IN THE SUPREME COURT OF NAURU
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 25 of 2020

BETWEEN

THE REPUBLIC

AND

DUNSTAL HARRIS

Before:	Khan, J
Guilty Plea:	11 August 2021
Sentencing Submissions by Defence:	24 August 2021
Sentencing Submissions by Prosecution:	22,30 September 2021 and 4 October 2021
Date of Sentence:	21 October 2021

Case to be known as: The Republic v Harris

CATCHWORDS: Charge of causing a child under 16 years old to engage in sexual activity – Section 118 of the Crimes Act 2016 – The maximum penalty is life imprisonment and the minimum period to be served is 15 years before eligible for parole or probation – Whether the Court has discretion to reduce the minimum period of 15 years.

The defendant may seek Presidential pardon under Article 80 of the Constitution.

APPEARANCES:

Counsel for the Prosecution:	R Talasasa (DPP)
Counsels for the Defendant:	T Lee

SENTENCE

INTRODUCTION

1. You were charged with the following offences:

COUNT ONE

Statement of Offence

Rape of child under 16 years old: Contrary to Section 116(1)(a), (b) of the Crimes Act 2016.

Particulars of Offence

Dunstal Harris, at Nibok District, in Nauru, on 25 November 2020, intentionally engaged in sexual intercourse with DK and that the said DK was under the age of 16 years.

OR IN THE ALTERNATIVE

COUNT TWO

Statement of Offence

Causing a child under 16 years to engage in sexual activity: Contrary to Section 118(1)(a), (b), (c)(iii) of the Crimes Act 2016.

Particulars of Offence

Dunstal Harris, at Nibok District, in Nauru, on 25 November 2020, intentionally engaged in conduct in relation to DK and that the said DK was under the age of 16 years, put his penis in the mouth of DK for his sexual gratification or sexual arousal.

2. On 11 August 2021 the DPP withdrew count one and you pleaded guilty to count two. The complainant in this matter is 11 years old and the penalty for the offence is life imprisonment of which term at least 15 years to be served without any parole or probation.

FACTS

3. The facts of this case are as follows:

   1) The accused's mother and the victim's mother are brothers and sisters thus making the accused and the victim 'first cousin'.

   2) The accused had been living with the victim's family at Denig Location Blk 59, Room 5 for some time since his father was admitted to hospital and his mother was looking after his father;

   3) On 25 November 2020 the accused was asked to fetch water at his parents' house at Nibok District;

4) The accused invited the victim to accompany him to his parents' house at Nibok District.

5) Upon reaching the accused's parents' house the victim went to fetch water at the tank while the accused went to do his laundry.

6) After the victim had filled the container with water and while waiting for the accused at the tank, the accused then called the victim into the house and they both laid on a bed inside a room.

7) The accused then started kissing the victim before stopping to go outside to continue with his laundry.

8) After doing his laundry the accused called the victim into the same room again and kissed the victim.

9) The accused took out his penis and put it in the victim's mouth.

10) During that time, the victim's uncle went by the house alerting the accused who ran out of the room. The victim's uncle saw the accused naked and rushing out of the room.

11) The uncle went into the house and saw the victim was inside the room and upon enquiring with the victim if anything had been done to her, the victim then relayed the full story to her uncle.

12) Thereafter the uncle went to the police station that same day and reported the matter.

13) The accused was arrested soon after the report was made by the victim's uncle.

14) The victim was under the age of 16 and at the time of the offence was 11 years old – her date of birth is 20 October 2009.

MAXIMUM AND MINIMUM SENTENCE

4. This is the first case in Nauru which deals with maximum and minimum sentences. The changes in the sentencing regime came about on 23 October 2020 when Parliament amended the penalties for numerous offences under the Crimes Act 2016 (the Act) including s118 to which you have pleaded guilty.

SENTENCING PROVISIONS

5. Under the sentencing provisions of the Act the Court is required to consider the following provisions:

(a) Section 277 which provides:

e) Impose any other sentence or make any order that is authorised by this or any other law in Nauru.

(b) Section 278 provides:

Purposes of Sentencing

278

The purpose to which a Court may impose a sentence on an offence 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 the offender;

e) To make the offender accountable for the offender's action;

f) To denounce the conduct of the offender;

g) To recognise the harm done to the victim and the community.

