

IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 36 of 2016

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

FC
Defendant

Mr. David Tonganivalu for the Republic
Mr. Sevualoni Valenitabua for the Defendant

Date of hearing: 7 September 2016
Date of Sentence: 14 September 2016

Sentence

1. The defendant pleaded guilty to 3 counts of indecent treatment of girls under seventeen contrary to section 216 of the Criminal Code 1899. The defendant's name has been suppressed to protect the identity of the victim. The maximum penalty for this offence is two years imprisonment.

FACTS

2. The agreed facts as summarized are;

The defendant has been separated from his wife and has been living with his two daughters. The other daughter lives with his wife.

The first incident occurred on a night in November 2015. The victim was asleep in her room at their home when she felt her breast being fondled. She woke up and was shocked and terrified to see that her father the defendant was fondling her breasts. The victim could smell a strong odour of alcohol from the defendant. She tried to go to sleep but she could not and the defendant entered her bed room again and told her not to tell anyone or he will hurt her. In fear she did not tell anyone.

It was another day in the following week of November 2015 after the first incident of indecent assault, the victim was alone at home about 4pm watching television in her sister's room. The defendant entered the room and told the victim to take off her shirt and bra. The victim replied saying no. The defendant then forcefully took off her shirt and bra. The defendant began to fondle her breasts and was sucking one of her breasts continuously. The victim felt so disgusted, was helpless and angry with what the defendant was doing. After a while, the defendant stopped fondling and sucking her breasts and left the room.

The third occasion was on a particular day during the Christmas Holiday of 2015. The victim was asleep on her bed. She felt the defendant carry her from her bed and lay her down on the floor. The defendant told the victim to take off her clothes and she refused. The defendant then forcibly removed her shirt, bra, pants and underwear. The defendant then applied coconut oil on his hands and began to massage her legs, buttocks and vagina. This continued for a while and then he told the victim to cover her face with a cloth and place herself in an upward position while he continued to massage her legs, buttocks and vagina. The victim was so afraid and even tried to push the defendant's hand away but the defendant stopped her from doing that. After a while of massaging the victim the defendant stood up and left the room.

The victim cried so much after thinking about what the defendant was doing to her. She put on her clothes and was ashamed and afraid. It was only in 2016 that the matter was reported to the police because a video of when the defendant was indecently assaulting the victim was being circulated around the Island. The victim was not aware that the defendant was filming his indecent treatment of her.

The defendant is 40 years old and the victim is his 13 year old daughter

MITIGATING FACTORS

3. In terms of the matters that are personal to the defendant, Mr. Valenitabua has informed the Court that the defendant is 40 years old and is separated from his wife and is now in another relationship with another woman and that relationship still continues. Mr. Valenitabua further

submits that the defendant's girlfriend would at times stay over at his place and would bring her daughter to the defendant's place. Mr. Valenitabua informed the Court that the defendant has two brothers and three sisters and that his father divorced his mother and that the defendant was raised by his grandparents until they both died and that the defendant had been drifting from one family to another and never had a stable life. And because of that he did not start formal education until he was in year eight.

4. Mr. Valenitabua also informed the Court that the defendant is a school teacher from the year 2000 until his arrest in 2016 when he resigned. The defendant had represented the Nation in various international sporting events.

5. Mr. Valenitabua has also informed the Court that the defendant is remorseful for what he has done and that this case has resulted in his family being demoralized and embarrassed and the family reputation has been smeared. Mr. Valenitabua has further submitted that the defendant has shown remorse by pleading guilty at the earliest possible opportunity, he did not want to go through trial because the ensuing factor that he would have to make his daughters attend Court and give evidence and that he was not going to allow that to happen because of his consideration of the effects going to trial will have on his daughters. Mr. Valenitabua has submitted that the defendant saved his two daughters from undergoing the demoralizing and painful process of having to give evidence in Court and for victim reciting her experience in Court. It is further submitted on behalf of the defendant that he has saved the Court's time and resources in not going through trial. That the defendant is now a sad person. He may have lost his daughter's trust and love and that it may take a long time and a delicate process to win back his daughter's love and trust for him. This in itself will be punishment to him for a long time in the future.

6. Mr. Valenitabua has properly conceded that the following factors aggravate the offending by the defendant in the circumstances of this case;

- a) The victim is a child
- b) The victim is the biological daughter of the defendant
- c) The indecent treatment was repeated three times
- d) The daughters trust on his father has been breached

I accept that these are aggravating features in the commission of the offence by the defendant.

