



**REPUBLIC OF NAURU**

**IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION**

**Criminal Case No. 29 of 2017**

Between

**THE REPUBLIC OF NAURU**

Complainant

And

**BRANTON NAMADUK**

Defendant

**Before:** Chief Justice Filimone Jitoko

**For the Prosecution:** Ms L Tabuakuro, Public Prosecutor

**For the Defence:** Mr D Cecil, Pleader

**Date of Hearing:** 10, 11, 13 July 2018,  
13, 14, 23, 24 August 2018

**Date of Judgment:** 24 August 2018

**Case may be cited as:** *Republic v Namaduk*

**Catchwords:** *Causing a child under 16 to engage in sexual activity – Section 118 Crimes Act 2016 – Child under 13 years old – Purpose of sentencing – Sentencing considerations – Sections 277, 278, 279, 280 Crimes Act – Previous convictions – Sentence.*

## JUDGMENT ON SENTENCE

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### **Introduction**

- 1 The accused is charged with Causing a child under 16 to engage in sexual activity contrary to Section 118(1)(a)(b)(c)(iii) of the *Crimes Act 2016* (the Act).
- 2 The accused was found guilty of the offence on 22 August 2018. Submissions on sentence were heard on 23 August 2018.

### **Summary of Facts**

- 3 The accused is the step-father of the victim. He is currently 31 years old.
- 4 At the time of the offence, the victim was 8 years old.
- 5 The offence occurred at the security booth of Anibare Lodge in the presence of two other unidentified men. The accused caused the victim to unbutton his pants, take out his penis and touch it. The accused then put his penis on the victim's face and ejaculated on it.
- 6 The offence under section 118 of the Act of Causing a child to engage in sexual activity carries a maximum sentence of 12 years imprisonment. If the offence involves a child under 13 years old or aggravating circumstances apply, a maximum sentence of 15 years imprisonment applies. Section 118 states:

#### **118 Causing a child under 16 to engage in sexual activity**

(1) A person commits an offence if:

- (a) the person intentionally engages in conduct in relation to another person;  
and
- (b) the other person is a child under 16 years old; and
- (c) the person does so intending to cause or procure, or to make it easier to cause and procure, the child to do an act of any of the following kinds:
  - (i) sexual intercourse;
  - (ii) masturbation or sexual self-penetration;
  - (iii) any activity that involves physical contact by the child with the person or a third person (including a dead person) for sexual gratification or sexual arousal of any person (whether of the people involved or some other person);

- (iv) any activity that involves physical contact by the child with an animal for sexual gratification or sexual arousal of any person;
- (v) an act, for sexual gratification or sexual arousal of any person, involving undressing so that the child is clothed only in underwear;
- (vi) an act involving nudity or exposure or partial exposure of a person's private parts for sexual gratification or sexual arousal of any person;
- (vii) any other act with, or towards, the child that is indecent, but that is not covered by subparagraphs (i) to (vi).

**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.

(2) Absolute liability applies to subsection (1)(b).

*Note for subsection (2)*

*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.*

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

7 The victim in this case was a child under 13 when the offence was committed against her. The defendant therefore faces a maximum sentence of 15 years imprisonment.

**Submissions by the defence**

- 8 Counsel for the defence filed written submissions and gave oral submissions in support of those.
- 9 Counsel for the defence sought to redact the first paragraph of their written submissions on instructions from his client. Whilst the submissions had already been tendered, the Court will disregard the paragraph as requested.
- 10 Counsel for the defence outlined that the accused is 31 years old, his level of education is “Year 7 Kayser College” and that he previously worked as security before he was charged with this offence. He has a fiancée and is visited by her and their children at the Correctional Centre.

