



IN THE NAOERO COURT OF APPEAL
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 2 of 2024
Supreme Court Miscellaneous
Case No. 3/2022

BETWEEN: Tomwell Raidinen

Appellant

AND: The Republic of Naoero

Respondent

BEFORE: Palmer, JA
Coates, JA
Salika, JA

Date of Hearing: 18 June 2026
Date of Judgment: 17 August 2026

Case may be referred to as: *Tomwell Raidinen v. The Republic of Naoero.*

CATCHWORDS: Disclosure of document - Section 176 of Criminal Procedure (Amendment) Act 2020 — Where trial has already commenced and prosecution intends to tender the birth certificate of the child - Where under section 93 of the Births Deaths and Marriages Registration Act 2017 birth certificate is prima facie evidence of the information it contains — Whether the defendant would suffer any prejudice if late disclosure is allowed — Whether the defendant was informed of the age of the victim at the very outset — Where the evidence of proof of age can also be given by the mother of the victim — Application allowed as the defendant would not suffer any prejudice.

APPEARANCES:

Counsel for the appellant: Vinci Clodumar, Pleader
Counsel for the respondent: S Shah

JUDGMENT

INTRODUCTION.

1. **BY THE COURT:** This is an appeal against the conviction of the Appellant, Mr Tomwell Raidinen, following a trial before the Supreme Court of Naoero constituted by Khan ACJ. On 10 November 2023, the learned trial judge convicted the Appellant of one count of committing an indecent act in relation to a child under the age of sixteen years, contrary to section 117(1)(a), (b) and (c) of the *Crimes Act 2016*. The Appellant was subsequently sentenced to a term of thirty years' imprisonment with a non-parole period of ten years.
2. The Appellant now appeals against his conviction pursuant to section 29(1)(a) of the *Court of Appeal Act 2018*. He advances nine grounds of appeal alleging errors of law and mixed questions of law and fact. The appeal challenges, amongst other matters, evidentiary rulings made during the course of the trial, the assessment of witness credibility, the admissibility and reliability of identification evidence, alleged procedural unfairness arising from late disclosure, and the sufficiency of the evidence upon which the conviction was entered.
3. The Respondent opposes the appeal and submits that none of the grounds establishes appealable error. It is contended that the learned trial judge correctly directed himself as to the applicable law, carefully evaluated the evidence, and was entitled to conclude beyond reasonable doubt that each element of the offence had been proved.
4. The appeal therefore requires this Court to consider the proper scope of appellate review in criminal proceedings, the principles governing appellate intervention in findings of fact made by a trial judge sitting alone, and whether any of the matters relied upon by the Appellant, whether considered individually or cumulatively, demonstrate that the conviction is unsafe or that a miscarriage of justice has occurred.

THE APPEAL

5. The appeal is brought pursuant to s 29(1)(a) of the *Court of Appeal Act 2018*, which confers a right of appeal from a conviction entered in the original jurisdiction of the Supreme Court upon a question of law or a question of mixed law and fact.
6. The Appellant does not appeal against sentence. He seeks orders quashing the conviction, entering a verdict of acquittal, and directing his immediate release.
7. The Respondent on the other hand seeks an order dismissing the appeal and affirming the conviction entered by the Supreme Court.
8. We set out herewith for ease of reference the grounds of appeal as set out in the Notice of Appeal:

“The Grounds of Appeal are as follows:

- 1) That the Learned Judge erred in law in allowing the Prosecution to disclose the birth certificate of the victim after the trial has commenced which was objected to by the Defence on the grounds that it was prejudicial to the defendant's case. [at (17)]. The birth certificate was not tendered as evidence by the Prosecution.
- 2) That the Learned Judge erred in law and fact when he decided that the mother (PW2) knew of the incident with the Appellant on 26 February 2022, a date she stated in her un-sworn statement to the police which she refuted in her oral, sworn statement at the trial that she learned of the incident from the police and not from her daughter. [at (87)]
- 3) That the Learned Judge erred in law by failing to address the point of law raised by the Defence that PW3 acquired the information concerning the indecent assault on the complainant fraudulently by telling her that her mother had informed of "another" incident after the interview of another case (Renak Mau) was conclude, which was the reason for her being at the police station with her mother. This was raised in the closing submission of the Defence at paragraph 8 (iv).
- 4) That the Learned Judge erred in law when he stated that the defence failed to challenge the complainant about the identity of the car that she was taken in. The defence challenged her that they were many harrier vehicles on the island with different colours and she said yes. [at(80)] It is trite law that the onus was on the prosecution to prove that a "grey harrier" existed on the island and if so, which one. No investigation was carried out by the Police at all.
- 5) That the Learned Judge erred in law in finding the Appellant guilty when there were many contradictions between the evidence of the complainant and the mother (PW 2) [at (99)] who was supposed to be a recent complainant of the incident concerning the two incidents - one alleged to involve the Appellant and another alleged to involved "Renack Mau". The complainant did state in her cross examination that she is mixing up the cases. [at (39)]. It is trite law that if the defence is able to raise a doubt about the case, the benefit of the doubt accrues to the defendant.
- 6) The Learned Judge erred in law and fact in finding the Appellant guilty when the Prosecution failed to prove that the Appellant made two calls to the complainant despite that fact that the complainant agreed that if no calls was made to her, then "nothing happened" a term the complainant had used with her mother. [at (38)]. No investigation was made by police to established if there were two calls made by the Appellant to the complainant. PW3 did obtain a search warrant to be issued to the Nauru Digicel Corporation in the course of investigation of the incident, but the search warrant was not related to the incident. But the fact remains that the Police are aware of process of obtaining evidence concerning telecommunication matters.
- 7) The learned Judge erred in law and fact in allowing the "dock" identification as sufficient evidence to identify the Appellant as the person who indecently assaulted the complainant when in fact she admitted in her cross examination that she had prior identified him by a photograph shown to her by PW3. The

