



IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 9 OF 2021

BETWEEN

THE REPUBLIC

Prosecution

AND

BARRY QUADINA

Accused

Before:

Khan, ACJ

Date of Hearing:

31 May, 1 and 2 June 2023

Date of Judgement:

20 June 2023

Case to be referred to as: *Republic v Quadina*

CATCHWORDS: Rape – Indecent act – Sections 105 and 106 of the Crimes Act 2016 – It is not in dispute that the defendant had sexual intercourse with the complainant by penetrating her vagina with his penis – Where the defendant requested the complainant to have sex with him and she responded by saying not here (Topside) but in your room – where the complainant never said yes – Where the defendant believed that by her saying not here but in your room to mean that she was agreeing to have sex – Whether that belief was reasonable.

APPEARANCES:

Counsel for the Republic:

A Driu (DPP)

Counsel for the Accused:

R Tagivakatini

JUDGEMENT

INTRODUCTION

1. The defendant is charged with one count of rape and an alternative count of indecent act. The charges state as follows:

COUNT ONE

STATEMENT OF OFFENCE

Rape contrary to s.105(1)(a), (b)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Barry Quadina on 21 March 2021 at Topside (inland) in Nauru, intentionally engaged in sexual intercourse with Tawake Marera without her consent and Barry Quadina knows that fact.

ALTERNATIVE COUNT

COUNT TWO

STATEMENT OF OFFENCE

Indecent act: contrary to s.106(1)(a), (b) and (c)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Barry Quadina on 21 March 2021 at Topside (inland) in Nauru, intentionally touched Tawake Marera on her vagina and the touching was indecent and Barry Quadina was reckless about that fact and Tawake Marera does not consent to the touching and Barry Quadina knew that fact.

RELEVANT LAW

RAPE

2. Section 105(1) of the Crimes Act 2016 (the Act) provides:

- 1) A person (the **'defendant'**) that 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 the consent of the other person.

Penalty: life imprisonment, of which imprisonment term at least 15 years to be served without any parole or probation.

DEFINITION OF SEXUAL INTERCOURSE

3. S.8 of the Act defines sexual intercourse means:

- a) The penetration, to any extent of or any part of the person's genitals with any part of the body of another person.

DEFINITION OF CONSENT

4. Consent is defined as follows in s.9 of the Act:

- 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 misrepresentations about the nature or purpose of that to which the person consents; or
 - f) mistaken belief in use by another person.
- 3) Without limiting subsection (1), a person does not have the cognitive capacity to give consent to an act if one 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; or
 - 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.

INDECENT ACTS

5. Section 106(1) of the Act provides:

- 1) A person (the '**defendant**') commits an offence if:
 - a) the defendant intentionally touches another person;
 - b) the touching is indecent and the defendant is reckless about that fact; and
 - c) the other person does not consent to the touching and the defendant:

- i) knows that fact; or
- ii) is recklessly indifferent to consent of another person

Penalty:

- i) if aggravating circumstances apply – 20 years imprisonment; or
- ii) in any other case – 10 years imprisonment.

6. Touching is defined in s.106(4) and (5) where it is stated:

(4) In this section:

‘touching’ includes the following:

- a) touching with any part of the body;
- b) touching a person through clothing or other material; or
- c) using an object to touch a person.

(5) The question whether touching or an act is indecent is one of fact to be determined by applying the standards of an ordinary person.

7. The question whether touching or an act is indecent is one of fact to be determined by applying the standards of an ordinary person.

BURDEN OF PROOF

8. Under s.25 of the Act the prosecution has the legal burden of proving each element of the offence.

FACTS NOT IN DISPUTE

9. It is not in dispute that sexual intercourse took place between the defendant and Tawake Marera (complainant) at Topside in Nauru on 21 March 2021 in the early hours of the morning when it was dark.

10. It is also not in dispute that the defendant penetrated the complainant’s vagina by his penis and that sexual intercourse took place for some 2 to 3 minutes.

MATTERS IN DISPUTE

11. The prosecution’s case is that the complainant did not consent to the act of sexual intercourse and that it took place against her will.

12. The defence case is that the defendant asked the complainant to have sex with him and she responded by saying: “not here (Topside) but in your room”. The defendant agrees

that she never said yes but he was under the belief that by her saying "not here but in your room" to mean that she was consenting to have sex with him.

