



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 12 of 2018

BETWEEN

The Republic

AND:

DG

Before: Khan, J
Date of Hearing: 14, 19, 21, 26, 28 June and 2 July 2019
Date of Judgement: 5 July 2019

Case may be cited as: *Republic v DG*

CATCHWORDS:

Criminal law- doli incapax- children between ages of 10 to 14 -section 41 of the Crimes Act 2106 provides that a child is only is criminally responsible for an offence if prosecution prove that his conduct was wrong.

APPEARANCES:

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

JUDGEMENT

INTRODUCTION

1. The defendant, DG, is a juvenile. His date of birth is 13 September 2004. He is charged with one count of rape which states as follows:

Statement of Offence

The rape of a child under 16 years contrary to s.116(1)(a), (b)(i) of the Crimes Act 2016 (Crimes Act).

Particulars of Offence

DG on 10 October 2017 at Nauru, intentionally engaged in sexual intercourse with AB by giving her oral sex when AB is a child under 16 years of age.

2. At the time of the offence the juvenile was 13 years 1 month old. The victim (AB) in this matter was born on 26 September 2011 and at the time of the offence was 6 years old. The victim shall be referred to as AB.

REVELANT LEGISLATION

3. Sexual intercourse as contained in the charge is defined on s.8 of the Crimes Act as follows:
 - (a) The penetration, to any extent, of or by any part of a person's genitals with any part of the body of another person; or
 - (b) The penetration, to any extent, of the anus of a person by any part of the body of another person; or
 - (c) The penetration, to any extent, of or any other part of a person's genitals by an object, carried out by another person; or
 - (d) The penetration, to any extent, of the anus of a person by an object, carried out by another person; or
 - (e) Oral sex; or
 - (f) The continuation of any activity covered by paragraph (a) to (e).

ONUS OF PROOF

4. The onus of proof is on the prosecution to prove each and every element of the offence charge beyond all reasonable doubt.

DOLI INCAPAX

5. I dealt with the issue of doli incapax in Republic v RD¹ where it was stated at [8], [9], [10],[11] and 12 as follows:

[8] Under the Crimes Act a child under 10 years old is not criminally responsible for an offence².

CRIMINAL RESPONSIBILITY

- [9] For children aged 10 to 14 years old s.41 of the Crimes Act provides:

¹ Criminal Case No. 18 of 2018

² S.40 of Crimes Act 2016

- (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.
- [10] Under s.41 of the Crimes Act a child can only 'be criminally responsible for an offence if the child knows that his conduct is wrong'. The prosecution bears the burden of proof which is beyond all reasonable doubt to prove that a child knew that his conduct was wrong. Under s.41 there is a presumption of innocence in favour of the child and if the prosecution is unable to prove that his conduct was wrong then he is entitled to be acquitted of the charge, notwithstanding the fact that he may have committed the offence.

[11] In *C v DPP*³ the House of Lords stated as follows at page 43:

"The presumption that a child between the ages of 10 and 14 was doli incapax and the rules of the presumption could only be rebutted by clear positive evidence that the child knew that his act was seriously wrong, and that the evidence of the acts amounting to the offence itself was not sufficient to rebut the presumption, were still part of English Law."

[12] Further, at page 62 of *C v DPP* Lord Lawry stated:

"A long and uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that when doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief. The criminal standard of proof applies. What is required has been variously expressed, as in *Blackstone*, 'a strong and clear beyond all doubt or contradiction' or in *R v Gorrie (1919) 83 JP 136*, 'very clear and complete evidence' or in *B v R (1958) 44 CrAppR 1 at 3* per Lord Parker CJ, 'It has often been put in this way, that "guilty no less must be proved and the evidence to that effect must be clear and beyond all reasonable doubt" '....

The second clearly established proposition is evidence to prove the defendant's guilty knowledge, as defined above must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be. As Erle J said in *R v Smith (1845) 1 Cox CC 260*:

"... A guilty knowledge that he was doing wrong – must be proved by the evidence, and cannot be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it is satisfactorily proved that at the time he fired the rick (if you should be of the opinion he did fire it) he had guilty knowledge that he was committing a crime."

