



REPUBLIC OF NAURU

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

Criminal Case No. 19 of 2018

Between

THE REPUBLIC OF NAURU

Complainant

And

AD (Juvenile)

Defendant

Before:

Chief Justice Filimone Jitoko

For the Prosecution:

F. Lacanivalu, Public Prosecutor

For the Accused:

R. Tagivakatini, Public Defender

Date of Sentence:

2 February 2019

Case may be cited as:

Republic v AD

Catchwords: Sentence – Indecent acts in relation to a child under 16 years old contrary to section 117 of the Crimes Act 2016 – Maximum penalty of 15 years imprisonment – Guilty plea – Section 15, 16 Criminal Justice Act 1999 – Probation order – Breach of probation order – Previous criminal history – Juvenile offender – Similar prior offending – Sentence of imprisonment – Article 37(b) Convention on the Rights of the Child.

SENTENCE

Introduction

- 1 The defendant A.D is a juvenile of 16 years of age. He is charged with one count of *Indecent acts in relation to child under 16 years old* contrary to s. 117 (1) (a), (b), (c) and (i) of the *Crimes Act 2016* ('the Act').
- 2 The defendant pleaded guilty to the offence on 16 January 2019.
- 3 The information by the Director of Public Prosecution reads as follows:

COUNT 1:

Statement of Offence

Indecent acts in relation to a child under 16 years old: Contrary to section 117 (1) (a), (b), (c) and (i) of the *Crimes Act 2016*.

Particulars of Offence

A.D on the 4th of November 2018 at Nauru intentionally touched E.O. and the touching was indecent and A.D was reckless about that fact and E.O. is a child under 16 years old.

- 4 Both the defendant and the victim are juveniles and will therefore be referred to by their initials in compliance with section 55(1)(b) and section 61 of the *Child Protection and Welfare Act 2016*.

Relevant Law

- 5 The law for the charge is set out as follows:

117 Indecent acts in relation to child under 16 years old

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

Note for subsection (4)

Although absolute liability applies to the circumstances 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 determined by applying the standards of an ordinary person.

Summary of Facts

- 6 The summary of facts are as follows:
- 7 On 4 November 2018, the victim E.O, a girl aged 12 years old, was at her home in Anetan District. E.O went down to the beach, where the defendant, A.D, a male of 16 years of age, called out to her and went towards her at the beach. E.O is the sister of A.D.
- 8 E.O and A.D sat down together some distance away and E.O asked A.D what he wanted to tell her. A.D then reached out and rubbed E.O's vagina with his hand on top of her underwear and leggings that she was wearing. E.O pushed his hand away and asked him what was wrong with him and whether he was crazy. Therefore the

defendant on this date, intentionally touched E.O and the touching was indecent and he was reckless about that fact.

- 9 E.O's cousin – S.O who is 11 years old, was going to see E.O at the beach when she saw A.D and E.O together. She asked them what they were doing, to which E.O replied that A.D had called her over and touched her vagina outside of her clothes.
- 10 When E.O reached home, her sister noticed that she had 'watery eyes' and asked her and S.O what happened. E.O told her sister that A.D touched her private part (vagina).
- 11 The defendant was arrested and interviewed under caution where he admitted touching E.O's private part over her clothes twice. He was produced in court afterwards and then was further remanded.