(c) Section 279 provides:

279 – Sentencing Considerations – General

1) In deciding the sentence to be passed or the order to be made, in relation to a person for an offence against a law of Nauru, **a Court must impose a sentence or make an order that is of severity appropriate in all the circumstances of the offence.**

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 account;

c) If the offence forms part of a cause of conduct consisting of a series of criminal acts of the same or similar character – the cause of conduct;

d) Any injury, loss 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 damages 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 co-operated in the investigation of the offence;

k) The deterrent effect of 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 and mental condition of the person;

n) The prospect 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 a victim of the offence) – those circumstances.

3) For the purpose of subsection (1), the appropriate severity of a sentence not only include mitigating factors but other aggravating considerations such as:

a) deterrence of prevailing nature of common crimes;
b) the impact on the victims and the community; or
c) matters that in the opinion of the court are appropriate for the prevention of prevailing or certain nature of offences or protection of the vulnerable members of the community. (Amended 23 October 2020)

(d) Section 282A provides:

282A – Pre-trial Detention not to be taken into account in certain offences or for sentencing purposes

In determining the final term of imprisonment, the Court shall not make provision to discount any period served in remand pending or prior to a trial, for offences under Part 7.

6. Your counsel concedes the minimum sentence of imprisonment under s.118 is 15 years, however, he submits that I should consider imposing a sentence which is lesser than the prescribed minimum term of 15 years. On the other hand, the DPP submits that the Court has no discretion and can only impose a sentence of life imprisonment and you will only become eligible for parole or probation after serving 15 years of imprisonment, which is the minimum term.

WHAT DOES MAXIMUM AND MINIMUM SENTENCE MEAN?

7. In an article of National Judicial College (NJC article) of Australia titled Sentencing Factor it is stated at [2] as follows:

> [2] Section 16A in the Common Law Sentencing Principles
>
> In *DPP (Cth) v El Karhani* (1990) 51 A Crim R 123 Kirby P, Campbell and Newman JJ remarked at 130:
>
> [s] 16A(1) imposes on the Court the duty, which is its primary obligation, **to ensure that the sentence or order "is of a severity appropriate in all the circumstances of the offence"**.[1] It is by this duty that the general principles of sentencing law are imported into the function of a court imposing a sentence on a federal offender convicted of the offence. What will be "appropriate" will depend, in part, upon a consideration of fundamental notions, such as that of general deterrence.
>
> Note: prior to November 2015, general deterrence was not specifically recognised in s 16A. General deterrence is now listed as a relevant factor in s 16A(2)(ja).

8. In *Edward Nafi v The Queen*[2] Kelly J stated as follows:

> "So far as sentencing principles are concerned, I am required to take into account such of the matters set out in – s.16A(2) of the Crimes Act as are relevant and known to me. Having done so, I am required by s.16A(1) of that Act to impose a sentence which is of '**a severity appropriate in all the circumstances of the offence**'.[3] However, I am prevented from doing so by the mandatory sentencing regime in s.236B of the Migration Act. That section provides that for the offence to which you have pleaded guilty, the Court must impose a minimum sentence of 5 years imprisonment with a minimum non-parole period of 3 years. In the case of a repeat offender, the mandatory minimum sentence is 8 years imprisonment with the minimum non-parole period of 5 years."

She later stated:

> "You will be convicted and sentenced to imprisonment for 8 years commencing on 15 June 2020. I will fix a non-parole period of 5 years."

9. In the NJC article the relevance of maximum sentence is discussed at [4.2] where it is stated:

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[1] This provision is similar to s.279(1) of the Crimes Act 2016

[2] Sentence SCC 2110 2367 (NTSC Transcript of Proceedings at Darwin in 19 May 2011) (unreported)

[3] This provision is similar to s.279 (1)of the Crimes Act 2016

[4.2] **Relevance of the maximum sentence**

The seriousness of an offence for the purposes of s 16A(1) and s 16A(2)(a) is to be determined by taking into account the statutory maximum penalty.[4]

> In *Tector v The Queen* [2008] NSWCCA 151 the Court noted in relation to s 16A at [103]:
>
> The evaluation of the criminality of an offence is for the sentencing judge to determine upon the relevant evidence in relation to the crime. This requires the court to assess the seriousness of the offence. The maximum penalty for an offence may operate as a yardstick and may, in relation to certain offences, assume particular significance.

