IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 2 of 2023
Supreme Court Criminal Case No. 2 of 2021

BETWEEN

LAKENA DEGIA

APPELLANT

AND

THE REPUBLIC

RESPONDENT

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING: **29 July 2024**

DATE OF JUDGMENT: **15 November 2024**

CITATION:	**Lakena Degia v The Republic**
KEYWORDS:	Strict liability; absolute liability; totality principle; consecutive; concurrent
LEGISLATION:	S. 23, 24, 117 of the Crimes Act 2016
CASES CITED:	Republic v Hartman [2020] NRSC; Criminal Case 16 of 2019 (13 March 2020); Barbaro v. The Queen; Zirilli v The Queen [2104] HCA 2 (12 February 2014); Mill v R (1988) 83 ALR 1; Kabui v Republic Criminal Appeal No 66 of 2015, [2016] eKLR; R v Balddock (2010) 269 ALR 674
APPEARANCES:	
COUNSEL FOR the Appellant:	**R Tagivakatini**
COUNSEL FOR the Respondent:	**A Driu**

JUDGMENT

1. This is an appeal against the sentence. The defendant (Appellant) was found guilty for two counts of Indecent Acts in Relation to a Child Under 16 Years Old contrary to s.117(1)(a), (b) and (c)(i) of the Crimes Act 2016 by the Supreme Court by the judgment dated 19 May 2022. Subsequently, on 19 October 2022 the Appellant was sentenced to 6 years of imprisonment for each count and a total of 12 years was imposed. Being aggrieved by the sentence, the Appellant filed a notice of appeal on 28 March 2023 against the sentence.

2. The Appellant advances two grounds of appeal, challenging the sentence, and raises an additional ground related to the conviction. However, it was

submitted to the Court that this additional ground is not intended to seek the conviction to be set aside but rather to ensure the correct law is affirmed in the judgment. The Appellant argued that the offence he was charged with is one of absolute liability, not strict liability. The Respondent also concedes this point, as the Appellant does not advance it as an appeal ground to set aside the conviction.

3. The three grounds of appeal are as follows:

    i. The learned Trial Judge erred in law when he held in paragraph 4, that the offence of Indecent Acts in Relation to a Child under 16 Years Old is a strict liability offence.
    ii. The Learned Trial Judge erred in law and fact when he failed to consider both counsels' submissions on the sentencing tariffs on the highly persuasive case of Republic v Hartman [2020] NRSC 9; Criminal Case 16 of 2019(13 March 2020).
    iii. The learned Trial Judge erred in law and fact when he failed to consider both counsels' submissions on the totality principle on the highly persuasive case of Republic v Hartman [2020] NRSC 9; Criminal Case 16 of 2019 (13 March 2020)

4. As per the facts of the case the victim was under 13 years of age at the time of the offences. The Appellant is married to the victim's maternal grandmother. However, the Appellant is not victim's biological grandfather. The Appellant lived with the victim's maternal grandmother and the victim also resided at the same two-bedroom house with her parents and two younger siblings. On 18 January 2021 the Appellant voluntarily surrendered to the Police and reported that he had sexually assaulted another person. Subsequently, the victim was brought to the police station following the Appellant's revelation, where she provided a statement indicating that on two separate occasions, the Appellant touched her vaginal area outside her clothing.

5. The incident related to the first count occurred when the victim was sleeping on a couch and her grandmother was sleeping on a mattress on the floor. The Appellant came home late that night, lifted her from the couch, laid her on the mattress, and touched her on the thigh and vaginal area from outside her pants. The incident related to the second count occurred on a day when her parents had an argument, and her father left the house. The Appellant called her and made her lie next to him and touched her vaginal area from outside the pants. According to the evidence, the Supreme Court decided that the two incidents took place between January 2018 and December 2019, prior to the amendment of the Crimes Act 2016, in October 2020.

First Ground of Appeal

6. The Appellant's counsel submitted that the Learned Trial Judge erred when it was stated that the offence of Indecent Acts in Relation to Child Under 16 Years Old as stipulated in section 117 is an offence of strict liability. He submitted that the law is very clear that absolute liability applies to offences under subsections 1(c), 2(c) and 3(c) of 117. The offences in the two counts against the Appellant is contrary to section 117(1)(a), (b) and (c)(i) of the Crimes Act 2016, and therefore it is very clear that it is an offence of absolute liability.