Submissions by the Prosecution

- 12 Prosecution submits that the maximum sentence for this offence is 15 years imprisonment, as the victim was 12 years old at the time of offending. Counsel submits that this is not the first time that A.D has been charged with this type of offence, having also been convicted of it in Supreme Court Criminal Case No. 14 of 2017.
- 13 The prosecution submits that the charge of Indecent Acts is akin to that of *Indecent Assault* or *Indecent Acts* contrary to s. 350 and s. 227 of the *Criminal Code 1899* which both carry a maximum penalty of 2 years imprisonment. The prosecution refers the court to numerous cases wherein these charges were laid.
- 14 The first case is that of *R v Adam*,¹ where the defendant forcefully got on top of the victim and tried to put his tongue in her mouth. In this case the defendant was an adult and a first time offender and he was sentenced to 9 months imprisonment.
- 15 The second case is that of *R v Tanner Benjamin*,² where the defendant entered the home of the child complainant and tried to take her pants off while she was asleep. When the victim woke up she saw the defendant with his pants half-way down and his underpants showing. The defendant was convicted and sentenced to 6 months imprisonment. He was also put on probation for 12 months to be of good behaviour.
- 16 The prosecution further refers the court to the case of *Republic v CD*,³ where the juvenile defendant was charged with the same offence under s. 117 of the Act as A.D, as well as one count of *Publishing of indecent or obscene information or material in electronic form*, contrary to s. 16(1)(a) of the *Cybercrime Act 2015*. In this case, the defendant had forcefully and indecently inserted his penis into the mouth of the victim

¹ *Republic v Adam* [2007] NRSC 4; Criminal Case No. 2 of 2007 (6 December 2007).

² District Court Criminal Case No. 6 of 2012 (unreported); Sentence delivered on 8 April 2016.

³ Supreme Court Criminal Case No. 9 of 2017 (unreported); Sentence delivered on 6 September 2017.

and penetrated it continuously while recording it on his mobile phone. The video was later distributed to a friend using a mobile phone application. In this case the defendant was a first time offender and placed on a probation order for 2 years and 6 months for both counts to be served concurrently, with no conviction entered.

- 17 Further reference is made to the case of *Republic v KK*,⁴ where the juvenile defendant was sentenced to 9 months imprisonment and 9 months of community probation for stripping the victim in public while she was asleep and filming her scratch her private parts. The defendant in this case was charged with *Indecent acts* contrary to s. 227(2) of the *Criminal Code 1899*, as well as *Publishing of indecent or obscene information* contrary to s. 16 of the *Cybercrime Act 2015*. In this case, the defendant was a first offender and pleaded guilty in the first instance.
- 18 Prosecution further submits the case of *Republic v Carlos Baetiong*,⁵ wherein the defendant was convicted under s. 117 of the Act and the victim was an 11 year old girl. The defendant pleaded guilty to the charge and was sentenced to 4 years imprisonment.
- 19 The case of *Republic v E.F* also concerns a charge under s. 117 of the Act, where the victim was the niece of the defendant.⁶ In this case, the defendant was sentenced to 4 years and 3 months imprisonment.
- 20 The prosecution makes further reference to international principles on sentencing of juveniles and the court is grateful for this direction. Counsel for the prosecution refers to Article 37(b) of the United Nations *Convention on the Rights of the Child*:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

- 21 This Article is further reflected in the *Child Protection and Welfare Act 2016* at s. 48:

Despite the provision of any other law to the contrary, the following apply to any criminal proceedings taken against a child:

- (a) *no child may be sentenced to death or to imprisonment for life under any act and for any offence;*
- (b) *a sentence of imprisonment may only be imposed against a child as a **sentencing option of last resort.***

[Emphasis added].

⁴ District Court Criminal Case No. 20 of 2016; Sentence delivered on 11 July 2016.

⁵ Supreme Court Criminal Case No. 7 of 2017.

⁶ Supreme Court Criminal Case No. 94 of 2016.