- 11 Defence submits that there were no aggravating circumstances in this offence, as “...no physical harm was caused; no intentional threats to inflict physical harm was occasioned; no breaking and entering reported; no one was deprived of their personal liberty; none were even given drugs or alcohol but the defendant himself; and neither was there any disabled persons identified nor mentally impaired”.<sup>1</sup>
- 12 Counsel concedes that there is “undeniable evidence that BN could have done awkward things to family, friends and people during such times he regularly takes drugs and with bad drinking habits”.<sup>2</sup> In oral submissions it was further stated that the accused had “rehabilitated” from this drug and alcohol use whilst he was in remand.
- 13 Further, in oral submissions, the trauma of the victim was discussed. Mr Cecil states that her trauma during the trial was likely due to the rape charge and the fact that the victim was being asked about being raped. He stated “...probably another thing happened, but definitely not rape”. He linked the victim’s trauma to having to recall something that “never happened”.
- 14 It was submitted that the accused would like to return to his family so that he can raise his children properly and finish building his incomplete home.
- 15 Counsel for defence submitted in their written application that this was a first-time offence for the defendant. Upon hearing and reading submissions on behalf of the prosecution, Mr Cecil conceded that this was not his client’s first offence.
- 16 The defence submits that an adequate sentence would be a rehabilitation order or alcohol treatment classes.

#### Mitigating Factors

- 17 The following can be summarised as mitigation factors submitted on behalf of the defendant:
  - (i) He has been in custody since 23<sup>rd</sup> November 2017 and has never been released on bail.
  - (ii) No aggravating circumstances existed.
  - (iii) The defendant has ‘rehabilitated’ from drugs and alcohol.

#### **Sentencing submissions - Prosecution**

- 18 Counsel for the prosecution submitted that the sentence in this matter will be a ‘guideline’ sentence for the offence under s. 118, as there are currently no sentences in relation to that offence in Nauru.

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<sup>1</sup> Submissions on Mitigation, Defence, p. 1.

<sup>2</sup> Submissions on Mitigation, Defence, p. 2.

- 19 Prosecution counsel cited her Honour Judge Crulci as she then was, in the case of **R v AB [2016] NRSC 29**, where the Supreme Court stated the following at paragraph 29:

*“A study published in 2014 by the Nauru Ministry of Home Affairs considered sexual abuse in childhood before the age of 15 years. Of the women who participated in the survey, over 30% reported sexual abuse in childhood, the majority of cases between the ages of 5 and 14 years, with male family members being mentioned as the most frequent offenders. The prosecution of these offences sends out a clear message to the community that offending of this nature is not to be tolerated, and part of the Court’s role when sentencing is to underline that message.”*

- 20 The Court is referred by prosecution counsel to section 277 of the Act which sets out the kind of sentences the Court could impose on a person found guilty of an offence. Section 277 is set out as follows:

**277 Kinds of sentences**

If a court finds a person guilty of an offence, it may, subject to any particular provision relating to the offence and subject to this Act, do any of the following:

- (a) record a conviction and order that the defendant serve a term of imprisonment;
- (b) with or without recording a conviction, order the offender to pay a fine; or
- (c) record a conviction and order the discharge of the offender;
- (d) without recording a conviction, order the dismissal of the charge for the offence;
- (e) impose any other sentence or make any order that is authorised by this or any other law of Nauru.

- 21 Counsel for the prosecution further directed the Court to purposes of sentencing and sentencing considerations under s. 278 and s. 279. They are set out below for completeness:

**278 Purposes of sentencing**

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other people from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of sentencing;

- (e) to make the offender accountable for the offender's actions;
- (f) to denounce the conduct of the offender;
- (g) to recognise the harm done to the victim and the community.

**279 Sentencing considerations – general**

- (1) ...
- (2) In addition to any other matters, the court must take into account whichever of the following matters are relevant and known to the court:
  - (a) the nature and circumstances of the offence;
  - (b) any other offences required or permitted to be taken into account;
  - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – the course of conduct;
  - (d) any injury, loss or damage resulting from the offence;
  - (e) the personal circumstances of any victim of the offence;
  - (f) the effect of the offence on any victim of the offence;
  - (g) any victim impact statement available to the court;
  - (h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;
  - (i) if the person pleaded guilty to the charge for the offence – that fact;
  - (j) the degree to which the person cooperated in the investigation of the offence;
  - (k) the deterrent effect that any sentence or order may have on the person of anyone else;
  - (l) the need to ensure that the person is adequately punished for the offence;
  - (m) the character, antecedents, age, means and physical or mental condition of the person;

- (n) the prospects of rehabilitation of the person;
- (o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependants;
- (p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than another offender or victim of the offence) – those circumstances.