PRELIMINARY ISSUES

13. The defendant was born on 16 December 1980 in Melbourne, Victoria. His birth was registered in the Republic of Nauru and in his birth certificate his full name is Barry Kip Clive Quadina. [Exhibit P4]
14. The police had a copy of his birth certificate and the defendant also told the investigating officer when he was interviewed in his record of interview that his full name was Barry Kip Clive Quadina. Despite having knowledge of his full name the charge in the District Court as well as the information filed in this court has his name as Barry Quadina.

FACTUAL BACKGROUND

15. On 20 March 2021 the defendant was employed at Nauru Utilities Corporation and was doing an 8-hour shift which finished at midnight. Whilst he was at work he was in contact with his friends and family members on Facebook chat group to have drinks at his place at Anabar and he also wanted some girls to join them for drinks.
16. When he returned home, he telephoned Baneawa who is originally from Kiribati and lives at Location in Denig District. The complainant is Baneawa's niece and lived with her at the time.
17. The defendant spoke to Baneawa and invited her to join him for drinks but she declined the invitation and the complainant and her friend Joycee Timothy told Baneawa that they would like to go for the drinks. The defendant agreed to them joining in for the drinks.
18. The complainant and Joycee arranged to meet with the defendant to be picked up at the cemetery next to Moonlight shop. They had never met each other before that day but the defendant had seen the complainant previously at the "Grog Bar" when he drank grog with Baneawa.
19. As arranged the defendant came with his friend, Fab, on 2 separate motorcycles to pick them up. Joycee sat at the back of the defendant's motorcycle whilst the complainant sat at the back of Fab's motorcycle and they drove through Meneng District to Anabar.
20. When they arrived at Anabar the complainant saw 5 or 6 males present at the defendant's house. She did not know any of them and they sat outside at a table to have drinks. The complainant and Joycee drank Vodka AK47 mixed with juice whilst the defendant drank beer and the drinking went on until the early hours of 21 March 2021 when one person became rowdy and started banging the table which frightened the complainant as well as Joycee. They then asked the defendant to drop them home.
21. Fab refused to drop them and both the complainant and Joycee asked the defendant if both of them could be dropped together on his motorbike as passengers on a single ride. He did not agree to this as police were patrolling the road.

22. It was agreed that the defendant would drop the complainant first and Joyce later.

DEFENDANT DROPPING OFF COMPLAINANT

23. From Anabar the defendant decided to drive through Meneng District to Location but at Anabar hill he decided to turn right into Topside Road as he claimed that he was informed by a friend on his mobile phone that there was a police blitz in Meneng District.
24. Having turned right into the Topside road (gravel) the defendant drove up to the Correctional Centre. The road to Location goes in front of the Correctional Centre but the defendant turned right to go behind the Correctional Centre.
25. The defendant claimed that as soon as he went behind the Correctional Centre the motorbike's engine turned off by itself.

COMPLAINANT'S VERSION OF WHAT HAPPENED BEHIND THE CORRECTIONAL CENTRE

26. When the motorcycle stopped behind the Correctional Centre the defendant said to the complainant that he wanted to have sex with her. She said no. She told him that she did not want to have sex with him.
27. She stated that the defendant grabbed her by her hand and tripped her to the ground and sat on top of her and he struggled to take off her three-quarter pants and her underwear. She was wearing a bra and a t-shirt on top.
28. He struggled to take off her pants and sat on top of her. She told him that she would take off her pants. She stated that:
- "I said that because I had no option to run away."
29. She took off her pants and underwear whilst lying on the ground and Barry was still on top of her.
30. She stated that she was afraid as it was very dark and there was no one there to help her. She stated:
- "I did not scream because I was afraid, he might hurt me."
31. She stated that the defendant inserted his penis into her vagina and had sexual intercourse with her for 2 to 3 minutes.
32. She was questioned as follows:
- Question: What did you do?
- Answer: I was afraid. I asked him to take off his shirt.
- Question: What type of shirt?

Answer: Bula shirt with buttons.

Question: Why did you ask him to take his shirt off?

Answer: I wanted to run away from him.

Question: Did he take his shirt off?

Answer: Yes, he pulled the shirt over his head without unbuttoning it.

Question: When he took his shirt off where was he?

Answer: He was at the end of my feet.

Question: What did you do?

Answer: I got up and ran away.

Question: Where did you go? Did you know where you were going to?