photograph was not disclosed by Prosecution. It was not disclosed by PW3 in her examination in chief. The learned Judge stated that the defence failed to raise this issue when PW3 was cross-examined. The defence is not required to do anything. It was for the prosecution to establish to the court that due process of photographic identification was performed by the Police. None was made. [at (91)] and [at (92)].

- 8) The learned Judge erred in law and fact when he accepted that fact that the Appellant's penis touched the vagina of the complainant when there is evidence from the complainant that she never removed her pants. [at (94)]. *This fact will be verified when the transcript is available.*
- 9) The learned judge erred in law when he stated that the defence failed to challenge the complainant allegation of the indecent assault and thereby breaching *Brown and Dunn*. The defence did challenge the allegation that it was made up and the complainant did admit that she did mix the facts with another case. [at (39)] Secondly, section 127 (1) of the Crimes Act 2016 closed the door on any challenge using subsection 2 of section 127 because the child was under 13 years old. Allowing the Prosecution to disclose the birth certificate prejudiced the case of the Appellant."

BACKGROUND

9. The prosecution alleged that during December 2021 the Appellant established contact with the complainant ("DV"), then aged twelve years, through Facebook Messenger. After obtaining her telephone number, it was alleged that the parties arranged to meet during the early hours of the morning in the Bauda District.
10. According to the prosecution case, the Appellant collected the complainant outside the Bauda Church in a grey Toyota Harrier motor vehicle and drove with her to several locations - to Yaren, then to the Bauda Oval, before ultimately taking her to his residence at Anibare, via the Topside Road.
11. Once inside the residence, it was alleged that both parties removed their clothing, kissed and embraced, and that the Appellant intentionally touched the complainant's vagina with his penis. He applied coconut oil to his penis and attempted to penetrate her vagina.
12. The prosecution alleged that the conduct ceased after the Appellant received a telephone call, following which he drove the complainant home.
13. It is not disputed that the allegation was not immediately reported to police. The evidence disclosed that the complaint came to the attention of the authorities some weeks later while the complainant was attending the police station in connection with the investigation of another alleged sexual offence involving a different individual.
14. The Appellant denied the allegation. He elected to make an unsworn statement at trial and called no witnesses. His defence was, in substance, that the prosecution had failed to prove its case beyond reasonable doubt and that significant inconsistencies in the prosecution evidence rendered the complainant's account unreliable.

THE PROCEEDINGS IN THE SUPREME COURT

15. The Appellant pleaded not guilty to one count of committing an indecent act in relation to a child under sixteen years contrary to s 117 of the *Crimes Act 2016*. Section 117 provides:
 - (1) A person commits an offence if:
 - (a) The person intentionally touches another person: and
 - (b) The touching is indecent and the person is reckless about that fact; and
 - (c) The other person is a child under 16 years old.”
16. Subsection 117(4) confers absolute liability to subsections (1)(c), (2)(c) and (3)(c).
17. The prosecution called three witnesses, namely the complainant, the complainant's mother, and the investigating police officer.
18. During the course of the trial an issue arose concerning proof of the complainant's age. Although the prosecution had not initially disclosed the complainant's birth certificate, the document was subsequently produced after the complainant's mother expressed uncertainty concerning the complainant's year of birth. Defence counsel objected to the late disclosure, contending that it occasioned prejudice to the defence. The learned trial judge overruled that objection and permitted the document to be used for the purpose of establishing the complainant's date of birth.
19. The Appellant elected not to give sworn evidence but made an unsworn statement denying the allegation. No defence witnesses were called.
20. Following closing submissions, the learned trial judge reserved judgment and subsequently delivered written reasons convicting the Appellant of the offence charged.

APPLICABLE PRINCIPLES GOVERNING CRIMINAL APPEALS

21. The function of an appellate court in a criminal appeal against conviction is well established. An appeal is not a retrial. Rather, the Court's task is to determine whether the conviction is affected by legal error, a miscarriage of justice, or whether the verdict is unreasonable or cannot be supported having regard to the evidence.
22. It is not the role of this Court to substitute its own assessment of the evidence merely because it may have reached a different conclusion. Where findings of fact depend substantially upon the assessment of the credibility and reliability of witnesses observed by the trial judge, considerable weight is accorded to those findings. A trial judge enjoys the significant advantage of seeing and hearing the witnesses give evidence,

observing their demeanour and evaluating their responses under examination and cross-examination.