³ 1999 2 All ER 43

6. So, I shall first consider whether the juvenile 'did the act charged' and once I am satisfied beyond all reasonable doubt that he 'did the act charged', then I shall consider whether the prosecution has adduced sufficient evidence to prove that he knew that his conduct was wrong.

VICTIM AS A CHILD WITNESS

7. AB was 7 years old at the date of the hearing and I had to ask her a series of questions to ascertain her competency to give evidence. Having asked her the questions I was satisfied that she was of sufficient intelligence and was therefore competent to give evidence and understood the nature of an oath and I therefore allowed her to give sworn evidence.

FACTS

8. The juvenile and AB are neighbours. On 10 October 2017 at around 8pm he saw the AB outside her house and called her. She came over to him. He asked her to lie down on airbed and he took off her pants and licked her vagina. The juvenile told her not to make any noise and he only stopped when AB told him that she was in pain.
9. After that AB ran back to her house and her mother (referred to as CB to suppress the identity of AB) who was outside washing dishes to prepare dinner. She saw AB coming. It was dark. She asked her where had she been and she told her that she had gone out to relieve herself. The mother noticed that her behaviour was strange, so she confronted her and questioned her as to what was she doing outside in the dark. After a lot of probing AB admitted that she was with the juvenile and thereupon the mother took her to the juvenile's house to confront him but he was not at home. So, she spoke to the juvenile's aunts and told them that he did something to AB.
10. CB broke down and started to cry and thereupon AB told her that the juvenile took her outside and made her lie down on the airbed and licked her vagina and only stopped when she told him that it was painful.

AB'S EVIDENCE

11. In her evidence she stated that this year was 2019 and last year was 2018 and the year before was 2017. She further stated that this month was June and the month before that was May. She was not able to give her date of birth but stated that when it is her birthday, she has a party at her house.
12. She remembered 10 October 2017 when she went outside her house. She said that she met DG in the night outside her house. She identified DG in Court by pointing to him.
13. When she met DG, she stated that he inserted a paper in her vagina and did not do anything else. She left him as it was painful.
14. She stated that her mother saw her coming back and she asked her as to what was she doing in the dark.

15. She stated that apart from putting paper in her vagina he did not do anything else and she clarified that private part is her vagina.
16. She said she spoke to her mother who did not do anything to her.
17. She went to the police station with her mother and later went to RON Hospital where she was medically examined.
18. She stated her mother is now deceased.
19. AB was not cross examined by the defence.

CB'S EVIDENCE

20. Unfortunately, CB died after this incident. Her date of death is not clear. Her date of birth was 31 July 1979. She gave a statement to the police shortly after she reported this matter to the police. The statement is not dated but it was signed by CB. The DPP tendered her statement through Const Drusky Dabwadauw.
21. The statement was tendered by consent of Mr Tagivakatini, the counsel for the defence' pursuant to s.147 of Criminal Procedure Act 1972 (CPA). The statement states as follows:
 - 1: On 10 December 2017 at approximately 200 hours onwards I was outside my house washing the pot to prepare dinner. When I was about to enter the house, I saw my 6-year-old daughter, namely, AB coming out from the dark.
 - 2: I asked her where she'd been and she replied saying she was having a pee, and she continued walking. When she came, I noticed that something strange is going on with her because her pants looked like it has been torn and her reaction was very strange.
 - 3: I continue asking where she had been and she ignored me and she made her way into the house, I pulled her hair at the end of her ponytail and asked her again why she had just come out from the dark due to I am very curious, because I know my daughter she's a girl who is afraid of the dark.
 - 4: AB tried to evade me but I managed to grab the end of her ponytail and demanded that she talk to me. It slipped out of her mouth that she was with D and then she paused again. I took her back from where she'd been so she can tell me why she was there in the dark.
 - 5: When we went there it was completely dark. I had to go back inside the house to tell my kids to turn on the light.
 - 6: When we reached the place, an airbed had been laid where and an umbrella was open. I asked A what the reason for the stuff was there, where she replied saying that D was laying there.