Answer: I followed the lights.

Question: Where were the lights coming from?

Answer: From the Correctional Centre.

Question: What were you wearing?

Answer: Just my t-shirt and bra.

Question: What happened to your pants and underwear?

Answer: I left them behind.

33. The complainant was asked as to what happened when she got to the Correctional Centre and she responded that she saw a security guard was sleeping and she jumped on his back to wake him up and help her call the police.
34. She was asked as to how was she feeling when she went to the security officer and her response was that she was afraid and when asked who was she afraid of she said she was afraid of the defendant.
35. She stated that the security guard called the police and she sat near him waiting for the police. Whilst waiting for the police she stated that no one else came over to her including the defendant.
36. She saw the police vehicle arrive and saw a female police officer with 2 male police officers. She did not know any of the police officers. She stated that when the police arrived it was still dark but dawn was setting in.

37. She spoke to Acting Inspector Sareima (A/I Sareima) and told her about the incident and was later driven in the police vehicle to the place of the incident where photographs were taken with the assistance of the headlights of the police vehicle. At the scene she saw a cigarette roll, a packet of cigarettes and her thongs (slippers) which she was wearing earlier that day. She was asked as to where were her pants and panties and she said Barry took them.
38. She stated that whilst photographs were taken she saw 2 people arrive on a motorbike and she recognized them to be Barry and Joycee and she said that Joycee handed over her pants and her underwear.

DEFENDANT'S RETURN TO PICK UP JOYCEE

39. Whilst the complainant ran to the security guard the defendant returned to Anabar to pick up Joycee.
40. Having picked up Joycee the defendant showed her the complainant's pants and underwear and asked her to hold on to it and she refused to do so. She asked him as to where was the complainant.
41. Joycee recorded the defendant's response in her police statement which was taken on 13 April 2021 by A/I Sareima and she stated at [15] and [16] as follows:

[15] I was surprised when he told me to hold my friend's pants and undies that he was holding in his hands whilst driving. I refused to take it from him and then I got suspicious and questioned him where my friend was.

[16] Self: Where is Tawake?

Barry: She's at topside. I asked her to have sex with me but she refuses. So I pushed her and told her to take her pants off, which she did because she was scared of me. I did penetrate her once where she told me to take my shirt off where I tried to out my shirt and was surprised when she quickly took off without turning back and she was half naked.

42. The defendant and Joycee arrived at Topside and saw the police car and the complainant's clothes were handed to her.

MEDICAL EXAMINATION

43. The complainant was taken to the RON Hospital for medical examination. She was examined by a female doctor and was later dropped home. Later that morning the police came to her again and took her to Topside where more photographs were taken when it was daylight.

DEFENDANT ARRESTED AND TAKEN INTO POLICE CUSTODY

44. The defendant was arrested and taken into custody and was interviewed by A/I Sareima. After the allegation of rape was put to him, he was allowed to consult a

lawyer. Thereafter, he refused to answer any questions and stated that he did not wish to make any comments.

DEFENCE CASE

45. In the cross examination of the complainant, it was put to her as follows:

Question: When you got off the motorbike his question was can you give me what I want?

Answer: Yes.

Question: Is it true from your response to his question was let's have it in your room?

Answer: Yes.

Question: After you responded to him he asked if he could hug you?

Answer: Yes.

Question: He then hugged you?

Answer: Yes.

Question: After he hugged you he also told you that he will not hurt you?

Answer: Yes.

Question: After that is it correct that he asked to kiss you?

Answer: No.

Question: I put it to you that he asked to kiss you?

Answer: No.

Question: Did you and Barry kiss that night?

Answer: No.

Question: I put it to you that you two kissed each other?

Answer: No.

Question: I put it to you that you started kissing each other and then you grabbed onto his penis outside his pants?

Answer: No.

Question: You stated earlier that you were tripped to the ground?

Answer: Yes.

Question: I put it to you that he did not trip you to the ground. He assisted you to lie down on the ground?

Answer: No he tripped me.

Question: Were you able to see the lights from the Correctional Centre or was it totally dark?

Answer: It was dark but could see the lights.

Question: Were you able to see his face clearly at the time?

Answer: No.

Question: I put it to you that you were on the ground and removed your pants and underwear and he started performing oral sex on your vagina?

Answer: No.

Question: You said earlier that he inserted his penis in your vagina and it took place for around 2-3 minutes?