- 22 The prosecution highlights s. 227, s. 278 and s. 279 of the Act in relation to determining the appropriate sentence. Further reference is made to s. 7, s. 11 and s. 12 of the *Criminal Justice Act 1999* which discuss probation orders. The prosecution also discusses the option of a community service order under s. 22 and s. 23 of the *Criminal Justice Act*, which can be followed by a term of probation under s. 8 of the same Act.
- 23 In concluding remarks, the prosecution provides that although the defendant is a juvenile, he has previous convictions of the same nature of offences which both involved children. The prosecution submits that the defendant is a clear threat to the community, especially to children, who are vulnerable members of Nauruan society. It is submitted that his previous convictions for similar offending, indicate that the defendant has not reformed.
- 24 The prosecution submits that both a conviction and custodial sentence is warranted, as this case satisfies the requirements of s. 280 of the Act. Whilst the prosecution concedes that there was little to no violence in the circumstances of this offending, they highlight that the defendant has shown a 'tendency to sexually molest or assault other people particularly children that are known to him'. As a result it is stated that it is highly likely that he will commit the same offence again if he is permitted to 'go at large'.
- 25 The prosecution submits that the defendant has already been convicted of two offences punishable by imprisonment, and that any sentence other than imprisonment in this case would be inappropriate having regard to the gravity and circumstances of the offence. The prosecution states that the defendant was given an 'incredible opportunity' in the form of probation for his prior convictions, one of which was the rape of a 9 year old girl. Counsel submits that he disregarded that opportunity for rehabilitation and chose to indecently assault his own young sister.

Victim Impact Statement

- 26 In support of their sentencing submissions the prosecution attached the Victim Impact Statement (VIS) of E.O.
- 27 The VIS outlines no physical injuries. Under the heading of *Emotional and/or psychological effects*, E.O describes that she was 'not happy' and 'in shock' when the defendant touched her. She further states that she wants 'to forget about it'.
- 28 Under the heading of *Life Changes*, the victim describes that she wasn't afraid of the defendant before, but that she is afraid of him now 'just a little'. She states that she does not want the defendant to return to the District where she resides.
- 29 The guardian of E.O writes that they are not happy with what the defendant did and 'can't believe it because [E.O] is his sister', with the same mother and the same father.

Aggravating Factors

- 30 The Republic submits the following in aggravation:

- (1) *There is an element of planning from the Juvenile as he wanted to have E.O away from the others before committing the offence.*
- (2) *A.D was 16 years old and E.O was 12 years old at the time of the offending. Although he is young, A.D is the biological brother of E.O thus there is a clear breach of trust by him towards her as he was supposed to take care of her.*
- (3) *The Defendant showed disregard for her safety and privacy.*
- (4) *The Defendant has a previous conviction of the same offence on a child.*

Mitigating Factors

- 31 The prosecution submits that the only mitigating factor in this case is that A.D pleaded guilty as it shows he has taken responsibility for his actions. His guilty plea further saved the victim from having to testify, as well as saving court expense and time.

Submissions by the Defence

- 32 The defence submits that the defendant is currently 16 years old, single and resides in Buada District with his parents. He has been in remand since 9 November 2018. Counsel for the defence submits that the defendant does not attend school. Prior to his current incarceration, the defendant caught noddly-birds and went fishing for subsistence purposes.
- 33 It is submitted that whilst part of A.D's probationary orders were for him to reside with his parents in Buada District; he resided for a time with his uncle in Anetan District to assist him with fishing.
- 34 Counsel submits that A.D was again exposed to pornography during the period of his probation and 'wanted to experiment on it'. It is submitted that this is what led to his current offending.
- 35 In relation to the tariff, counsel for the defence refers to the case of *Republic v AD* [2018] NRSC 27,⁷ wherein the defendant is the same defendant as in this case. In that case, the defendant was convicted of *Indecent acts in relation to a child under 16 years* for indecently touching a 6 years old girl's vagina and *Rape of a child under 16 years* for having sexual intercourse with a 9 year old girl. In this case, Khan J sentenced him to a probation order of 2 years and 11 months for both offences.
- 36 In further reference to the above case, counsel for the defence submits that it would appropriate to record a conviction for A.D in this matter, as it was done so in the previous matter as well. Counsel submits that there are no exceptional circumstances in favour of a conviction not being recorded.

⁷ Republic v AD [2018] NRSC 27; Criminal Case 14 of 2017 (20 February 2018).