7. The Respondent did not dispute that it was erroneous to classify the offence as one of strict liability. However, it was submitted on behalf of the Respondent that, since the Appellant had not raised a defence of mistake or ignorance of fact in the lower court, this issue did not affect the findings. Furthermore, the Respondent submitted that, as the Appellant does not seek to set aside the conviction on this ground, the Respondent concedes that this issue should be rectified to affirm the correct legal position.

8. The difference between strict liability and absolute liability is clearly set out in section 23 and 24 of the Crimes Act 2016.

Section 23 Strict Liability

(1) Where a written law that creates an offence provides that the offence is and offence of strict liability;

   a. No fault element is required to prove the physical elements of the offence; and
   b. The defence of mistake or ignorance of fact under Section 45 is available.

(2) Where a written law that creates an offence provides that strict liability applies to a particular physical element of the offence:

   a. No fault element is required to prove the physical element; and
   b. The defence of mistake or ignorance of fact under section 45 is available in relation to the physical element.

(3) The existence of strict liability does not make any other defence unavailable.

Section 24 Absolute liability

(1) Where a written law that creates an offence provides that the offence is an offence of absolute liability:

   a. No fault element is required to prove the physical elements of the offence; and
   b. The defendant may be found guilty of the offence regardless of any mistake or ignorance of fact under Section 45 by the defendant.

(2) Where a written law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

   a. No fault element is required to prove that physical element; and
   b. The defendant may be found guilty of the offence regardless of any mistake or ignorance of fact under Section 45 by the defendant.

(3) The existence of absolute liability does not make any other defence unavailable.

9. Given the distinction between strict and absolute liability, the defence of mistake or ignorance of fact is not relevant to the present case, as no such defence was advanced by the Appellant. Although the learned trial Judge erred in law by stating in paragraph 4 of the judgment that "this is a strict liability offence," I do not find that this error impacts the final outcome of finding the Appellant guilty on both counts.

10. Nevertheless, to clarify the correct legal position, it should be noted that the Appellant is charged with two counts of Indecent Acts in Relation to a Child Under 16 Years Old, contrary to s.117(1)(a), (b), and (c)(i) of the Crimes Act 2016, and that absolute liability applies to this offence.

11. In the circumstances, the first ground of appeal is allowed to that extent.

Second Ground of Appeal

12. The Appellant contended that the learned trial Judge erred in law and fact when his Honour failed to consider the sentencing tariffs in Republic v Hartman [2020] NRSC; Criminal Case 16 of 2019 (13 March 2020). The counsel for the Appellant submitted that the facts of Hartman (supra) are eerily similar to the current matter, if not worse. The argument of the Appellant is that the level of offending in the current matter is lower than Hartman (supra). In Hartman (supra) the defendant was convicted for one count based on indecent exposure and masturbation in the presence of the victim. The other count was for carrying the victim to the defendant's room and the third count was for touching the victim's buttocks as the defendant walked past her. The Appellant's counsel argues that the two incidents in the current case are less severe than the incidents in Hartman (supra).

13. In Hartman (supra) the Supreme Court stated the following in the sentence:

> "20. When the facts of this case are compared to the facts of the cases that I have referred to above, the level of offending in this case is indeed at the very low end of the scale of gravity. In relation to Count 1 there was no touching, it was only a case of an indecent act of exposure, whilst in Count 3 you carried the complainant into your room and were disturbed when a motor cycle arrived; and in Count 4 you touched the victim's buttock as you walked past her. So, the element of touching was very minimal."

14. It appears that the argument presented by the Appellant's counsel contradicts the position established in Hartman (supra). In Hartman, the Supreme Court considered the gravity of the offences to be low, as two counts involved no physical contact, and even in the third count, the contact was minimal. In contrast, the current case involves physical contact in both counts. Additionally, in reaching its conclusion in Hartman (supra), the Supreme Court compared it to other cases, finding the circumstances in Hartman to be relatively minor. The cases used for this comparison are outlined in paragraph 16 of that judgment.