23. An appellate court will ordinarily interfere with findings of fact only where it is demonstrated that the trial judge:
- (a) acted upon a wrong principle of law;
 - (b) misunderstood or misapplied the evidence;
 - (c) overlooked material evidence;
 - (d) drew conclusions not reasonably open on the evidence; or
 - (e) reached findings that are plainly wrong or give rise to a substantial miscarriage of justice.
24. Where the appeal concerns alleged errors in the admission of evidence or procedural rulings made during the trial, the Court must determine whether any such error occurred and, if so, whether it occasioned a miscarriage of justice. Not every error requires a conviction to be set aside. The Court must consider whether the appellant has suffered actual prejudice affecting the fairness of the trial.
25. It is also well established that where the prosecution case depends principally upon the testimony of the complainant, the trial judge must carefully assess the credibility and reliability of that evidence in light of the whole of the evidence, including any inconsistencies, corroborative circumstances and the defence case. Ultimately, the prosecution bears the burden of proving every essential element of the offence beyond reasonable doubt.

FINDINGS OF THE TRIAL JUDGE

26. Having heard the evidence of the prosecution witnesses, the complainant and the appellant, the learned Acting Chief Justice was satisfied beyond reasonable doubt that the prosecution had proved each element of the offence charged.
27. The trial judge accepted the complainant as a truthful and credible witness. His Honour considered that although there were minor inconsistencies in aspects of the evidence, they did not materially affect the reliability of the complainant's account of the offending.
28. His Honour accepted the complainant's evidence concerning her communications with the appellant through Facebook and telephone, the arrangements that resulted in her entering the appellant's vehicle, and the subsequent events which occurred at the appellant's residence.
29. The trial judge also accepted the evidence identifying the appellant as the driver of the grey Toyota Harrier and rejected the defence contention that the identification evidence was unreliable.

30. His Honour considered the evidence concerning the complainant's age, including the birth certificate tendered during the proceedings, and was satisfied beyond reasonable doubt that the complainant was under sixteen years of age at the relevant time.
31. The appellant elected to give an unsworn statement denying the allegations. The trial judge considered that denial but concluded that it did not raise a reasonable doubt when viewed against the totality of the prosecution evidence.
32. Accordingly, the trial judge found the appellant guilty of one count of committing an indecent act upon a child under sixteen years contrary to section 117(1) of the Crimes Act 2016.

GROUND OF APPEAL

33. The appellant filed a Notice of Appeal advancing a number of grounds challenging both the conviction and aspects of the conduct of the trial. Although expressed in different ways, the grounds may be summarised as follows:
 - 1) The learned trial judge erred in admitting or relying upon the complainant's birth certificate when it was disclosed late in the proceedings, was objected to on the grounds that it was prejudicial to the defendant.
 - 2) The trial judge failed properly to evaluate inconsistencies in the evidence of the complainant's mother, in particular in relation to her knowledge of the alleged rape. In her statement to the police she indicated she knew of the incident on or about 26th February 2022 but in her sworn statement she told the court she only became aware from the police and not from her daughter.
 - 3) The trial judge erred in accepting evidence concerning the complainant's complaint to police.
 - 4) The trial judge erred in accepting the identification evidence concerning the appellant and the grey Toyota Harrier motor vehicle.
 - 5) The trial judge failed adequately to consider inconsistencies within the complainant's evidence.
 - 6) The trial judge erred in accepting evidence concerning telephone communications between the appellant and the complainant.
 - 7) The trial judge erred in accepting the complainant's identification of the appellant.
 - 8) The prosecution failed to prove beyond reasonable doubt that the alleged indecent touching occurred.
 - 9) The verdict was unreasonable and unsupported by the evidence as a whole.

34. Although presented separately, a number of these grounds overlap and raise common issues concerning the credibility and reliability of witnesses, the admissibility of evidence, and whether the prosecution discharged the burden of proof beyond reasonable doubt.

APPELLANT'S SUBMISSIONS

35. Counsel for the appellant submitted that the conviction should be quashed because the trial judge failed properly to assess significant inconsistencies within the prosecution case and wrongly accepted evidence which ought either to have been excluded or treated with caution.
36. It was submitted that the late disclosure of the complainant's birth certificate prejudiced the defence and deprived the appellant of a fair opportunity to investigate and challenge the evidence concerning the complainant's age.
37. Counsel further submitted that the complainant's mother gave inconsistent evidence concerning material matters, including the complainant's movements and the circumstances in which the complaint was made. It was argued that those inconsistencies undermined the overall reliability of the prosecution case.
38. The appellant also challenged the evidence concerning the alleged telephone communications, the identification of the appellant and his vehicle, and the circumstances in which the complainant identified him to police. It was submitted that these matters were inadequately investigated and should not have been accepted without independent corroboration.
39. Counsel argued that the complainant's account contained material inconsistencies regarding the alleged offending itself and that the trial judge failed sufficiently to address those inconsistencies in the reasons for judgment.
40. Finally, it was submitted that when all of the alleged deficiencies in the prosecution case are considered cumulatively, the conviction was unsafe and unsatisfactory. Counsel therefore invited the Court to allow the appeal and quash the conviction.

RESPONDENT'S SUBMISSIONS

41. Counsel for the Republic submitted that none of the grounds of appeal disclosed any appealable error and that the conviction should be affirmed.
42. The respondent submitted that the learned trial judge carefully considered all of the evidence, gave comprehensive reasons for accepting the complainant's testimony and correctly directed himself regarding the applicable standard of proof.
43. In relation to the birth certificate, it was submitted that the document merely confirmed an issue that had never been genuinely in dispute and that the appellant suffered no

prejudice by its admission. Any procedural irregularity was said to be incapable of affecting the fairness of the trial.