- 7: I trust my daughter but at the same time I do not want to believe her. So I continue asking her what reason she had been to that place and she again stated that she was peeing. I kept asking her the same questions. She stopped responding.
- 8: I took A and we went to D's house so I can ask him what he has done to A. When we reached D's house, he was not there only his aunts L and E. I asked where is D due to as he has done something to A and I want to talk to him. When I was talking to them, I burst out crying and begging them to look for D for what he has done to A.
- 9: When I told them, what happened they immediately left us and went searching for him at their mother's place so A and I were left alone in front of their house.
- 10: While we were waiting A came up to me and said she was sorry. I asked her what she was sorry about. She said she will never do it again and she will tell D to stop for what he is doing. I asked A what D done to her, she replied saying D kissed her. And I paused and I continued crying hysterically due to that I can't stand hearing the words she was saying. I asked if D ever touched her OBIM (private parts). She nodded and stated D insert his finger into the circle (vagina) and it was very painful.
- 12: After there I took her outside our house so that we can have her bathed but somehow, I changed my mind not letting her take her bath.
- 13: I decided to check her vagina to see if there any injury on her and just then L walked in and we tried to investigate what happened to her.
- 14: First L asked how did she end up in the dark. She said D told her to go there.
- 15: After I check her I ask her what D has done to her and again she said that D kissed her. He stuffed a piece of paper inside the circle. I asked her if the paper is still inside her when she replied, saying no he took it out. He even stuck his tongue in the circle and it was really painful. He inserted his finger into her vagina.
- 16: I asked A if that was what D did to her tonight and she keo ngago jyoram (long time ago). Shocked and confused I had to ask A to take off her pants and lie down so I can have a check on her private area. All I found was red rashes outside the vagina. I stopped for what I was feeling uncomfortable and thought we should go and see the doctor.
- 17: While I was talking to A and G walked in and told me the police will be here soon and I must press charges. I disagreed. Phone rang and the police at the other end asked if I want to press charges against D and I said no due to I am still lost for what is happening.
- 18: Still lost and confused I asked A if D ever put his penis into her vagina and she said yes and that is when I immediately took her to the hospital to be examined.

- 19: I believe that this is not the first time that D has done this to her for she was talking she said that ago/ngago but not that night. Coming from my daughter (NGAGO JYORAM) 'can mean tomorrow, this morning, yesterday, few days ago, last week, but not NGAGE or tonight'. So, all the above all the above said regardless on the piece of paper, tongue and penis didn't occur on the night of 2017 but has already happened before.

This is all I can state in this matter. This is the end of the statement.

MEDICAL REPORT

22. AB was medically examined on 10 October 2017. In the background relevant to the request for medical report Bryvenia Dageago of Nauru Police Force stated as follows:

- Today at around 8pm mother was doing house chores when her daughter came out of the dark around the house.
- Mother was curious of where her daughter just come out from and starts asking daughter what and where she has been.
- Victim states to the mother that she has been indecently assaulted by DG who resides nearby our houses.
- Victim also states to the mother that he put his tongue in her vagina and put paper in as well as his penis inside.
- Recently today victim states to the mother that he put his finger in her vagina using his pointer to put it into his vagina which victim also states it pains and is still having pain now.

23. AB was medically examined by Dr Benjamin Keke of RON Hospital and in the history narrated by the victim he stated as follows:

"Alleged that the victim was sexually abused by a 13-year-old boy who is a neighbour on several occasions. It is alleged that he had used his finger and at times objects to poke the victim's genitals."

24. In his finding the doctor stated at D14 as follows:

"There is no abnormal findings of externalof genitals and general physical examination."

And later at D16:

"Examination findings were not confirmed nor exclude..... of sexual abuse."

RECORD OF INTERVIEW

25. DG participated in a record of interview conducted by Const Drusky Dabwadauw. The record of interview as tendered in which it is stated as follows from questions 9 to 47:

Question 9: It is alleged that on 10 October 2017, you indecently assaulted a person by the name of AB at Anatum District. Do you understand the allegations?

Answer: Understand.