Answer: Yes.

Question: Is it true that he was on top of you? He never threatened and said he will not hurt you?

Answer: No.

Question: When he was taking off his Bula shirt do you recall that he was on his knees?

Answer: Yes.

Question: Is it correct that when his shirt was over his head you took the opportunity and ran?

Answer: Yes.

Question: Is it true that you did not say anything to him before you ran away?

Answer: No.

Question: Is it true that Barry did not chase you?

Answer: He ran after me.

DEFENDANT'S EVIDENCE

46. The defendant's evidence is that after the motorbike stopped and he asked the complainant to have sex with him and her response was no and that we should go back to his room.
47. He kept asking her for sex and she kept insisting that they should go to his room.
48. The examination in chief was as follows:

Question: What happened after you called her for a hug?

Answer: She came over and we held onto each other whilst we were holding to each other I told her that I will not hurt her.

Question: What was her response?

Answer: When I received the hug or embrace, she walked away from me and she took off her pants.

Question: So what happened after she did this?

Answer: I held her back and gently laid her on the ground and I came on top of her.

Question: What happened next?

Answer: She asked me for a kiss. Then whilst she was kissing her hand slipped into my pants and she held my penis.

Question: So, what happened?

Answer: While she held onto my penis, she stopped kissing me and told me to take off my clothes.

Question: So what did you do?

Answer: So I sat on my knees and pulled my pants and underwear. Then I laid on top of her then and she held onto my penis and directed it into her vagina.

Question: Did you insert your penis into her vagina?

Answer: Yes I entered her vagina.

Question: For how long?

Answer: Not long maybe a minute or two.

Question: At the time was it dark or was there light?

Answer: It was very dark.

Question: When you were on top of her were you able to see her face?

Answer: Not really it was a shape of her face as it was dark.

Question: What happened after that?

Answer: So I got off her and gave her oral sex.

Question: What did you do?

Answer: So I gave her cunnilingus.

Question: What happened after that?

Answer: She stood up and told me that she wanted to give me oral sex.

Question: What happened after that?

Answer: That's when I stood up to take my shirt off.

Question: As you stood up to take your shirt off what happened?

Answer: Whilst I was taking my shirt off she took off and ran.

Question: Did you see where she ran to?

Answer: She ran to the Correctional Centre where the lights were coming from.

Question: What did you do when she ran away?

Answer: I grabbed her clothes and was going to go after her to give her clothes back but I thought it will cause more panic if I chased her.

Question: So you mentioned it will cause more panic. What did you do?

Answer: When she ran - she first like she sprinted and if I chased her it would have frightened her more.

Question: So what did you do?

Answer: I thought the only person who could help me was her friend Joycee so I got on my motorbike and went to pick Joycee.

Question: So what happened when you went to pick Joycee?

Answer: I picked Joycee and went to Topside.

Question: Did you tell Joycee what happened?

- Answer: I told her that I had sex with her friend and she ran away.
- Question: What about Tawake's pants and undies?
- Answer: I had it and I took it with me.
- Question: What did Joycee say to you?
- Answer: She did not believe me so I showed her Tawake's pants.
- Question: What did Joycee say?
- Answer: When I showed her the pants, I asked her to help me. I did not know why she stood up and ran.
- Question: Help you how?
- Answer: I asked her to help me look for her at Topside.
- Question: Did you and Joycee reach Topside?
- Answer: Yes when we arrived the police were there as well.
- Question: So what happened when you saw the police?
- Answer: So when we stopped at the top of the hill Joycee got down and walked and I drove down towards the police vehicle.
- Question: Why did you drive down to the police vehicle?
- Answer: If the police were involved the issue had to be solved in court.

CROSS EXAMINATION OF THE DEFENDANT

49. The defendant agreed that he stopped behind the Correctional Centre where it was very dark and that there were no houses, no road users, nobody in and around. He was cross examined as follows:

- Question: So that's when you stopped and asked her why can't you have sex?
- Answer: Yes.
- Question: And she said no Barry didn't she?
- Answer: She said we should go to my room
- Question: That's right she never said yes did she? She said let's go to your room and never said yes.