- 37 Counsel for the defence refers the court to section 277, 278, 279 and 280 of the Act and submits that the court needs to weigh all factors in favour of the minor, which should be proportionate to the offence and the interests of the child victim.
- 38 It is submitted that should the court exercise its discretion to re-sentence A.D for his previous offences and breach of probation, that a concurrent sentence be considered, in consideration of A.D's youthful age.

Mitigating Factors

- 39 In mitigation, counsel for the defence submits that A.D acknowledges that he is charged with a serious offence and has displayed remorse and shame over his actions.
- 40 A.D entered a plea of guilty to the charge, saving the Court's time and expenses from a full hearing.
- 41 A.D is still a minor at only 16 years of age.
- 42 A.D has been in remand since 9 November 2018, being a total of approximately 86 days to the day of sentence.
- 43 A.D's offending was opportunistic in nature.

Aggravating Factors

- 44 Counsel for the defence addressed no aggravating factors in their submissions.

Consideration

- 45 The court takes note of reference to sections 277 to 280 of the Act in relation to sentencing and sets them out for completion:

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.

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 or 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.

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.

Previous Criminal History

- 46 A.D has two previous convictions. He was convicted of one count of *Indecent acts in relation to a child under 16 years old* contrary to section 117 (1) and (i) of the *Crimes Act* in Nauru Supreme Court Criminal Case 14 of 2017.⁸
- 47 He was also convicted with one count of *Rape of a child under 16 years old* contrary to section 116 (1) (a), (b) and (i) of the *Crimes Act* in Nauru Supreme Court Criminal Case Number 15 of 2017.
- 48 He entered pleas of guilty to both counts and was convicted. He was placed on a probation order for 2 years and 11 months, which expires on 20 January 2021. This current offending is therefore in breach of that probation order.
- 49 As a proviso to the bail conditions, the court specifically warned A.D of the powers of the court under section 16 of the *Criminal Justice Act 1999* to sentence him for the same offences if he (section 16(1):

“(a) is convicted of another offence committed during the period of probation; or

(b) is charged with a breach of his probation order ,

a probation officer may apply to the Court to sentence him for the offence for which he was released on probation.”

Conclusion

- 50 In finding the most appropriate tariff for the offence and the offending, the court is required to carefully weigh all the factors that are set out under sections 277, 278, 279 and 280 of the Act as detailed at paragraph 45 above.
- 51 The essence of the court’s deliberation on all the sentencing provisions above is the attempt to strike a balance between punishing a wrongdoer against person(s) or society and such sentence to reflect the seriousness of the offence, and at the same time deter others from committing similar offences, while bearing in mind the goal of rehabilitating the offender and also too lending moral support to the victim(s).

⁸ Republic v AD [2018] NRSC 27; Criminal Case 14 of 2017 (20 February 2018).

- 52 A.D the defendant had pleaded guilty to the offence of indecent acts against a child under 16 years old. The victim is 12 years old.
- 53 While the offence is serious, given the age of the defendant, the courts in most cases, would have released him on probation with strict conditions of supervision, treatment where appropriate, and compliance. This court may have been drawn to the same decision in this case, were it not for two (2) other considerations in the case, namely:
- (i) The defendant is the older blood brother of the victim; and
 - (ii) The defendant has two (2) previous convictions for sexual offences, one for indecent acts in relation to a child under 16 years old (s.117(1)(i)), and rape of a child under 16 years old (s.116(1)(a)(b)(i)).
- 54 In respect of (i) above, the defendant, being the older brother of the victim, had by committing the offence, completely misplaced the trust his younger sister had placed on him. She was let down and betrayed by someone closest to her and who should have been acting as her protector at all times.
- 55 In respect of (ii), the defendant had been given a life line by the court, after having been found guilty of serious offences of indecent acts and rape of a child under 16 years old in June 2017, with a probation order for a period of 2 years 11 months. The period of probation would have expired in January 2021. By committing this present offence on 4 November 2018, the defendant is clearly in breach of his probation conditions, this notwithstanding the shortcomings of the system to help him comply.
- 56 In the court's considered view, having taken all the relevant matters required of it into account, that the defendant, be sentenced to a term of imprisonment.
- 57 The court is mindful in arriving at this conclusion with the guiding principles set out under Article 37(b) of the *UN Convention on the Rights of the Child* and reflected under section 48 of *Nauru's Child Protection and Welfare Act 2016* that, inter alia, states, at section 48(b), that in criminal proceedings against a child:
- “(b) a sentence of imprisonment may only be imposed against a child as a sentencing option of the last resort.”
- 58 It is clear to the court that there is no other option available to it, other than to impose a term of imprisonment as the only suitable punishment. In terms of the sentencing considerations for imprisonment under section 280, the defendant clearly is showing a propensity to commit similar offences in the future if he is released into the community.
- 59 The court has a duty to protect the community and in this case especially vulnerable young girls.