Question 10: Before I ask you further questions, I must warn you that you are not obliged to say anything unless you wish to do so but what you say may be put in writing and given in evidence. Do you understand?

Answer: Understand.

Question 11: You have the right to seek legal representation; do you wish to exercise this right?

Answer: Yes I want to get a lawyer.

Interview paused at 12.47 and resume at 13.52 hours after consulting with his rep.

Question 12: Where were you on 10 October 2017 at around 200 hours onwards?

Answer: No comment.

Question 13: What were you doing at that particular time?

Answer: No comment.

Question 14: D can you state for the record if you know a person by the name of AB?

Answer: No comment.

Question 15: What is your relationship with A?

Answer: No comment.

Question 16: Can you tell me how old is A?

Answer: No comment.

Question 17: How did you know A?

Answer: No comment.

Question 18: D can you tell me where does A live?

Answer: No comment.

Question 19: Can you tell me how did you meet A the night mentioned above?

Answer: No comment.

Question 20: It is alleged that you told her to meet you in the dark, do you agree or what can you say to this?

Answer: No comment.

Question 21: What did you do when A reached you?

Answer: No comment.

Question 22: What were you lying on?

Answer: No comment.

Question 22: What did you tell A to do when she was with you?

Answer: No comment.

Question 23: It is alleged that you told A to lie down, do you agree or what can you say to this?

Answer: No comment.

Question 24: What happened next?

Answer: No comment.

Question 25: Can you tell me what was A wearing at the time of the incident?

Answer: No comment.

Question 26: What did you do with the piece of paper?

Answer: No comment.

Question 27: It is alleged that you placed a piece of paper at A's vagina and then pressed it, do you agree or what can you say to this?

Answer: No comment.

Question 28: What else did you do to A?

Answer: No comment.

Question 29: What did you tell A to do when you were pressing the piece of paper to her vagina?

Answer: No comment.

Question 30: It is alleged that you told her to be quiet and not to make noise, do you agree or what can you say to this?

Answer: No comment.

Question 31: What did you do after throwing away the piece of paper?

Answer: No comment.

Question 32: Put to you that you leaned over in between A's legs and started licking her vagina, do you agree or what can you say to this?

Answer: No comment.

Question 33: Did at any time, A tell you to stop?

Answer: No comment.

Question 34: Did you stop when A told you to stop?

Answer: No comment.

Question 35: What did you tell A to do?

Answer: No comment.

Question 36: It is alleged that you told her to make a moaning sound like this 'haaa, haaaa', do you agree or what can you say to this?

Answer: No comment.

Question 37: How long have you been doing this to A?

Answer: No comment.

Question 38: For the record where did you learn this kind of behaviour?

Answer: No comment.

Question 39: Do you know that it is against the law to do this kind of behaviour?

Answer: No comment.

Question 40: Then why did you do it?

Answer: No comment.

Question 41: Do you have anything to say in relation to this allegation laid against you?

Answer: No comment.

Question 42: For the record, what did you tell A, when she left you in the dark?

Answer: No comment.

Question 43: It is alleged that you told her not to tell anyone about what you have been doing to her, do you agree, or what can you say to this?

Answer: No comment.

Question 44: Do you agree that there was no threat against you to make you provide the answers?

Answer: Agreed by nodding his head up.

Question 45: Do you agree there no assault against you to provide the answers.?

Answer: Agreed by nodding his head up.

Question 46: Do you agree that there were no promises made to provide the answers?

Answer: Agreed by nodding his head up.

Question 47: Do you wish to read this statement or do you wish an officer to read it to you?

Answer: You read it to me.