> "1. Republic v AD - where the juvenile offender was charged with one charge of indecent assault and was sentenced to 18 months imprisonment. The facts of the case were that the juvenile touched the victim on her vagina on top of her underwear. The juvenile was sentenced to 18 months imprisonment but he had two previous convictions – one for indecent act and one for the offence of rape.
> 2. R v EF - where the accused was 29 years old and the victim was 14 years of age. The circumstances of the offending were that the accused woke the victim up at about 4am after consuming alcohol and wanted to give his mobile phone to her and she refused to take it. She later went back to bed and slept and when she woke up she found that she was not

wearing her underwear and the accused had his mouth on her vagina and he said to the victim that she should go to his house: 'so that he could eat me properly'. The accused was a first offender and was sentenced to 4 years 3 months imprisonment.

3. R v Baetiong- the accused was charged for the offence of deprivation of liberty and indecent act under the Act – the accused was 71 years old and the complainant was a girl under 11 years of age. The accused enticed the complainant to go into a room so that he could give her lollipops. Thereafter he tied the complainant's hands, blind folded her and put clothing in her mouth, closed the door and threatened to stab her with a knife. The accused removed her pants, and he kissed her on her lips and her neck and rubbed his fingers on her vagina. The accused was sentenced to 5 years imprisonment for deprivation of liberty and 4 years imprisonment for indecent act and both sentences were ordered to be served consecutively."

15. The Respondent acknowledged that they also cited Hartman (supra) in their sentencing submissions filed in the lower court. However, it was noted that this case was referenced alongside other local authorities, and the Respondent never argued that the circumstances of the instant case were comparable to those in Hartman (supra). Rather, it appears that the Respondent relied on Hartman in the Supreme Court submissions to emphasize the principle that children must be protected at all costs. The Respondent further argued that the circumstances of the present case are more serious than those in Hartman (supra).

16. The Respondent further submitted that sentencing on this case must be based on its specific circumstances, considering the prevalence of the offence and the needs of the society as reflected by Parliament through legislative changes overtime. Furthermore, it was submitted that the sentencing process should not be a mathematical exercise citing Barbaro v. The Queen; Zirilli v The Queen [2104] HCA 2 (12 February 2014):

"[34] Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts..."

17. I have considered the submissions of both parties. The Appellant's main argument is that the learned trial Judge erred by not referencing the sentence in Hartman (supra). However, the fact that a specific sentence from another case cited by the parties was not mentioned does not constitute an error of law or fact. As discussed above, the circumstances in Hartman (supra) and the instant case are not comparable, and there was no obligation for the learned trial Judge to follow the same sentencing approach. While the sentencing approach of a previous case can serve as a guideline, each case must be assessed based on its specific circumstances to arrive at an appropriate sentence.

18. In this instance, I find that the reasoning in Hartman (supra) itself demonstrates that a lesser sentence was imposed because the offences were on the lower end of the scale in terms of gravity. Two of the counts involved no physical contact, and the third involved only a brief incidental touch while passing by in that case. By contrast, both counts in the instant case involve touching the private areas over clothing, a significantly more serious act than in Hartman (supra). Additionally, the learned trial Judge took into account specific aggravating circumstances in this case in arriving at a sentence of six years for each offence.

19. In the circumstances, I am of the view that the second ground of appeal lacks merit.

Third Ground of Appeal

20. The Appellant contended that the learned trial Judge did not consider the totality principle in arriving at the final sentence. Furthermore, it was submitted that the same learned trial Judge presided over Hartman(supra) case and have given due regard to the totality principle in that case as follows:

> "[24] I am obliged to consider the totality principle to ensure that the total sentence that you serve is just and appropriate."

21. The Respondent conceded that there is no mention of totality principle in the impugned sentence. However, the Respondent asserted that given that the offending relates to separate incidents that did not occur as part of one transaction it warranted the court to impose a consecutive sentence.

22. The High Court of Australia in Mill v R (1988) 83 ALR 1 referred to totality principle as follows:

> "The totality principle is a recognised principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed (1979), pp 56-7 as follows (omitting references):
>
> > The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see

whether it looks wrong'; 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

23. In Kabui v Republic Criminal Appeal No 66 of 2015, [2016] eKLR, a Kenyan case somewhat similar to the present case, the accused was sentenced for two counts of indecent assault involving a child and was given ten years imprisonment for each count. The sentences were ordered to run consecutively. The sentence was appealed and the Kenyan Court of Appeal stated:

> "As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.
>
> In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts."