22 Counsel further referred the Court to sentencing considerations for imprisonment under s. 280:

**280 Sentencing considerations – imprisonment**

A sentence of imprisonment may be imposed on a person only if:

- (a) in the opinion of the court:
  - (i) the person has shown a tendency to violence towards other people; or
  - (ii) the person is likely to commit a serious offence if allowed to go at large; or
  - (iii) the person has previously been convicted of an offence punishable by imprisonment; or
  - (iv) any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or
  - (v) the protection of the community requires it; or
- (b) a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.

Aggravating factors

- 23 The following were submitted as aggravating factors on behalf of the prosecution:
- i. The victim was 8 years old and vulnerable at the time of the offending.
  - ii. The victim was the young child of his long term partner and she trusted him.
  - iii. He breached her trust and used her for his own sexual gratification.
  - iv. Subjecting the victim to give evidence and relieve [sic] the traumatic experience.
  - v. The lack of remorse by the Defendant.

vi. He is not a first offender.

- 24 The prosecution submits that whilst there was no victim impact report produced before the Court, it invites the Court to use its objective judgment to assess the impact this offending has and will continue to have, on the victim.

#### Previous convictions

- 25 The prosecution submitted that the defendant has a previous criminal history. Two cases were submitted in support of this.
- 26 The first is **Republic v Namaduk [2012] NRSC 5** where the defendant was convicted of indecently dealing with a child under the age of 17 years contrary to section 216 of the Criminal Code of Queensland 1899. The defendant entered a plea of guilty in this matter and was sentenced to 150 hours community service for 12 months and then a consecutive probation order for 1 year.
- 27 The second case referenced is **Republic v Namaduk [2013] NRSC 5**, where the defendant was convicted of wounding contrary to section 323 of Criminal Code. He was sentenced to an additional 150 hours of community service and a 12 month probation order to be served in addition to his sentence from 2012. In this case, the offence occurred within the 150 hours of community service hours from the previous offence in 2012.

#### Mitigating factors

- 28 The prosecution submits that the defendant's 9 months in remand is the only mitigating factor for the Court to consider.

#### Appropriate sentence

- 29 On the appropriate sentence for this case, the prosecution invites the court to exercise its powers under s. 277(a) and s. 278(a) and (b) of the *Crimes Act 2016*. It is submitted that an appropriate sentence is one of 13 years imprisonment.
- 30 In oral submissions, counsel for the prosecution offered that in the alternative, a sentence of no less than 10 years imprisonment would be appropriate.

#### **Consideration**

- 31 In arriving at an appropriate punishment for the offending, the Court is guided by section 277 of the Act as to the kind of sentences to be preferred; section 278 on the purposes of sentencing; and section 279 as to the general considerations the court takes into account.



- 32 It is important to emphasise that the defendant has been found guilty of a very serious offence that attracts a maximum term of 15 years imprisonment. The offence is a sexual offence against a child under 13 years old, and at the time of the commission of the offence, was only 8 years old.
- 33 It is equally important to note that the offending was a close family member, the child's very own step-father, that any child will look to for support and protection. This is another case that lends support to the statistics cited by the court in **R v AB (supra)**.
- 34 Both paragraphs above constitute the nature and circumstances of the offence and specifically the personal circumstances of both the perpetrator and the victim of the offence. As there is no victim impact statement available to the Court, it can only imagine the harmful effect the offence may have had or will have on her life.