7. Mr. Valenitabua has cited other cases where the District Court has imposed sentences ranging from 9 months to 18 months where the victims ages were from 6 to 8 years old.¹ The point as argued by Mr. Valenitabua is that the victim in this case now to be sentenced is 13 years old and as such the sentences imposed for each count should be less than 18 months. Whilst previous sentences imposed by the court are a useful guide to look at, each sentencing magistrate or judge still has to look at the circumstances of the case presented to him or her and impose the appropriate sentence.
8. From the submissions by Mr. Valenitabua, it is clear that the defence do not dispute that the imposition of an immediate custodial sentence is warranted. So the only issue for this court to determine is how long the sentence should be and how any such sentence should be served.

SUBMISSIONS BY THE PROSECUTION

9. Mr. Tonganivalu submits that the defendant has breached his trust as a father to his own daughter. The act was undoubtedly disgraceful and unbecoming of a father. Mr. Tonganivalu further submits that the injuries sustained by the victim are emotional and psychological. She stated in her victim impact statement that she was embarrassed, ashamed, hurt, and filled with hatred on what the defendant had done. The victim had also entertained suicidal thoughts after what had happened to her as it was done by the defendant who was biological farther. Mr. Tonganivalu submitted that an immediate custodial sentence should be imposed. Mr. Tonganivalu has cited the case of *R v Aki Akubor*² where the Supreme Court had sentenced the defendant to 18 months imprisonment for a similar offence where the defendant pleaded guilty.
10. I now address the mitigating factors as raised by Mr. Valenitabua. The defendant is entitled to a reduction in sentence for the guilty plea which he has entered in the

¹ District Court Criminal Case No. 110 of 2014; District Court Criminal Case 19 of 2015; and District Court Case No. 135 of 2014

² Republic v Aki Akubor NRSC 2 of 2009

first instance, which has the effect of saving the victim from the trauma of having to relive what she has gone through in Court had she given evidence and has saved the Court's time and resources. The early guilty plea is also indicative of remorse on the part of the defendant. These are in my view factors that would mitigate in favor of a reduction in sentence for the defendant.

11. The fact that the defendant is 40 years old is in my view an aggravating feature in the offending. This is because of the age difference between the defendant and the victim who is his 13 years old daughter. The victim is a child not capable of giving any consent or resisting the defendant who is a person who has authority over the victim and has responsibility to protect the child. He has abused his authority over the child and breached the trust with which the victim looks up to him as a child and the trust with which the community imposes on him to care for and protect the victim as a father.

12. Mr. Valenitabua has submitted that the defendant is remorseful for what he has done and that this has resulted in his family being demoralized and embarrassed and the family reputation has been smeared. This in my view is not a mitigating factor. The defendant only has himself to blame. I adopt the comments of his Lordship Gordon Ward CJ when he said:

*"If a family wishes to enjoy the respect of people in the area, it must achieve and maintain that respect by the conduct of its members. If a member fails in such conduct, he cannot then assume that the good name of the family he has let down will help him obtain a lesser sentence or any other special treatment"*³

13. Mr. Valenitabua has further submitted that he may have lost his daughters love and trust and that it may take a long process to win back his daughters love and trust for him and that this in itself will be a punishment to him for a long time. Again the defendant only has himself to blame. His Lordship Justice Pallaras described the actions of a defendant as:

"I find the fact that this was not an isolated event but a course of conduct, which continued over a period

³ *Campebell v Reginam* [1988]SBHC4 [1988-1989] SILR 136 at paragraph 5 page 3

of weeks to be a significant aggravating feature...He had ample opportunity to reflect upon what he was doing and to desist. He chose not to. Instead he continue his abuse of the Complainant time after time."⁴

14. I find the description by Justice Pallaras as cited above aptly describes the conduct of the defendant in this case before me. He had an opportunity to reflect upon what he did, especially given that she is his daughter that he was indecently assaulting. He chose not to. The time it might take for victim to be able to love and trust him again is in my view a natural consequence of his choice to first abuse the authority he had over her and the trust vested in him by virtue of his being her father. I do not see any merit in this aspect of the submission as a mitigating factor.
15. The victim was also abused in the privacy of her home where she is supposed to be safe and by the very person expected to protect her. He also took a video of what he did to her and the said video has been circulated. He not only abused her, but he recorded it and as a result the video recording is now being circulated.
16. In the case of *Republic v ND*⁵ this Court made the following observations at:

[6]The Nauru Family Health and Support Study led by the Department of Women's Affairs of the Ministry of Home Affairs published in 2014 show that:

"Over 30% of women who participated in the survey reported sexual abuse in childhood either during the interview or through the face card.