44. The respondent further submitted that the inconsistencies identified by the appellant were minor, concerned peripheral matters and did not undermine the essential credibility of the complainant's evidence. The trial judge was entitled to conclude that such inconsistencies were consistent with the normal imperfections of human recollection.
45. As to the identification evidence, the respondent argued that the complainant had ample opportunity to observe the appellant and his vehicle and that the trial judge was entitled to accept her evidence after considering the whole of the circumstances.
46. The respondent submitted that the trial judge correctly evaluated the defence case, including the appellant's unsworn denial, and was entitled to reject it as incapable of raising a reasonable doubt.
47. Accordingly, the respondent submitted that the conviction was properly open on the evidence, that no miscarriage of justice had occurred, and that the appeal should be dismissed.

CONSIDERATION

48. **General Approach.** The appellant advances nine grounds of appeal which, although separately expressed, substantially overlap. Many challenge the trial judge's assessment of the evidence, findings of credibility and factual conclusions. Others contend that the verdict was unreasonable or unsupported by the evidence.
49. It is convenient to consider each ground separately whilst recognising the considerable overlap between them.
50. Before doing so, it is appropriate to reiterate that this Court does not conduct a retrial. The function of an appellate court is to determine whether legal error has been demonstrated or whether the verdict reached by the trial judge was one which was open on the evidence. Findings based upon the assessment of witnesses are entitled to considerable respect because the trial judge had the advantage of seeing and hearing the witnesses give their evidence. Unless shown to be plainly wrong, affected by legal error, or unsupported by the evidence, such findings should not be disturbed.

Ground One:

"That the Learned Judge erred in law in allowing the Prosecution to disclosed (sic) the birth certificate of the victim after the trial has commenced which was objected to by the Defence on the grounds that it was prejudicial to the defendant's case. [at (17)]. The birth certificate was not tendered as evidence by the Prosecution."

51. This ground can be summarised as follows, that the learned trial judge erred in admitting or relying upon the complainant's birth certificate when it was disclosed late

in the proceedings, was objected to on the grounds that it was prejudicial to the defendant.

52. The appellant submits that the learned trial judge erred in law by permitting the prosecution to disclose the complainant's birth certificate after the commencement of the trial. It is argued that the disclosure was prejudicial to the defence and ought not to have been permitted.
53. We are unable however, to accept that submission.
54. The first difficulty confronting the appellant is that the birth certificate was never tendered into evidence. Nor was it relied upon by the prosecution as an exhibit proving any fact in issue. The trial judge expressly noted the objection raised by defence counsel but the document ultimately played no evidentiary role in the determination of guilt.
55. The appellant has not identified any specific forensic disadvantage arising from the disclosure, such as an inability to cross-examine a witness, call evidence, or alter the conduct of the defence.
56. The function of an appellate court is to determine whether any alleged error occasioned a miscarriage of justice. Even if it were accepted that the disclosure ought to have occurred earlier, the appellant must demonstrate actual prejudice affecting the fairness of the trial or the correctness of the verdict. The mere disclosure of a document, without its admission into evidence or reliance upon it by the judge, does not of itself establish prejudice.
57. No such prejudice has been identified.
58. The appellant has not demonstrated how the late disclosure impaired the conduct of the defence, prevented the calling of evidence, affected cross-examination, or otherwise influenced the outcome of the proceedings.
59. It needs to be borne in mind that at the heart of this appeal ground is the issue of the age of the complainant. In his findings on this issue, the learned Acting Chief Justice made the following remarks at [76], which we quote:

“[76] As I stated, DV' s birth certificate was not part of the disclosure documents, and therefore, it was not disclosed to the defence before the commencement of the trial. It was disclosed during the evidence in chief of DV; her birth certificate was disclosed following a ruling in *Republic v Raidinen*¹ where I stated as follows at [13]:

[13] The victim's age can be proved by the prosecution, without relying on her birth certificate, through the evidence of her mother. On the basis of the mother's statement the victim confided in her about the incident and when she gives evidence of the complaint made to her she can also give evidence of the victim's age as her mother. see *Carter's Criminal Law of Queensland* page 2290 where it is stated:

The girl's age may be proved by testimony of a person present at her birth or by inference from the appearance of the person; and as is case of Wallworth v Balmer [1965] 2 All ER 721 ; [1966] 1 WLR 16. Often, however, appearance alone may not be enough and would need to be supported by other evidence."

60. At paragraphs [77-78], the learned Judge states:

“[77] DV’ s mother asked if she remembered her date of birth, and she stated that it was 12 March and unable to state the year. She was shown DV’ s birth certificate without any objection from Mr Clodumar, and thereafter, she stated that her date of birth is 12 March 2009. The birth certificate was marked for identification, and Mr Shah stated that he was going to tender it through the investigating officer, Const. John-Ross Dube, but could not do so as he failed to attend court.

[78] DV’ s mother upon refreshing her memory stated that her date of birth was 12 March 2009. She is the natural mother who gave birth to DV, which is not in dispute. I am, therefore, satisfied that DV's age has been proved, which is 12 March 2009, and that she was 12 years old when the alleged incident took place.”

61. This finding of the judge on the evidence has not been challenged.

62. Furthermore, the complainant's age was not a matter genuinely in dispute at trial. The issue before the Court was whether the alleged offending occurred and whether the prosecution had proved the identity of the offender and the elements of the offence beyond reasonable doubt.