26. Upon completion of the prosecution's case Mr Tagivakatini did not make a submission of no case to answer and the juvenile elected to remain silent.
27. Upon the case being completed I adjourned the matter for judgement on 28 June 2019. On 26 June 2019 I invited further submissions from the counsels on two matters:
 - 1) Charge stated that DG performed oral sex and the evidence of AB is that he only inserted a piece of paper in her vagina – whether the charge should be amended?
 - 2) That the statement of CB was admitted by consent of the defence under s.147 of Criminal Procedure Act 1972. The mother is now deceased. But that the contents of the statement are hearsay.
28. In relation to the first issue the DPP submitted that the Court has powers to amend the charge under s.191(2) of CPA which provides:
 - (2) Where before a trial by the Supreme Court or at any stage thereof before judgement, it appears to the Court that the information is defective, either in substance or in form or inappropriate to the facts disclosed by the depositions or evidence received during the trial, the Court may make such order for alteration of the information, either by amending the particulars of the offence, or by substituting a new offence for the offence charge or by deleting any count or by adding a new count, as the Court thinks necessary to meet the circumstances of the case.

29. DPP made submissions that the words 'by giving her oral sex' be deleted and substituted by the words 'inserting a paper in her vagina'.
30. Mr Tagivakatini submitted that amendment will be unfair and prejudicial to the juvenile and that amendment should not be granted.
31. I granted the amendment under s.119(2) of CPA.
32. With respect to the second issue regarding CB's statement the DPP submitted that it was admitted by consent of the defence and it is up to the court to decide as to what weight should be attached to the contents as AB's statement as she has not been subjected to cross examination.
33. Mr Tagivakatini submitted that the statement contains hearsay material and the contents of the statement should not be taken into consideration and should be ignored.
34. On 2 July 2019 the charge was put to the juvenile as required by s.191(2)(a) of CPA and the juvenile pleaded not guilty. He was asked whether he wanted any of the witnesses to be recalled to give further evidence or be cross examined as required by s.191(2)(b) and he stated through his counsel that he did not want any of the witnesses to be recalled.

CONSIDERATION

Whether DG raped AB?

35. I have two sources of evidence on this issue. Firstly, I have the evidence of AB and then the statement of CB which was tendered by consent pursuant to s.147(2) of Criminal Procedure Act.
36. Before I consider the evidence of AB, I shall consider the statement of CB as to whether the contents are admissible in evidence.

Whether statement of CB is admissible in evidence

37. The full contents of the statement are set out in paragraph 21. AB's evidence is that DG only inserted a piece of paper in her vagina whereas the statement of CB states amongst other things that DG kissed her, he inserted his finger in her vagina, he stuck his tongue into her vagina and then he inserted his penis into her vagina.
38. The statement was tendered by consent of the defence counsel Mr Tagivakatini under s.147 of CPA which provides:
 - 1) Subject to the provision of this section, **any fact** (emphasis added) of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or the accused and the admission by any party of such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.(emphasis added)
 - 2) An admission under this section:

a) May be made before or at the proceedings

39. CB's statement contains a lot of hearsay evidence. In an article on 'Hearsay Admitted Without Objection'⁴ it is stated at page 60 and 61 as follows:

"In England hearsay evidence, that is to say the evidence of a man who is not here in court and who therefore cannot be cross examined, as a general rule is not admissible at all". Per Lord Blackburn, *Dysart Peerage Case*⁵.

"The rule against the admission of hearsay' evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by a cross examination, and the light which his demeanor would throw on his testimony is lost." Per Lord Normand, delivering the opinion of the Privy Council in *Lejzor Teper v The Queen*⁶."

"It could be, of course, that this and other leading rules of evidence, normally expressed in absolute terms, may be waived by a party. If legal proceedings were viewed as being primarily a contest between parties, and the rules of evidence were rules for conducting the contest, it would naturally be open to either party to waive the rule. But if on the other hand the main object were the administration of justice, the rules of evidence were laid down as those most likely to secure a correct decision by the tribunal, a doctrine of waiver would be less easily recognized. The latter principle, it is submitted, is the correct one. Thus in *R v Bertrand*⁷ on a retrial for a criminal offence, certain witnesses were sworn but instead of giving their evidence being given in the usual way, the evidence they gave in the first trial was read over to them, with liberty for them to add or correct it. There was no objection by the prisoner's counsel. In condemning this procedure, the Privy Council said⁸:

'The object of a trial is that administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be – not the interest of either party.'

