken?

Answer: I don’t know – that means I am sleeping.

Question: In the photo with Nimrod can you tell if you are awake or asleep?

Answer: I am asleep.”

20. In her cross examination by Mr Tagivakatini she was questioned as follows:

“Question: Is it true that when you go to sleep you wear a lavalava?

Answer: Yes.

Question: Is it true that when the pictures were taken it was daylight?

Answer: I can’t recall – don’t know if it was day or night.

Question: When you go to sleep do you leave lights on or do you turn them off?

Answer: I normally turn them off.

Question: The pictures are bright and not dark.

Answer: Yes they are bright the lights on not dark.

Question: I put to you that when the pictures were taken you were not sleeping and were pretending to be asleep.

Answer: No I disagree. I am a standard woman. Could I agree to have my pictures taken which 6 children. I was asleep and not awake.

Question: I further put to you that you and Nimrod had returned from work and you agreed to take these pictures.

Answer: I have no idea – no never he is a liar.”

CONSIDERATION


PHOTOGRAPHS

21. Six photographs were uploaded on the chat group; the photographs are bright but are very blurred. In four photographs both the defendant's and the complainant's faces can be seen, whilst two photographs is that of the complainant (Exhibit P1(c) and (e)). The photographs of the complainant are very explicit and in one of the photographs the defendant is seen lying on the complainant's shoulder (Exhibit P(1)(d)); in all the photographs the eyes of the defendant and the complainant are closed.
22. This relationship lasted only a couple of months and the complainant always slept with a lavalava on and no other clothing and the defendant had all the opportunity to take her photographs but he did not do so.
23. The complainant maintains that just because her eyes were closed she was sleeping when the photographs were taken and therefore she could not have consented to the photographs being taken; likewise, the defendant's eyes are closed in the photographs. Does it mean that he took the photographs whilst he was asleep?
24. In her answer to Mr Shah when asked as to whether she was asleep or awake when the photographs were taken, her response first was: "I don't know" and later she said: "that means I was asleep"; and in her cross examination when it was put to her specifically that the photographs were taken after they had returned from work and her response was: "I have no idea" and later she said: "No never he is a liar".
25. In light of my above discussions I have difficulty in accepting the complainant's version and I accept the defendant's version that the photographs were taken with the consent of the complainant.

CONCLUSION

26. In the circumstances I find that the prosecution has not proved its case beyond all reasonable doubt against the defendant and I find him not guilty of the charge and he is acquitted of the charge.

DATED this 2nd day of February 2023


Mohammed Shafiullah Khan
Acting Chief Justice