63. In those circumstances, we are not satisfied any miscarriage of justice had occurred from the disclosure of the birth certificate. This ground accordingly must fail.

Ground 2 – Alleged Inconsistency in the Evidence of PW2

“2. *That the Learned Judge erred in law and fact when he decided that the mother (PW2) knew of the incident with the Appellant on 26 February 2022, a date she stated in her un-sworn statement to the police which she refuted in her oral, sworn statement at the trial that she learned of the incident from the police and not from her daughter. [at (87)]*”

64. The appellant next contends that the learned judge erred in finding that PW2 knew of the incident on 26 February 2022 when, according to the appellant, her sworn evidence differed from her earlier police statement.

65. The argument focuses upon an apparent inconsistency regarding whether PW2 learned of the incident from the complainant herself or subsequently from police officers.

66. The trial judge was alive to that issue and addressed it in his reasons. At paragraphs [46 – 51], the learned Judge referred to this issue in his judgment as follows:

“[46] When asked to explain as to how and when she came to know about this incident her response was that she only got to know about it when the police came to her house, and it was before DV's birthday — sometime in February 2022.

[47] When asked to explain as to how the incident came to her knowledge, her response was that:

“I noticed difference in her behaviour, she was not herself - she was withdrawn.”

[48] She also stated that she was convinced that she was neglecting her as she was always working and DV "shut me out". The only thing that she told her was that she could not urinate properly — it was very painful.

[49] As she was talking to DV there was a knock on the front door, and she opened it, and met the police officers who came looking for DV. They told her that they wanted to question her. She went back inside the house and told DV that she was not telling her anything that's ok the police are here and will tell me everything.

[50] She was asked as to what communication she had with DV before the police arrived, and she said that she did not have any communication with her.

[51] At the police station she stated that the police told her that there was an incident in the school — that someone reported that incident, and they asked if I was aware of it, and I told them that my daughter did not tell me anything.”

67. According to the evidence given in court, the mother indicated that she was not aware of the rape incident until about in February 2022 when the police came to her house. Prior to that she was not aware of it.

68. Later at paragraphs [84 – 87], when dealing with the complainant's evidence, the learned Judge again referred to this issue. According to the evidence of the complainant, there were actually three versions given about when she told her mother about the incident. First, she says she told her mother around middle of the year, then in April – May and then when asked further, she says she did not remember.

69. At paragraph [85], the learned Judge noted the evidence of the complainant, in which she says that after telling her mother about the incident, the mother then reported the matter to the police.

70. The learned Judge noted too that the mother in her statement to the police had stated that she was told about it in February 2022. In evidence however, she says that she only knew about the incident when she went to the police to give a statement about the case of another person – Renack Mau.

71. The learned Judge also noted from the records before the court in an application for detention of the defendant, where the investigating officer – Sgt Doggeiy stated in his affidavit at paragraph 13¹ as follows:

“That the juvenile on 26th February told her mother about the incident.”

72. At paragraph [87], his Honour states:

“[87] This confirms DV’s contention that her mother knew about the incident and reported it to the police.”

73. Later in his concluding findings, his Honour noted the diverging versions of the mother as to when she knew of the incident and when it was supposedly reported to the police, however his Honour pointed out **that in relation to the substantive issues of the offending, there was no contradiction.** We quote:

“[99] I accept that there are many contradictions in DV's own evidence when she gave evidence in chief, and during her cross examination as discussed above. **I also accept that there are contradictions** in DV's and her mother's evidence in respect of how she confided in her and **as to how the matter was reported to the police,** but there is **no contradiction in her evidence** of how she started communicating with the defendant and how they met and the time that they spent together in the car and in his bedroom and about how the alleged incident took place there.” (Emphasis added).

74. The discrepancy identified by the appellant concerns the manner and timing by which PW2 became aware of the allegation. **It does not concern the essential facts constituting the offence itself nor the identity** of the alleged offender.

75. The learned judge was aware of that inconsistency and was required to assess its significance. The critical issue was whether the inconsistency undermined the reliability of PW2’s evidence or the prosecution case as a whole.

76. In our view, the inconsistency - discrepancy related more to the source and timing of PW2’s knowledge of the complaint. It did not directly concern the occurrence of the alleged indecent assault itself. The learned judge was entitled to regard the inconsistency as affecting weight rather than admissibility.

77. It is well established that not every inconsistency undermines the reliability of a witness. Human recollection is rarely perfect, particularly where witnesses are recounting events occurring some time earlier. The task of the trial judge is to determine whether any inconsistency affects the substance of the evidence or merely concerns a peripheral matter.

78. In our view, the trial judge was entitled to conclude that the discrepancy identified by the defence did not materially affect the reliability of PW2's evidence.

¹ See paragraph 14 of the judgment.

79. More importantly, PW2 was not an eyewitness to the alleged offending. Her evidence was essentially corroborative and contextual in nature. The prosecution case did not depend upon acceptance of PW2's account concerning when she first learned of the allegation.
80. We are not satisfied any error of law has been demonstrated and ground 2 is dismissed herewith.