24. However, it should be noted that, in that case, the offences were committed against two different complainants, whereas, in the present case, the two incidents involve the same victim. The purpose of the totality principle is to ensure that the combination of sentences for multiple offences is fair and

proportionate to the overall criminality of the acts. It aims to prevent mere adding up of individual sentences to draw an unfair and disproportionate term of imprisonment. There is no indication that the learned trial judge had regard to the totality principle when arriving at the final sentence. Although it is not necessary to specifically mention the totality principle in sentencing, the trial Judge's considerations should reflect that the totality of the sentence was duly assessed to ensure it remains within fair and proportionate limits, particularly when consecutive sentences are imposed. In this case, however, there is no indication that the learned trial Judge gave due regard to the aggregate effect of the sentence.

25. In R v Balddock (2010) 269 ALR 674 it was discussed how courts should approach sentencing when multiple counts are involved:

> "It is apparent from the decided cases that an appropriate sentence is to be fixed for each offence followed by consideration of cumulation or concurrence and then by questions of totality. To the extent to which two or more offences contain common elements it would be wrong to punish the offender twice, with the result that concurrence is appropriate where there is essentially one transaction or commonality is evidenced.
>
> The totality principle enables a court to mitigate what strict justice would otherwise indicate that the overall sentence to be served is inappropriately long. The key factor is proportionality, with a view to ensuring that the aggregate of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved. An appropriate result may be achieved by making sentences wholly or partially concurrent or by lowering individual sentences."

26. The learned trial Judge imposed a 6 years imprisonment term on each count after considering the aggravating and mitigating circumstances. The Appellant does not dispute the factors considered as aggravating and mitigating circumstances. However, the Appellant still argued that the 6 years term was

still excessive in the second ground of appeal. The learned trial Judge stated the following when arriving at the final sentence:

> "[25] You will be sentenced to a term of 6 years imprisonment on each count and I order that the sentence on count one is to be served concurrently with the sentence on count two making a total of 12 years imprisonment. I order that the time spent in remand awaiting the trial and sentence which is 21 months is to be deducted from the total sentence of 12 years.
>
> [26] You will serve a sentence of 10 years and 3 months."

27. Based on the wording of the sentence, it appears that the learned trial Judge imposed a total of 12 years imprisonment term for both counts, which was subsequently reduced to 10 years and 3 months after crediting the time spent in custody. Although the learned Trial Judge noted, "I order that the sentence on count 1 is to be served concurrently with the sentence on count 2," it appears the two sentences were still added together, resulting in a total of 12 years. Although the learned trial Judge noted in the sentence the word 'concurrent' his Honour in fact imposed the sentences to run consecutively.

28. Be that as it may, I am of the view that the learned trial Judge failed to appreciate the totality principle when determining the final sentence, particularly in light of the maximum punishment prescribed by law for the offence of Indecent Acts in Relation to a Child Under 16 Years Old. The penalty for this offence, prior to the amendment, was 15 years imprisonment. The learned trial Judge should have taken this into account to arrive at a proportionate and fair sentence, regardless of the subsequent amendment that raised the maximum penalty to 30 years, as the Appellant was sentenced under the previous law. Imposing a total of 12 years imprisonment was not fair and proportionate given the overall objective criminality in this case. When the circumstances of the case and the criminality involved is considered, I am of the view that the total sentence is unduly harsh and long. As such, it would be fair to order that the two sentences run concurrently. Therefore, I conclude

that the learned trial Judge erred by failing to address his Honour's mind to the totality principle and thereby imposing a sentence that does not appropriately reflects total criminal conduct of the Appellant.

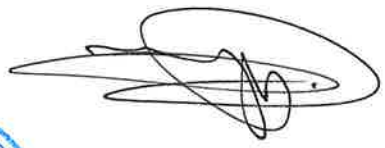
29. In the circumstances, I allow the third ground of appeal.

Orders of the Court

i. The sentence imposed by the Supreme Court is quashed.
ii. The Appellant is sentenced to 6 years imprisonment for each count, and the sentences are ordered to run concurrently.
iii. After deducting 21 months for the time spent in custody, the Appellant should serve a total of 4 years and 3 months, effective from 19 October 2022.

Dated this 15 November 2024.

Justice Rangajeeva Wimalasena



President

Justice Sir Albert Palmer

Justice of Appeal

Justice Colin Makail

Justice of Appeal