



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

**[CRIMINAL JURISDICTION]**

Case No. 94 of 2016

Between

**THE REPUBLIC OF NAURU**

**v.**

**EF**

Before: Crulci J

For the Prosecution: F. Lacanivalu

For the Defence: R. Tagivakatini

Date of the Hearing: 15, 16 June 2017

Date of Decision: 16 June 2017

**CATCHWORDS** – *Criminal law – Crimes Act 2016 – section 117 Indecent Acts in Relation to a Child Under 16 years*

## JUDGMENT

1. EF is charged with one offence of Indecent Acts in relation to a child under 16 years of age. He pleaded not guilty to the offence and the issue to be determined at trial is the particulars of his actions. The defendant is the uncle of the victim. In order to preserve her identity both his name and her name are reflected as letters.

### COUNT ONE

#### *Statement of Offence*

**Indecent Acts in relation to a child under 16 years**: Contrary to section 117(3)(a), (b), (c) (ii) of the *Crimes Act* 2016.

#### *Particulars of offence*

EF on the 17<sup>th</sup> September 2016 at Nauru did intentionally do an indecent act towards YZ by licking her vagina and was reckless about the act and the said YZ is a child under 16 years old.

2. Section 117 of the *Crimes Act* 2016 reads as follows:

#### **117 Indecent acts in relation to child under 16 years old**

- (3) A person (the defendant) commits an offence if:
  - (a) the defendant intentionally does an act towards another person;  
and
  - (b) the act is indecent and the person is reckless about that fact;  
and
  - (c) the other person is a child under 16 years old.

Penalty:

- (i) if the child is under 13 years old or aggravating circumstances apply—15 years imprisonment; or
- (ii) in any other case—12 years imprisonment.

- (4) Absolute liability applies to subsections (1)(c), (2)(c) and (3)(c).

*Note for subsection (4)*

*Although absolute liability applies to the circumstance that the other person is under 16 years old (which means the defence of mistake of fact under section 45 is not available), other defences apply to an offence against this section: see section 127.*

- (5) In this section:

'touching' includes the following:

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

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

### THE REPUBLIC'S CASE

#### *Agreed facts between the parties*

3.
  - (1) The defendant is 29 years of age and lives in the Meneng District
  - (2) The victim is his niece; she is 14 years of age
  - (3) The victim's house and the defendant's house are in close proximity to each other
  - (4) On the 17 of September, 2016, during the school holidays, the victim was sleeping outside her home on the veranda with her younger siblings
  - (5) At 4.00 am the defendant came and woke the victim and told her to meet him at his house
  - (6) The defendant had been drinking alcohol at his home and also in the Land Rover with the others that evening
  - (7) The victim agreed as he was her uncle, but she was scared because it was late at night
  - (8) The defendant said he wanted to give her his mobile phone to use, but the victim rejected his offer; he offered it to her again and she again turned the offer down
  - (9) She went back to her house, climbed on the bed and went to sleep
  - (10) The defendant came back again and tried to wake her but she refused to wake up
  - (11) The defendant went away again and continued drinking
  - (12) The victim woke up and kicked or stomped at the defendant but didn't know where her legs landed
  - (13) The defendant got up and left the victim, she didn't say anything to him
  - (14) The victim then put on her underwear and pants
  - (15) Shortly thereafter another of her uncles came out of the house
  - (16) That uncle saw the defendant walking away from the house, got on his motorbike and go away



- (17) The uncle saw that the victim was sitting on the bed with a terrified look on her face
- (18) The victim told her mother what had happened on the 19<sup>th</sup> of September, 2016 when they were at home
3. The statement of the victim's mother and her uncle who came out of the house are agreed between the prosecution and defence for the purpose of the trial.
  4. The First Information report is an agreed exhibit.

*Victim YZ Evidence*

5. The witness confirmed to the Court that she has two brothers and two sisters. In the early hours of September 17, 2016 she was at home sleeping outside on the verandah with her siblings. At the time her mother was working and her other uncle was inside in the home.
6. The defendant had been drinking alcohol at his home at night and he was also drinking alcohol near a Land Rover with others.
7. The defendant woke her up and told her to meet him at his house which is nearby. She went with him but she was scared because it was late at night; she went because he is her uncle.
8. When her uncle woke her, he shone the light of his phone on to her face and she could see that it was a 04:00 a.m. in the morning. He also said the words to her "*I am marijuana*".
9. The defendant told the victim that he wanted to give her his mobile phone to use but she didn't want to take it because she was afraid; he offered another time and she refused again.
10. The victim went back to her home and to sleep on the bed.
11. Later the defendant tried to wake her a second time but she didn't want to wake up, and he walked away to where the others were drinking.
12. The victim says she was sleeping and then she was aware there was someone beneath her. She discovered that she was not wearing her underwear and shorts.
13. The defendant was beneath her, and his mouth was on her vagina. The victim kicked the defendant off and he stood up.