- Answer: She never said yes but when she asked to go to my room I took that as yes.
- Question: She never said yes?
- Answer: But when she told me we should go to my room I thought it was a female way of trying to make a man or me to try harder.
- Question: Try harder for what?
- Answer: Try harder for sex.
- Question: You kept asking her to have sex didn't you?
- Answer: Yes
- Question: You did because she never said yes and that's why you kept asking her for sex?
- Answer: She never said yes she told me she wanted go to my room and she never said no.
- Question: You called her for a hug you told us and she came over to you?
- Answer: Yes.
- Question: And you told her that you will not hurt her?
- Answer: Yes.
- Question: But she fell down on her back?
- Answer: No she stepped back to take her pants off.
- Question: I put it to you that you tripped her and that's when she fell on the ground?
- Answer: No that's not what happened.
- Question: I put it to you struggled with her on the ground to take her pants?
- Answer: No that's not what happened.
- Question: She finally told you she will take off her pants because she was afraid of you?
- Answer: When she stepped back she told me she will take off herself.

Question: And I put it to you once she took off her pants and her undies and that's when you took off your pants and inserted your penis into her vagina?

Answer: No I laid her down first and went on top of her.

Question: I put it to you that she was afraid that she allowed you to do this because she was in a frightened state and she did not know what you would do to her in complete darkness with no one around to help her?

Answer: Her voice did not sound like she was scared.

Question: I put it to you because you couldn't even see her face that you really didn't know what she was under?

Answer: I couldn't see her face when I laid on top of her. She asked me for a kiss.

Question: So if she was looking scared you wouldn't know because it was dark?

Answer: I couldn't see because it was dark but her voice did not sound like she was scared.

Question: She asked you to take off your shirt?

Answer: No she didn't tell me to take off my shirt.

Question: So are you saying you took off your shirt of your own?

Answer: When she told me she wanted to give me oral sex and that's when I stood up and I tried to take off my shirt.

Question: Well I put it to you that she asked you to take your shirt off and you did so by pulling it over your head and that is when she escaped from you?

Answer: No I disagree.

Question: In that half naked state she chose to run away and escape from you?

Answer: I was shocked when she ran. I didn't know why she ran.

Question: Now Barry would you agree if one was willing to have sex that evening would they get up and run in a half-naked state?

Answer: That is why we are in court today because she did consent then and now she took off and ran and I don't know why.

Question: Well I put to you the reason why she ran is because she was not a willing partner and that's why she ran away from you in her half naked state.

Answer: If she had stopped me in the first place if she didn't consent, I would have stopped but she didn't so I assumed it was okay. I did not know why she ran away.

Question: So you assumed yet again. So you assumed that in the beginning she wanted to have sex?

Answer: I didn't know if she was scared. I didn't know she would run away.

Question: Now Barry when she ran did you know where she ran to? She ran towards the Correctional Centre is that right?

Answer: Yes.

Question: Did you run after her?

Answer: Yes I was going to run after her to give her clothes but then didn't want to because I thought she might get more panicked.

Question: So you realized she left her pants, her panties and her slippers and her packet of cigarettes on the ground where the incident happened?

Answer: Yes.

Question: Would you agree that she was not a willing partner to the whole event and that happened to her?

Answer: It dawned after...you know that it seems to me to be the case that I was not how it happened in the beginning.

Question: Now Barry you said that straight after you got off your bike and thought of Joycee her friend who could help?

Answer: Yes.

Question: Your bike started didn't it?

Answer: Yes kick start.

Question: Isn't it true that you were going to pick Joycee anyway because she was the second drop off?

Answer: Yes.

Question: And that was because you had to drop her home as well and that is when you chose to tell her?

Answer: Yes when I did go back to pick Joycee my intention was to have her help me look for Tawake.

Question: Now was Joycee surprised that you were holding her pants and panties?

Answer: Yes when I showed her.

Question: So when you came to Topside past the Correctional on the hill you stopped didn't you? You stopped your bike? You didn't drive straight down to where the police were, you actually stopped at the hill?

Answer: Yes on the hill.

Question: Well I put to you you stopped at the hill because you didn't really want to go down to the police? Were you scared?

Answer: Yes I was scared when saw the police.