This principle applies with at least equal force, it is submitted, to the canons of exclusion, the rules against hearsay, similar effect and opinion evidence. See *Steirland v Director of Public Prosecutions*⁹. It was applied by Philip J in a recent case, *R v Pearson*. The Crown Prosecutor sought to read as evidence the deposition of a medical witness, absent in another State, who had been called in the preliminary proceedings. The deposition was not admissible under Justices Acts. Counsel for the accused consented to its admission, but was not prepared to admit as facts all that was alleged in the deposition. Philip J. held

⁴ W.N. Harrison BA., LL.M. (Qld) BA (Oxon.), Qld

⁵ (1881) 6 App. CAS. 489, 503

⁶ [1952] A.C. 480, 486

⁷ (1867) L.R. 1.PC. 520

⁸ (1867) L.R. 1.PC 520, 534

⁹ [1944] A.C. 315, 328

that the deposition could not be admitted even with the consent of the accused.”

40. The statement of CB contains hearsay material and I therefore hold that it is not admissible in evidence notwithstanding the consent of the defence.

AB's Evidence

41. AB's evidence is that he inserted his finger into her vagina and her evidence was not challenged by the defence.
42. Under s.101 of the Crimes Act 2016 the need for corroboration of the evidence of a complainant has been abolished. In respect of the inserting of the paper in her vagina, she gave evidence in a very confident and forthright manner.
43. Sexual intercourse takes place when there is a penetration of a person's genitals by an object. AB's vagina was penetrated by a piece of paper and the paper in my view would be an object. I am satisfied beyond all reasonable doubt that sexual intercourse as contained in the charge took place.

DOLI INCAPAX

44. I stated earlier that under s.41 of the Crimes Act a child can only be criminally responsible if the child knows that his conduct is wrong. The onus is on the prosecution to prove beyond all reasonable doubt that his conduct was wrong. If the prosecution is unable to prove that then he is entitled to be acquitted.
45. There is no evidence to prove that the child knew that his conduct was wrong. At best we have the record of interview in which there was no admission. The prosecution had to adduce evidence to establish the juvenile's conduct was wrong and no evidence has been adduced to that effect.

CONCLUSION

46. In the absence of any evidence that the juvenile knew that his conduct was wrong, the juvenile is acquitted of the charge of rape.

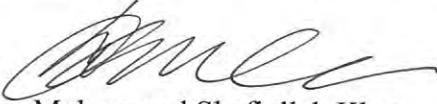
FURTHER OBSERVATIONS

47. This case and R v RD¹⁰ were the first cases before this Court involving the issue 'doli incapax' under s.41 of the Crimes Act 2016.
48. From my observations it was quite apparent that the investigating officers did not understand the concept of doli incapax, and understandably so as this was their first case.
49. For the investigating officer in the case of R v RD, Sgt Sareima, who is a very senior police officer this was the first time she had interviewed a juvenile offender in her career.

¹⁰ Criminal Case No. 18 of 2018

50. The juvenile offenders as well as the child victims have to be treated differently from the way adults are treated. It is the child victim who is required to appear in court and give evidence and relate to the court as to how the incident took place, so therefore it is imperative that her account of events should be recorded in her own words. Their guardians should not be allowed to assist them.
51. I noticed that in both cases the police interviews were suspended to allow the juveniles to seek legal advice. In this case the interview was suspended at 12.47 hours and resumed at 13.52 hours. The juvenile was attended to by a lawyer in the interviewing room whilst the police officers remained outside. In R v RD the interview was suspended at 12.20 hours and resumed at 12.41 hours. The circumstances of where the legal advisor saw the juvenile is not clear. The juveniles in my view should to be given legal advice in a more friendly and conducive environment, so I suggest that before they participate in the record of interviews their guardians should be informed by the investigating officers of the allegations against the juveniles and also be advised of their right to seek appropriate legal advice.
52. I make these comments not as a criticism of the police, but I do so in the interest of justice and public interest at large. All cases should be investigated properly so that the parties can feel satisfied that they had their day in court. I recommend to the authorities that the investigating officers dealing with juvenile offenders and child victims ought to be given appropriate training.

DATED this 5 day of July 2019


Mohammed Shafiullah Khan
Judge