14. The victim got up and found her underwear and pants which were beside her and she put them on.
15. When another uncle came out of the room she didn't tell him anything because she was afraid.
16. A few days later she told her mother what had happened; she waited to tell her mother because she was afraid to tell her about this incident.
17. Under Cross-Examination the victim emphatically denied that when the defendant woke her up he just hugged her. The victim stated that the defendant did put his mouth on her vagina.
18. The victim agreed that she was covered by a blanket and at first she couldn't see that it was the defendant.
19. When asked more about the blanket she agreed that there was a blanket, she said "*Although I can't really recall everything because it's been a long time since, to come here for this trial.*"
20. In answer to a question in Re-Examination the victim explained that she couldn't see the defendant who was under the blanket because she couldn't see through the blankets, they are from a hotel and they are red and thick.
21. In relation to the question asked in Cross-Examination about the defendant just touching her by her hugging and using his hand, the victim stated that the defendant had also said to her "*that I should go with him to his place so that he can eat me properly*" and that she "*felt that it wasn't a finger, it was a tongue and wet*".
22. The victim's evidence was that these words were said to her after she had kicked the defendant off from her. He got up came around to say that to her and then he went away.

*Agreed witnesses statements*

23. The victim's mother statement confirms that her daughter came to speak to her on the 19<sup>th</sup> of September, 2016. The witness was lying down relaxing and the victim came and lay next to her and told her what had happened two days beforehand in the early hours at 04:00 a.m.



24. The witness told her mother and that her uncle had come and woken up by shining his phone in her face and asked her to follow him and spoke to her but the witness was scared and went back home. After going back to sleep she felt someone licking her vagina.
25. The phrase used by the victim "*he eat me*", and when the mother asked her to clarify the victim said the defendant was licking her vagina.
26. The witness asked the victim if any sexual intercourse had taken place but this was denied.
27. The witness (mother) decided to report the matter to the police so as not to involve her brothers; and for the matter to be dealt with to prevent another child being hurt in the future.
28. The second agreed statement is from another uncle of the victim who was sleeping in a room in the house. He came outside around 6.00 AM on 17 September, 2016.
29. He saw his niece, the victim walking past him and to her bed. Later he heard footsteps and saw the defendant walking from the area then got on his bike and left.
30. The witness said his niece was sitting on her bed and 'looking like she was afraid of something'.
31. A complaint was made to the police at 0948 hours on 22 September, 2016 that the victim had been molested by her adult male uncle, the defendant.

#### DEFENCE CASE

32. The defendant exercised his right to remain silent.

#### PROSECUTION SUBMISSIONS

33. The prosecution filed written submissions and also spoke to them. The prosecution confirmed for the Court the victim's date of birth as August 2002; hence she had just turned 14 at the date of the offence.
34. The prosecution submits that the victim was quite clear in giving her evidence as to the indecent act, and certain that the defendant had licked her vagina or put his mouth on her, rather than touching her with his hand.

35. The prosecution point to the words said by the defendant to the victim: *"He also said to me so that I could go to his place so that he can eat me properly"*.
36. The prosecution submits that considering all the evidence before the Court cumulatively, it is sufficient for this Court to be satisfied beyond reasonable doubt the offence took place as alleged, and to convict the defendant of the charge with particulars as stated.

#### DEFENCE SUBMISSIONS

37. The defence filed written submissions with the Court and spoke to them. The counsel for the defence says that in effect of this is a Newton hearing as the defendant accepts that something did occur of an indecent nature but it is the details that are in dispute. The defendant's case is that he only touched the victim's vagina with his hands.
38. The defence points to the fact that the victim confirmed in her evidence that she was covered by a blanket, and so she could not be certain about what the accused did to her under the blanket.
39. The defence submits that had the defendant been acting as the victim alleges, her kicking the defendant would have landed on the defendant's head. As she didn't know where her feet landed that signified that her kick did not land on his head, so he couldn't have been doing what she was alleging.
40. Counsel for the defendant accepts that the statements made to her mother amount to recent complaint of an incident, but not necessarily the detail of what is alleged.

#### CONSIDERATIONS

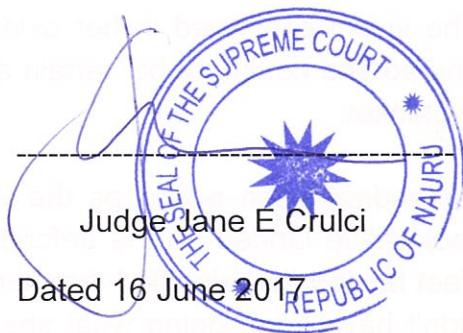
41. The Court notes that a significant proportion of the evidence in this matter is the subject of agreement between the prosecution and the defence.
42. The victim gave evidence before the Court in a clear and credible manner. Whilst she was clearly embarrassed to be discussing such intimate matters in a room of strangers, nonetheless she was emphatic in her denials to the suggestions that the defendant had hugged her. She was also clear that the defendant he had not touched her vagina with his hands, rather her used his mouth.

43. The evidence before the Court is clear that the defendant tried to engage with the victim on two occasions before the act of indecency was committed. His comments afterwards to her that they should go to his house so that he could 'eat her properly' leave this Court in no doubt that the victim is telling the truth about the details of the incident. Therefore the offence as charged is made out.

44. In light of the evidence before the Court I am satisfied so that I am sure that the prosecution have proved the case beyond reasonable doubt.

45. I find as follows:

On the Count of Indecent Treatment of a Child Under the Age of 16 years, the defendant is Guilty as charged and convicted of the offence.

The seal of the Supreme Court of the Republic of Nauru is circular, featuring a central starburst design. The text "THE SEAL OF THE SUPREME COURT" is inscribed along the top inner edge, and "REPUBLIC OF NAURU" is inscribed along the bottom inner edge. A signature in blue ink is written over the seal, and the name "Judge Jane E Crulci" is printed below it. The date "Dated 16 June 2017" is printed below the name.

Judge Jane E Crulci  
Dated 16 June 2017