CONSIDERATION

50. The complainant's version of how the incident took place at Topside is in complete contrast to the defendant's version; she states that she never agreed to the act of sexual intercourse and that she only agreed to taking off her pants and underwear as she had no choice. She said that she was scared of the defendant, and it was very dark – so much so that they could not see each other's face.
51. The complainant agreed that when the defendant asked her for sex, she responded to him by saying that “not here” (at Topside) but in your room and she agreed to hugging him when he asked her to do so.
52. She maintained that there was a struggle between them and he tripped her to the ground and she fell on her back and at that point she agreed to remove her pants and underwear and that is when the defendant inserted his penis into her vagina.
53. The complainant's version is supported by the defendant himself when he spoke to Joycee and she stated at [16] of her police statement where she stated:

[16] Self: Where's Tawake?

Barry: She's at topside. I asked her to have sex with me but she refuses. So I pushed her and I told her to take her pants off, which she did because she was scared of me. I did penetrate her once where she told me to take off my shirt where I tried to out my shirt and was surprised when she quickly took off without turning back and she was half naked.

54. The defendant did not challenge the admissibility of what Joycee said in her statement at [16] and further the statement was tendered by the prosecution without any objections from the defence counsel.

CONSENT – CIRCUMSTANCES OF RAPE

55. The issue of consent and circumstances of rape depends on each case as was discussed in the case of *R v Malone*¹ where it is stated at page 1471 as follows:

“We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that **there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent** (per Coleridge J in *Day* [1841] 9 C & P 722, 724). In the majority of cases, where the allegation is that intercourse was had by force or the fear of force, such a direction coupled with specific references to and comment on the evidence relevant to the absence of real consent will clearly suffice. In the less common type of case where intercourse takes place after threats not involving violence or the fear of it, as in the examples given by Mrs Trewella, to which we have referred earlier in this judgment, we think that an appropriate direction to a jury will have to be fuller. **They should be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to the act, and her reaction to them showing their impact on her mind.** Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of the 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. **Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.**” (emphasis added)

DEFENDANT’S BELIEF

56. When the complainant said that sex should take place in his room and not at Topside and when at the defendant’s request, she hugged him he said that he held “a reasonable and honest belief that Tawake was consenting to sexual intercourse”².
57. Mr Tagivakatini relies on the case of *DPP v Morgan*³ where it is stated:

¹ [1998] 2 Cr App R 447; [1998] EWCA Crim 1462

² Written submissions filed by the defence on 6 June 2021.

³ [1975] 2 ALL ER page 347

“The crime of rape consisted in having sexual intercourse with a woman with intent to do so without her consent or with indifference as to whether or not she consented. It could not be committed if that essential *mens rea* were absent. Accordingly, if an accused in fact believed that the woman had consented, whether or not the belief was based on reasonable grounds, he could not be found guilty of rape.”

TEST FOR REASONABLE BELIEF

58. The test for reasonable belief is stated at [6] of Crown Prosecution Services (UK at Chapter 6) where it is stated as follows:

The test of reasonable belief is a subjective one with an objective element. The best way of dealing with the issue is to ask two questions.

- Did the suspect genuinely believe the complainant consented? This relates to his or her personal capacity to evaluate consent (subjective element of the test).
- If so, did the suspect reasonably believe it? It will be for the jury to decide if his or her belief was reasonable (the objective element).

CRIMES ACT 2016

59. The reasonable belief defence is contained in s.44 of the Act which states as follows:

MISTAKE OR IGNORANCE OF FACT – FAULT ELEMENTS OTHER THAN NEGLIGENCE

A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

- a) when engaging in the conduct making up of the physical element, the person is under a reasonable but mistaken belief about, or ignorance of, the facts; and
- b) the existence of the mistaken belief or ignorance negates a fault element applying to the physical element.

FAULT ELEMENT

60. S.22 of the Act defines as to what is meant by fault element and it is stated:

- 1) Where a written law creating an offence does not provide a fault element for a physical element that consists only of conduct, intention is the fault element for the physical element.
- 2) Where a written law creating an offence does not provide a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for the physical element.

- 3) This Section does apply to create a fault element for physical element that consists of the existence or content of an Act or law.

EXPLANATORY NOTES

61. Clause 44 of the explanatory notes of the memorandum of the speech of the Minister for Justice on 12 May 2016 explained as to how the fault element can be negated where it is stated:

“Clause 44 explains that if a person is under a reasonable but mistaken belief about matters relevant to the offence, or is ignorant of relevant facts, then this may negate a fault element of the offence. For example, if a person is charged with murder after fatally shooting another person, they may be able to negate the fault element of intending to cause the death, if they can show that they had a reasonable but mistaken belief that the gun they fired was a toy gun.”