#### Previous convictions

- 35 The Court notes the previous criminal convictions of the defendant as submitted by the prosecution. In addition to this, the Court makes reference to the remarks of Judge John von Doussa in the case of **Republic v Namaduk [2013] NRSC 5**, where he states:

*[8] Other facts that I have to take into account are previous convictions. Some 6 years ago when you were still a fairly young man you were convicted of drunk and disorderly behaviour. You got a suspended sentence. For an assault at the same time, you were given a concurrent 6 months sentence also suspended on a 12 months good behaviour bond. About the same time you are convicted and sentenced to 3 weeks imprisonment for contempt of Court, I regret to say I have no details of that.*

*[9] On the 5th of March 2009, you were again before the Court on a common assault and offensive behaviour charge. You got six (6) months imprisonment at that stage which should have been a big lesson to you. Unfortunately no sooner were you out of jail than you again were charged with and convicted of assault occasionally actual bodily harm. This time you got 9 months. That was some 4 years ago and apart from one further offence I will mention in a moment, it does seem you have kept out street violence trouble. That is to your credit.*

- 36 This sheds some further light on the criminal history of the defendant that goes beyond what was presented to the Court and strongly contradicts the initial assertion made by counsel for the defence that the defendant is a first time offender; an assertion he later retracted.
- 37 Prior convictions may be taken into account by the Court, although it is not in itself a sufficient reason for a higher sentence than the offence calls for.
- 38 The correct approach is seen in Veen v the Queen (No. 2) (1988) 164 CLR 465 where the majority of the court said (at 477-478):

*The antecedent criminal history of the offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given*

*such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: Director of Public Prosecutions v Ottevell [1970] AC 642 at 650. The antecedent criminal history is relevant however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of the disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose a condign punishment to deter the offender or other offenders from committing further offences of a like kind.*

- 39 In this instance, the antecedent criminal history of the defendant is relevant and will be taken into account by the Court. His criminal history illustrates clearly his tendency to commit offences against other persons, and especially sexual offences against children.
- 40 This court in imposing a community service order after finding the defendant guilty of unlawfully and indecently dealing with a girl under the age of 17 years old in 2012, had warned that *“you are being given a chance by the court. Your list of prior convictions suggest that this is your last chance”*.<sup>3</sup>
- 41 Even though the defendant was given another community service in another case a year later; and within his probationary period, this court will now not give any more last warnings or chances.
- 42 Apart from spending 9 months in custody since his arrest, there are no mitigating factors to consider. Counsel made mention of drug addiction and alcoholism as a possible cause prompting such behaviour but this suggestion maintained unsubstantiated.
- 43 Given all the circumstances there is no avoiding a sentence of imprisonment for the accused in this case. The facts of this case fall squarely on all the imprisonment sentencing considerations under section 280 of the Act, the Court may take into account namely:
- (i) the person has shown a tendency to violence towards other people; or
  - (ii) the person is likely to commit a serious offence if allowed to go at large; or
  - (iii) the person has previously been convicted of an offence punishable by imprisonment; or
  - (iv) any other sentence would be inappropriate having regard to the gravity of the circumstances of the offence; or
  - (v) the protection of the community requires it.

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<sup>3</sup> *R v Namaduk* [2012] NRSC 5.


44 I have taken into account similar offences and penalties imposed by the courts in other jurisdictions, but in the end, I am guided by our own case law and the relevant legislations.

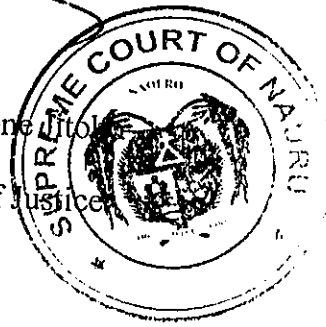
**Sentence**

45 The court finds you Brnton Namaduk guilty as charged for the offence of Causing a child under 16 to engage in sexual activity under section 118 (a) (b) (c) and (iii) of the Crimes Act 2016.

46 The court hereby sentences you Brnton Namaduk to a term of eight years imprisonment less nine months you have already served in custody. The balance of 7 years and 3 months of imprisonment is to commence from today.

Dated this 24 day of August 2018

  
.....  
Filimone Pitohaki  
Chief Justice



The seal of the Supreme Court of New Zealand is circular. It features a central emblem with a shield, a crown, and two birds. The text 'SUPREME COURT OF NEW ZEALAND' is written around the perimeter of the seal.