Ground 3 – Alleged Failure to Address Defence Submission Concerning PW3

“[10] That the Learned Judge erred in law by failing to address the point of law raised by the Defence that PW3 acquired the information concerning the indecent assault on the complainant fraudulently by telling her that her mother had informed of "another" incident after the interview of another case (Renak Mau) was conclude, which was the reason for her being at the police station with her mother. *This was raised in the closing submission of the Defence at paragraph 8 (iv).*”

81. The appellant submits that the trial judge failed to address a defence submission that PW3 improperly obtained information from the complainant by informing her that her mother had disclosed another incident involving a different individual.
82. It is said that this amounted to a form of deception which affected the reliability of the complainant's subsequent account.
83. We do not accept this submission.
84. A trial judge is required to deal with the essential issues arising for determination. However, a judge is not obliged to address expressly every argument advanced by counsel or every subsidiary factual contention raised during the course of a trial.
85. The question for the Court is whether the reasons, read fairly and as a whole, demonstrate that the judge understood and determined the issues requiring resolution.
86. The reasons reveal a detailed consideration of the complainant's evidence, the circumstances in which her complaint emerged, the police investigation, and the reliability of the witnesses.
87. Even assuming that PW3's approach to questioning could have been more carefully undertaken, the appellant has not demonstrated how that circumstance rendered the complainant's evidence unreliable or inadmissible.
88. Nor has the appellant demonstrated that any alleged omission in the reasons affected the ultimate findings of fact, the outcome of the trial or resulted in any unfairness.
89. We are satisfied accordingly, ground 3 should be dismissed.

Ground 4 – Identification of the Grey Toyota Harrier

"That the Learned Judge erred in law when he stated that the defence failed to challenge the complainant about the identity of the car that she was taken in. The defence challenged her that they (sic) were many harrier vehicles on the island with different colors and she said yes. [at(80)] It is trite law that the onus was on the prosecution to prove that a "grey harrier" existed on the island and if so, which one. No investigation was carried out by the Police at all."

90. Under this ground, the appellant submits that the trial judge erred in accepting the identification evidence concerning the appellant and the grey Toyota Harrier motor vehicle.
91. The appellant contends that the learned judge erred in finding that the defence failed to challenge the complainant's evidence concerning the vehicle involved.
92. The appellant submits that the complainant accepted in cross-examination that there were numerous Toyota Harrier vehicles on Nauru and that the police failed to investigate whether the particular vehicle could be identified.
93. We are satisfied this ground cannot succeed.
94. The prosecution case was not dependent upon proof of the registration number, ownership particulars, or exclusive identification of a specific motor vehicle. The vehicle evidence formed only one component of the prosecution case.
95. The trial judge did not convict because a grey Toyota Harrier existed. Rather, he accepted the complainant's evidence identifying the appellant as the person involved in the incident.
96. The complainant's acknowledgment that other similar vehicles existed on the island did not materially weaken her identification evidence. Nor was the prosecution required to prove the existence of every other similar vehicle or eliminate every theoretical possibility suggested by the defence.
97. The issue was whether the evidence as a whole established the appellant's guilt beyond reasonable doubt.
98. The trial judge was entitled to conclude that it did and accordingly, this ground should also be dismissed.

Ground 5 – Contradictions Between the Complainant and PW2

- "5. *That the Learned Judge erred in law in finding the Appellant guilty when there were many contradictions between the evidence of the complainant and the mother (PW 2) [at (99)] who was supposed to be a recent complainant of the incident concerning the two incidents - one alleged to involve the Appellant and another alleged to involved "Renack Mau". The complainant did state in her cross examination that she is mixing up the cases. [at (39)]. It is trite law that if the defence is able to raise a doubt about the case, the benefit of the doubt accrues to the defendant."*

99. Under this ground, it is alleged that the trial judge failed adequately to consider inconsistencies within the complainant's evidence.
100. The appellant submits that significant contradictions existed between the complainant and PW2 concerning the reporting of the incident and the existence of another complaint involving a different individual.
101. Reference was made to the complainant's acknowledgment during cross-examination that she may have mixed aspects of the two incidents.
102. The trial judge expressly considered these matters. For instance, we note that during the examination in chief of PW1 – the complainant, the learned Judge noted at paragraph [40] under the sub-heading “Re-Examination”, that she was sure about the identity of the person that took her out that night:
- “[40] In her re-examination she was asked if she knew who she was talking to, and **she stated that it was Tomwell**, and she agreed that they were not related to each other. That she did not know him personally. **She stated that it was Tomwell that she went out with** in the middle of the night.” (Emphasis added).
103. We note this evidence has not been contradicted by the defence.
104. Later in his judgment when dealing with the issue of identification of the Appellant, at paragraphs [96 and 97], his Honour notes that the issue of identification was not challenged by the defence as mistaken. He also notes that the two of them spent not less than 3 hours together that night and in close proximity. We quote:
- “[96]. In this case the defence does not allege that the identification was mistaken. DV's evidence is **that she spent in excess of 3 hours** with the defendant in his car and in his bedroom.
- [97] The dock identification had already been made, and it is a matter for me as to what weight shall attach to the identification, and in doing so I shall take into consideration the period of time that they spent together, which was in excess (sic) of 3 hours and in close proximity.” (Emphasis added).
105. According to the conclusion reached by the learned judge, there could not be any uncertainty or doubt, about the identity of the appellant in the circumstances of the case.
106. The identified inconsistencies related primarily to reporting history and surrounding circumstances rather than the essential allegations concerning the appellant's conduct.
107. The trial judge had the advantage of observing the complainant give evidence and assessing her responses during cross-examination.
108. Importantly, the judge accepted the complainant's evidence concerning the appellant despite recognising that some confusion existed regarding other allegations involving

another individual. The learned judge was entitled to find that complainant's evidence concerning the appellant was sufficiently clear and reliable.