EVIDENTIAL BURDEN

62. In accordance with ss.26 and 27 of the Act the defendant bears the evidential burden which is on balance of probabilities. So, in this case the onus was on the defendant to prove that he held the reasonable but mistaken belief that the complainant was consenting on a balance of probability.
63. The position in *DPP v Morgan* (supra) was similar to this case in that all the appellants (in Morgan) made admissions which corroborated the complainant’s story in that case. It is stated by Lord Edmund-David at page 369 as follows:

“She was amply corroborated by the oral and written statements of all four appellants which amounted to complete confessions of multiple rapes. But at their trial all challenged their police statements and asserted that Mrs Morgan was throughout a willing party.”

UNREASONABLE BELIEF

64. It is stated at page 372 of *DPP v Morgan* (supra) that “...the more unreasonable such a belief in the proved circumstances of the case, the slimmer the chances of the jury’s thinking that it was ever entertained”.

HONEST BELIEF

65. It is stated at page 374 of *DPP v Morgan* (supra) that:

“That case was followed by the Court of Criminal Appeal of New South Wales in *R v Sperotto and Salvietti*² where Herron CJ said:

‘Although the fact of the act of intercourse may be admitted by the accused or proved beyond reasonable doubt to the satisfaction of the jury, accused may negative any intention on his part to have sexual intercourse with the woman regardless of her consent if he holds an honest belief on

reasonable grounds in the existence of circumstances which, if true, would make his act of intercourse with the woman an innocent one (*Warner v Metropolitan Police Comr*⁴, per Lord Reid). This involves these three concepts, firstly, that he in fact held the belief that the woman was consenting to the act of intercourse, secondly, that he was mistaken in that belief and, thirdly, that he can point objectively to circumstances which provided him with reasonable grounds for his mistake...it then becomes necessary for the Crown as part of the ultimate onus which rests upon it to negative the existence of such belief, and this beyond reasonable doubt. This the Crown may do by reference to all the material adduced at the trial which stands to show that the belief asserted by the accused was not genuinely held by him or that the grounds upon which he relies for the foundation of his belief are, when examined in light of all the circumstances, not a reasonable basis for the mistake which he claims to have made”.

REASONABLE – BUT MISTAKEN BELIEFS

66. S.44 of the Act provides that a person is not criminally reasonable if he engages in a conduct under a “reasonable but mistaken belief”. In this matter the defendant made an admission to Joycee that “he asked the complainant for sex and she refused ... so I pushed her and told her to take her pants off which did as she was scared of me. I did penetrate her...”.

67. According to the evidence before me the act of the complainant saying “not here but in your room” and the act of hugging took place prior to the act of sexual intercourse by which the defendant stated that he was under reasonable belief that the complainant was consenting. The defendant’s account of the events is that he “gently laid her on the ground” but he admitted to Joycee that he “pushed her ... and she was scared of me ... so I told her take her pants off”. In his cross examination he stated the following:

Question: She never said yes?

Answer: But when she told me we should go to my room I thought it was a female way of trying to make a man or me to try harder.

Question: Try harder for what?

Answer: Try harder for sex.

68. Is the defendant’s version consistent with his reasonable but mistaken belief that she was consenting to the sexual intercourse? In light of his admissions to Joycee and his answers to the questions in cross-examination the answer is simply no.

69. It is stated in *R v Sperotto and Salvietti*⁴ at page 339 as follows:

“... As was pointed out in *R v Flaherty (11)*, the course of proceeding at trial is governed by the material properly before the Court, and the judge in his directions to the jury should not submit to them “defences” to the charge which the evidence does not justify. If the question of a mistaken

⁴ (1970) S.R. (N.S.W.) 334

belief is raised before the jury by the accused and there is no material capable of forming a basis for such a finding, the jury should be so advised (cf. *Gammage v The Queen*(12)).

70. In the circumstances, I hold that the defendant has not satisfied the evidential burden cast upon him for me to consider that he acted under “a reasonable but mistaken belief”.
71. I accept the evidence of the complainant and find that the defendant had sexual intercourse with her without her consent. I find that the prosecution has proved its case beyond all reasonable doubt against the defendant on count one and I find him guilty of the charge of rape on count one.

DATED this 23 day of June 2023


Mohammed Shafiullah Khan
Acting Chief Justice