Also women who reported sexual abuse in childhood through the face to face interview were also asked at what age the abuse happened for the first time. In most cases, the abuse happened between the ages of 5 and 14: 11.5 % experienced sexual abuse for the first time at ages 10-14 and 4.7% experienced it at ages 5-9 (Table5.5). The most commonly mentioned perpetrators

⁴ R v Limana [2013]SBHC 189; HCSI-CRC 318 of 2011(2 December 2013) at paragraph 12 page 2

⁵ Republic v ND Criminal Case No. 19 of 2015 (11 November 2015) paragraphs 6 & 7 at pages 2 to 3

were male family members (12.2%) and non-relative males (5.4%) (Table 5.5)"⁶

[7]The statistics as presented by the report referred to in paragraph 6 of this judgment cannot be ignored by the court from the perspective of child protection and the need for deterrent sentences to be imposed. The circumstances of the offending in this case calls for both a punitive and deterrent sentence to be imposed."⁷

17. I find that the circumstances in this case before me call for both a punitive and deterrent sentence to be imposed. His Lordship Pallaras J said:

*"It is said that a society is judged by the way in which it treats its weakest members. Amongst the weakest members of any society are its young children"*⁸

18. I find that the comments by Pallaras J aptly describe the seriousness of sexual offences including indecent assaults of a sexual nature committed on children.

19. Mr. Valenitabua also submitted that the sentences imposed should be served concurrently or if the Court decides that the sentence imposed be served consecutively then the court should sentence taking into account the totality principle. In Support of his submission Mr. Valenitabua cited the case of *Augustine Laui v Director of Public Prosecutions*⁹ where the tests were stated by Ward J as follows:

*"The test of a single transaction is not a matter of time but whether the offences really form part of a single attack on some other person's right. Thus, two separate offences even if occurring close together in time, for example, taking a vehicle without consent and then driving it dangerously would merit consecutive sentences. On the other hand, the sentences for a series of assaults against the same person even though spread over a lengthy period of time should properly be made concurrent."*¹⁰

⁶ Nauru Family Health and Support study; *An exploratory study on violence against women*, October 2014 at page 34 paragraphs 7 and 8.

⁷ Refer to footnote 6

⁸ *R v Limana*[2013]SBHC189;HCSI-CRC318 of 2012 (2 December 2013) at paragraph 28 page4

⁹ *Lau v Director of Public Prosecutions* [1987]SBHC;HC-CRAC011 of 1987(23 February 1987)

¹⁰ *Ibid* at paragraph 5 page 2

*"The so called totality principle referred to by counsel applies in two ways. Where concurrent sentences have been passed because of the single transaction principle, the court should ensure that the gravity of the offence is properly represented by the sentence for the principle offence. Where consecutive sentences are passed for a number of offences, the court must not just consider whether each sentence is appropriate for each offence but look also at the total to ensure it is not out of proportion to the overall circumstances. Where it does appear to be too great, the court should reduce the total term of imprisonment by making some or all sentences concurrent and not by reducing the individual sentences below an appropriate level for the particular offence for, by doing so, the impression given on the subsequent record of conviction is a series of relatively minor offences"*¹¹

20. The submission that the sentences imposed be ordered to be served concurrently because the offences were committed against the same complainant was made in the case of *R v Limana*¹². His Lordship Justice Pallaras said:

*"Again, with respect to counsel, this totally misses the point. These crimes were individual, separate crimes committed over a period of weeks. They did not all occur at the same time or as part of the one criminal transaction. The prisoner spread these offences over a period of two months and had several opportunities to reflect and desist. He chose not. In my judgment these are punishable by consecutive sentences, subject of course to the principles of totality."*¹³

21. I take the approach taken Pallaras J in *R v Limana* which is reflected by the totality principle as stated by Ward CJ in *Augustine Laui v Director of Public Prosecutions* to sentence. Taking into account the aggravating and mitigating factors present in the circumstances of this case I sentence the defendant as follows; Count 1, 1 year 6 months imprisonment; Count 2, 1 year 8 months imprisonment and Count 3, 2 years imprisonment. All sentences are to be served consecutively. Taking into account the principles of totality, I deduct 6 months imprisonment from the whole of

¹¹ *Ibid* at paragraph 3 page 3

¹² *R v Limana* [2013] SBHC 189;HCSI-CRC 318 of 2011(2 December 2013)

¹³ *R v Limana* [2013] SBHC 189;HCSI-CRC 318 of 2011(2 December 2013) paragraph 27 at page 5

the sentence to be imposed. The total term of imprisonment to be served by the defendant is 4 years 8 months. The term of imprisonment imposed will be back dated to 17 August 2016 the day when the defendant was first taken into custody.

Dated this 14 September 2016



Emma Garo
Resident Magistrate