109. Minor inconsistencies or confusion do not necessarily render a witness unreliable. The question is whether the inconsistencies were so significant that they created a reasonable doubt.
110. Having reviewed the evidence, we are not persuaded that those inconsistencies were of such significance as to render the complainant's account unreliable. The judge was entitled to assess the evidence in its entirety. We are satisfied this ground fails and should be dismissed.

Ground 6 – Telephone Calls

"10. The Learned Judge erred in law and fact in finding the Appellant guilty when the Prosecution failed to prove that the Appellant made two calls to the complainant despite that fact that the complainant agreed that if no calls was made to her, then "nothing happened" a term the complainant had used with her mother. [at (38)]. No investigation was made by police to established if there were two calls made by the Appellant to the complainant. PW3 did obtain a search warrant to be issued to the Nauru Digicel Corporation in the course of investigation of the incident, but the search warrant was not related to the incident. But the fact remains that the Police are aware of process of obtaining evidence concerning telecommunication matters."

111. Under this ground it is alleged that the trial judge erred in accepting evidence concerning telephone communications between the appellant and the complainant.
112. The appellant argues that the prosecution failed to prove that two telephone calls were made by the appellant to the complainant and that police failed to obtain telecommunications evidence which could have verified or disproved that allegation.
113. The appellant also relies upon the complainant's evidence that if no calls had been made, then "nothing happened".
114. It is true that no call records were tendered.
115. However, the absence of telecommunications records does not necessarily render the complainant's evidence incapable of acceptance. At the same time, the prosecution was not necessarily required to prove the calls by documentary telecommunications evidence if there was other admissible evidence capable of establishing the relevant facts.
116. In this instance, the prosecution was entitled to rely upon direct oral testimony, in particular that of the complainant who gave evidence concerning the communications she received, and which the trial judge accepted.

117. The role of the appellate court is not to determine whether additional investigations could have been undertaken. The relevant question is whether the evidence actually before the trial court was capable of supporting the findings made.
118. In our view it plainly was.
119. While the absence of telephone records was a matter capable of being relied upon by the defence in cross-examination and final submissions, the trial judge nevertheless accepted the complainant's account. That conclusion was open to him and accordingly we are satisfied that ground 6 should be dismissed.

Ground 7 – Dock Identification and Photographic Identification

- “7. The learned Judge erred in law and fact in allowing the "dock" identification as sufficient evidence to identify the Appellant as the person who indecently assaulted the complainant when in fact she admitted in her cross examination that she had prior identified him by a photograph shown to her by PW3. The photograph was not disclosed by Prosecution. It was not disclosed by PW3 in her examination in chief. The learned Judge stated that the defence failed to raised (sic) this issue when PW3 was crossed-examined. The defence is not required to do anything. It was for the prosecution to establish to the court that due process of photographic identification was performed by the Police. None was made. [at (91)] and [at (92)].”*
120. Under this ground it is alleged that the trial judge erred in accepting the complainant's identification of the appellant.
121. This ground constitutes one of the principal arguments advanced by the appellant.
122. It is submitted that the complainant's identification of the appellant in court was unreliable because she had previously been shown a photograph by PW3. The appellant argues that no evidence was led establishing that a proper photographic identification procedure had been conducted.
123. It is correct that courts have repeatedly warned against the dangers of dock identification, particularly where identification is a central issue.
124. However, each case depends upon its own facts.
125. The trial judge recognised that the complainant had previously seen a photograph of the appellant. The issue was therefore not ignored.
126. More importantly however, the complainant's identification was not based solely upon seeing the appellant in the dock. Her evidence was that she had direct personal contact with the offender during the incident itself.
127. It is important to note that the photograph did not create the identification. Rather, in the clear circumstances of this case, it was capable of confirming an identification already made from personal observation. She met the defendant and spent more than 3

hours in close proximity to him. There has been no challenge to those facts. In that regard, surely the defendant was known to her, recognisable and identifiable. That was what happened when the photographs were shown to her, and when she saw him in court and identified him in the dock, that he was the defendant that met her that night and took her to his house and with whom she spent more than 3 hours with. It has never been alleged that she was mistaken about his identity.

128. The weight to be attached to such evidence was a matter for the trial judge.
129. Having considered the circumstances as a whole, the trial judge was entitled to conclude that the complainant's identification remained reliable notwithstanding her prior viewing of the photograph.
130. We are not satisfied any miscarriage of justice has been demonstrated and this ground should also fail.

Ground 8 – Whether the Physical Contact Was Proved

“8. The learned Judge erred in law and fact when he accepted that fact that the Appellants penis touched the vagina of the complainant when there is evidence from the complainant that she never removed her pants. [at (94)].”