The High Court considered the significance of statutory maxima in Markarian v The Queen [2005] HCA 25. The majority of Gleeson CJ, Gummow, Hayne and Callinan JJ stated at [30]–[31]:

> **Legislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks.** It is well accepted that the maximum sentence available may in some cases be a matter of great relevance.
> ...
>
> It follows that careful attention to maximum penalties will almost always be required, first, **because the legislature has legislated for them**; secondly, because they invite comparison between the worst possible case and the case before court at the time; and thirdly, because in that regard, they do provide, **taken and balanced with all of the other relevant factors, a yardstick ...** (Emphasis added mine)

10. At [4.3] of the NJC article the relevance of mandatory minimum sentencing is discussed where it is stated:

In *Bahar v The Queen* [2011] WASCA 249 the Court considered the interaction of statutory minimum penalties for offences against the *Migration Act 1985* (Cth) with s 16A of the *Crimes Act 1914*. The Court held that mandatory maximum and minimum penalties reflect the seriousness of an offence for the purpose of s 16A and inform the proportionality assessment.[5]

McLure P (Martin CJ and Mazza J agreeing) stated at [54]:

> [54] The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1). It would be positively inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the "just and appropriate" sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a "just and appropriate" sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be. **The statutory minimum and statutory maximum penalties are the floor and ceiling** respectively within which the

[4] Bahar v The Queen [2011] WASCA 249, [45] (McLure P, Martin CJ and Mazza J agreeing)
[5] Bahar v The Queen [2011] WASCA 249, [54] (McLure P, Martin CJ and Mazza J agreeing)

sentencing judge has a sentencing discretion to which the general sentencing principles are to be applied (emphasis added).

And further at [58]:

[58] Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate (emphasis added).

The Court in *Bahar* rejected the approach taken in the earlier Northern Territory case of *The Queen v Pot, Wetangky and Lande* by which a court was to firstly determine the appropriate penalty in accordance with general sentencing principles. If that produced a result below the mandatory minimum, the mandatory minimum was to be imposed. *Bahar v The Queen* [2011] WASCA 249 has subsequently been followed in New South Wales, Queensland, Victoria and the Northern Territory.

In *Karim v R; Magaming v R; Bin Lahaiya v R; Bayu v R; Alomalu v The Queen* [2013] NSWCCA 23 the Court held that to follow the approach in *The Queen v Pot, Wetangky and Lande* would undermine the principle of equal justice. This is because cases involving offending of different seriousness would thereby be given the same penalty.

In the Victorian case of DPP (Cth) v Haidari [2013] VSCA 149 the Court found that the imposition of a minimum sentencing regime modifies the application of the principles in s 16A, stating at [42]:

[42] [A]lthough the imposition of a minimum sentencing regime does not oust either the sentencing principles of the common law or the accommodation of those principles effected by s16A of the Crimes Act 1914 (Cth), it necessarily modifies both. Thus while 'the common law principles relating to, inter alia, general deterrence, totality and parity apply to the sentencing of federal offenders', minimum sentences may, especially when considerations of totality also apply, affect the sentencing court's approach to mitigating circumstances. The objective circumstances against which the gravity of people smuggling crimes is to be judged include, as an essential element, the fact that Parliament requires the imposition of minimum penalties for those offences.

The High Court considered a challenge to the mandatory minimum provisions imposed by s 233C(1) of the Migration Act 1985 (Cth) in Magaming v The Queen [2013] HCA 40. In dismissing the appeal, the majority of French CJ, Hayne, Crennan, Kiefel And Bell JJ commented at [47]–[48]:

In very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. **But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge made principles. Sentencing an offender must always be undertaken according to law.**

In Markarian v The Queen, the plurality observed that "**[l]egislatures do not enact maximum available sentences as mere formalities.** Judges need sentencing

yardsticks." **The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.** (Emphasis added mine)

Whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender. Thus, in Bahar v The Queen [2011] WASCA 249, the Court dismissed the Crown appeal against sentence, noting that the offenders had limited education, lived in impoverished circumstances, offended by reason of financial imperative, were easy prey to people smuggling organizers and were at the bottom of the smuggling hierarchy.

11. In light of the above discussions, I must sentence you according to the law and legislature provides for a sentence of life imprisonment **(maximum or the ceiling)**, of which prison term at least 15 years **(minimum or the floor)** to be served without parole or probation.

12. I shall now consider as to whether the term of 15 years should be increased and in doing so I shall take into account all the relevant sentencing considerations see *Bahar v The Queen* [2011] WASCA 249.