- 60 I have considered all the sentences imposed by our courts for similar offences. The cases for consideration submitted by the prosecution range from a lengthy probation order in the case of *Republic v CD*⁹ and terms of imprisonment ranging from 6 months in *Republic v Benjamin*,¹⁰ to 9 months in *Republic v KK*¹¹ and *Republic v Adam*,¹² to 4 years in the case of *Republic v Baetiong*¹³ and to 4 years and 3 months in the case of *Republic v EF*.¹⁴ In addition to this, the court also notes the probation order imposed in the case of *Republic v AD* for charges under s. 117 and s. 116 of the Act.¹⁵ The lengthiest of these sentences were imposed in the case where a familial relationship existed between the accused and the victim in the case of *Republic v EF*,¹⁶ although there is no information before the court as to whether the defendant was a first-time offender. In the case of *Republic v KK*,¹⁷ the defendant was a juvenile first-time offender and received a term of imprisonment. Furthermore, in the *Republic v Adam*,¹⁸ the defendant was also a first-time offender and received a term of imprisonment. These cases are reflective of how seriously the courts deem offences against children in Nauru.
- 61 In all the circumstances, I am satisfied that a sentence of 18 months of imprisonment is the most appropriate in this case.

Breach of Probation Order

- 62 The decision of the court on the defendant's breach of probation order by the defendant in Criminal Case No. 14 of 2017 and Criminal Case 15 of 2017 is reserved to allow the provisions of section 16 of the *Criminal Justice Act 1999* to be complied with.
- 63 To assist the court in making a decision, counsel for both the prosecution and defence are to file submissions in the matter within 21 days.
- 64 Thereafter, this case, together with Criminal Cases 14 and 15 of 2017, will be brought back to this court on 25 March 2019.
- 65 The defendant, A.D will also come back to this court on 25 March 2019.

⁹ See at [16]; *ibid* n 3 above.

¹⁰ See at [15]; *ibid* n 2 above.

¹¹ See at [17]; *ibid* n 4 above.

¹² See at [14]; *ibid* n 1 above.

¹³ See at [18]; *ibid* n 5 above.

¹⁴ See at [19]; *ibid* n 6 above.

¹⁵ See at [35]; *ibid* n 7 above.

¹⁶ *Ibid* at n 13.

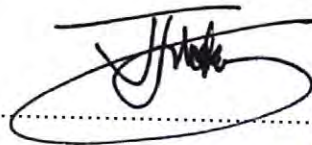
¹⁷ *Ibid* at n 11.

¹⁸ *Ibid* at n 12.

ORDERS

- 66 The defendant A.D, having been found guilty and convicted of the offence as charged, is hereby sentenced to a term of 18 months imprisonment, less the 86 days he had been on remand.
- 67 The Correctional Department is requested to keep the defendant separate from the general population of the prison until he reaches the age of 18.
- 68 For the purpose of addressing the outstanding matter set out at paragraphs 62 – 63 this case together with the defendant AD, will come back to this court on 25 March 2019 at 10am.

Dated this 2nd day of February 2019



Filimone Jitoko
Chief Justice