131. Under this ground it was alleged that the prosecution failed to prove beyond reasonable doubt that the alleged indecent touching occurred.
132. The appellant contends that the judge erred in finding that the appellant's penis touched the complainant's vagina because the complainant stated that she did not remove her pants.
133. This ground concerns the interpretation of the complainant's evidence.
134. The trial judge had the advantage of hearing the entirety of that evidence and assessing it in context.
135. The fact that clothing remained partially or wholly in place does not necessarily render physical contact impossible. Such questions depend upon the precise circumstances described in the evidence.
136. The judge carefully reviewed the complainant's account and accepted her evidence concerning the physical conduct alleged.
137. We note the following findings made by the learned Judge on this issue. Starting at paragraph [97], his Honour held as follows:

“[97] The dock identification had already been made, and it is a matter for me as to what weight shall attach to the identification, and in doing so I shall take into consideration the period of time that they spent together, which was in access (sic) of 3 hours and in close proximity.”

138. His Honour continues at paragraph [99]:

“[99] I accept that there are many contradictions in DV’s own evidence when she gave evidence in chief, and during her cross examination as discussed above. I also accept that there are contradictions in DV’s and her mother’s evidence in respect of how she confided in her and as to how the matter was reported to the police, but there is no contradiction in her evidence of how she started communicating with the defendant and how they met and the time that they spent together in the car and in his bedroom and about how the alleged incident took place there.” (Emphasis added).

139. Finally, at paragraph [101], his Honour concludes:

“[101] In the circumstances, I am satisfied that the prosecution has proved all the elements of the offence against the defendant, that is, it was the defendant who committed the act of touching DV’s vagina with his penis which is indecent. I, therefore, find the Defendant guilty of the offence of indecent act.” (Emphasis added).

140. Having reviewed the relevant passages, we are not persuaded that the finding was inconsistent with the evidence or unavailable to the trial judge and accordingly ground 8 should be dismissed.

Ground 9 – Alleged Failure to Challenge and *Browne v Dunn*

“9. The learned judge erred in law when he stated that the defence failed to challenge the complainant allegation of the indecent assault and thereby breaching *Browne and Dunn*. The defence did challenge the allegation that it was made up and the complainant did admit that she did mix the facts with another case. [at (39)] Secondly, section 127 (1) of the Crimes Act 2016 closed the door on any challenge using subsection 2 of section 127 because the child was under 13 years old. Allowing the Prosecution to disclose the birth certificate prejudiced the case of the Appellant.”

141. The appellant submits that the trial judge incorrectly concluded that the defence had failed to challenge aspects of the complainant’s evidence and thereby invoked the rule in *Browne v Dunn*².

142. The appellant further argues that defence counsel did challenge the allegations and that the complainant herself accepted that she had confused aspects of this case with another complaint.

143. The appellant further submits that section 127(1) of the Crimes Act 2016 precluded any challenge under section 127(2) because the complainant was under 13 years of age, and that the disclosure of the birth certificate prejudiced the appellant.

² (1893) 6 CR 67

144. The Court accepts that the defence did challenge the complainant's account during cross-examination. To the extent that the learned judge suggested that no challenge was made, that statement must be read in the context of the particular aspects of the evidence that the judge considered had not been squarely put to the complainant.
145. Again, we note what his Honour held at paragraph [100] that there was a breach of the rule in *Browne v. Dunn*:
- “[100] In his written submissions Mr Clodumar submits that DV fabricated her story. It is a very serious allegation as it means that whatever she said never took place — but Mr Clodumar **did not cross examine her on that issue or suggested to her that she is making it up**, and consequently her whole evidence on how they met and the time that they spent together **has been unchallenged**. In failing to put the defence case, there has been a clear breach of the rule in *Browne v Dunn*.”
146. Having reviewed the transcript passages relied upon by the parties, we accept that defence counsel did challenge the complainant's account in a number of respects.
147. However, even if the trial judge overstated the extent to which particular matters had been put in cross-examination, that does not establish a miscarriage of justice.
148. The trial judge's findings were not based solely upon the application of the rule in *Browne v Dunn*. Rather, they were based upon his overall assessment of the evidence, the credibility of the witnesses, and the consistency of the prosecution case.
149. The appellant's further reliance upon s 127 of the *Crimes Act 2016* does not advance the ground. As already noted under Ground 1, the birth certificate was not tendered in evidence and no prejudice affecting the fairness of the trial has been demonstrated. We are satisfied accordingly that ground 9 should be dismissed herewith also.

Conclusion on the Grounds of Appeal

150. Having carefully examined each of the nine grounds of appeal, individually and collectively, we are satisfied that none disclose legal error, factual error, procedural unfairness, or any miscarriage of justice warranting appellate intervention.
151. The learned trial judge was aware of the inconsistencies and weaknesses identified by the defence, considered the identification evidence, assessed the credibility of the witnesses, and gave reasons for accepting the prosecution case.
152. We are satisfied the learned trial judge correctly directed himself as to the applicable law, carefully assessed the evidence of the complainant and the other witnesses, and reached findings that were open on the evidence before him.
153. Although certain matters, particularly the photographic identification issue and the reference to *Browne v Dunn*, required careful consideration, none of those matters demonstrates legal error, factual error warranting appellate intervention, or a miscarriage of justice.

154. The appellant has not established that any of the impugned findings were plainly wrong, unsupported by the evidence, or affected by legal error.

155. We are satisfied accordingly, all nine grounds of appeal be dismissed herewith.

ORDERS OF THE COURT

1. The appeal is dismissed.

DATED this 17 day of August 2026



Palmer, JA
Justice of the Naoero Court of Appeal



Coates, JA
Justice of the Naoero Court of Appeal



Salika, JA
Justice of the Naoero Court of Appeal