MITIGATION

13. You are 27 years old and single and completed your secondary education in 2011 at Nauru Secondary School and thereafter enrolled in tertiary education in 2012 to do TVET Course. You have been gainfully employed since 2013 and your employment history is as follows:

- Egigu Transport Services 2013-2017
- NTSC Security Services 2017-mid 2017
- Kelsa House Removal (NZ) late 2017-2019
- Nauru Airlines Limited 2019-November 2020

14. You are a first offender and were living with your parents before this offence and have been in remand since 26 November 2020 which would be approximately 11 months to the date of your sentence. Unfortunately, s.282 of the Act does not allow me to take that period into consideration in sentencing you.

15. You have travelled quite widely and should have known that you could not have any kind of sexual contact with an underage child is an offence. You took advantage of your 11-year-old cousin when she was alone with you and there is 18 years age difference between you and her which is an aggravating factor.

16. To your credit you pleaded guilty as soon the charge of rape was withdrawn and you did so knowing full well that your guilty plea may not make any difference to the actual sentence. Further, you through your counsel made numerous representations to the DPP from March 2021 of your intention to plead to this charge and I must give you credit for this.

17. By pleading guilty you saved the complainant from giving evidence and reliving through the entire incident. According to the victim impact report she is very traumatised and does not wish to talk about this incident and needs counselling.

18. According to the Acting Chief Probationer Officer's report dated 8 September 2021 the victim's father has forgiven you.

19. Further according to his report, you love sports and represented Nauru in the year 2020 in the Rugby 15's.

20. You assisted the police when you were arrested and interviewed and made admissions for the offence.

21. Having taken into account the above matters, I shall not increase the minimum sentence of 15 years.

DETERRENCE

22. The entire reason for the enactment of the legislation was to protect the children who are considered weak and vulnerable and to send out a clear message to the offenders that they would spend long periods of time in prison. The overriding consideration was deterrence. The Minister for Justice and Border Control, Hon Mavrick Eoe, in his speech in introducing the Bill stated:

> "Mr Speaker, there is an increase in the number of sexual offences. These are moral offences and as leaders and community members, it is our duty to ensure that the vulnerable, the weaker and more so the children, are protected from the perpetrators of such crimes. Often, children of very tender age are victims of crime and more so are put into very difficult positions of testifying in Court. The Court by any means is not a place where our children should be at that age even as witnesses. This can only happen if the perpetrators of the crimes and those who intend to commit such offences, do know that the penalty for such crimes will be grave and that the best part of their life will need to be served in prison. This action is necessary on the part of the legislature to ensure that the judiciary is equipped with the necessary jurisdiction and power to impose sentences which will serve as deterrence. The new sentences in this Bill are very severe for this reason ..."

23. Nauru is a signatory to the Children's Rights Convention and yet there is an increase in child sexual offences which is very sad, and what is of real concern, is that most of the offenders like you are close relatives.

IMPRISONMENT TERM

24. You will be sentenced to life imprisonment of which imprisonment term at least 15 years to be served without any parole or probation.

25. I would like to send a clear message that the 15-year minimum sentence is one end of the yardstick and it can go up depending on the circumstances and seriousness of the offending. You are 29 years old now and by the time you will be eligible to be released from prison you will be over 44 years old.

PRESIDENTIAL PARDON

26. Your only recourse to seeking an early release before 15 years prison term is to seek the grant of pardon by the President under Article 80 of the Constitution where it is stated:

ARTICLE 80 OF THE CONSTIUTION

Grant of Pardon

The President may:

a) grant a pardon, either free or subject to lawful conditions, to a person convicted of an offence;

b) grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence;

c) substitute a less severe form of punishment for any punishment imposed on a person for an offence, or

d) remit the whole or part of a punishment imposed on a person for an offence or a penalty or forfeiture on account of an offence.

RESTRICTION ON PUBLICATIONS OF DEFENDANT'S NAME

27. As this is the first case under the new sentencing regime, I have no doubt that it will be given the widest possible publicity in the media and other sources and under s.55 of the Child Protection Welfare Act 2016 the child's identity has to be protected including 'any information leading to the identification of the child'. The defendant's name may lead to that identification of the victim and I therefore order that in any media release the defendant is to be referred to as 'DH' and not by his actual and real name.

DATED this 21 day of October 2021

Mohammed Shafiullah Khan
Judge