



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 11 OF 2020

BETWEEN

THE REPUBLIC

AND

DONMAN TOGARAN

Before:	Khan, ACJ
Date of Hearing:	15 September 2022
Date of Sentence:	22 September 2022

Case may be referred to as: *Republic v Togaran*

CATCHWORDS: Indecent Act to a Child under 16 years old – Section 117 of the Crimes Act 2016 – Maximum sentence of 30 years imprisonment of which at least one-third is to be served before eligible for parole or probation.

APPEARANCES:

Counsel for the Republic:	S Shah
Counsel for the Defendant:	T Lee

### SENTENCE

#### INTRODUCTION

1. You were initially charged with two counts of indecent act contrary to s.117 of the Crimes Act 2016 (the Act) and you pleaded not guilty to the charges and the matter was set down for trial between the 9 to the 13 of May, 2022.

2. On 23 April, 2022, the Director of Public Prosecutions filed amended information and reduced the charges to one count of Indecent Act.
3. On 9 May, 2022, when the trial was about to commence and the prosecution was granted leave to further amend the information and you then pleaded guilty to the charge. The amended information states as follows:

### COUNT ONE

#### Statement of Offence

Indecent Acts in relation to a child under 16 years old contrary to section 117(1) (a), (b) and (c) of the Crimes Act 2016.

#### Particulars of Offence

Donman Togoran on 4 April 2021 at Bauda District in Nauru intentionally touched LC, by touching her vagina and such conduct was indecent and that Donman Togoran was reckless about the fact that the said LC was a child under the age of 16 years.

4. The penalty for this offence is a maximum of 30 years imprisonment of which at least one-third is to be served without parole or probation<sup>1</sup>.
5. You pleaded just before the complainant was about to give evidence.

#### BACKGROUND – FACTS

6. You are the complainant's stepfather having married her mother and as a result of the marriage you have one child (son) who is one year old.
7. At the time of the incident the complainant was 13 years old and you were living with the complainant's mother and her three other children who were from her previous relationship in your mother-in-law's house in Bauda District together with your mother-in-law.
8. On the day of the incident, you were sleeping in the lounge with your wife, the complainant and her younger brother and you slept next to the complainant.
9. Whilst the complainant was asleep, she felt that someone touched her on her thigh and her vagina area and when she woke up, she saw that it was you. She then placed a pillow on her thigh to stop you from doing that and also change her sleeping position having her back towards you and you again touched her.
10. The complainant wanted to wake up her mother to inform her of what you did to her, but instead she went into her grandmother's room and told her what you did to her and she came into the lounge and confronted your wife about the incident.

#### SENTENCING PROVISION

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<sup>1</sup> Crimes (Amendment) No. 2 Act 2020 – Section 17 (23 October 2020)

11. The sentencing provision is contained in ss.277, 278 and 279 of the Act.
12. S.277 provides that the Court shall impose a sentence authorized by the law, whilst s.278 inter alia provides that adequate sentence should be imposed to protect the community and to promote rehabilitation of the offender; whilst under s.279 the Court is required to take into consideration the circumstances of the victim including the effect of the offence on the victim and also to take into account the circumstances of the accused.

#### MAXIMUM AND MINIMUM IMPRISONMENT TERM

13. The amendment to s.117 came into effect on 23 October 2021 and it allows for maximum and minimum imprisonment term to be imposed.
14. I discussed the relevance of maximum and minimum term in *R v Harris*<sup>2</sup> where I stated at [10] as follows:

*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.<sup>3</sup>*

*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 **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).*

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<sup>2</sup> [2021] NRSC 44 Criminal Case No. 25 of 2020 (21 October 2021)

<sup>3</sup> *Bahar v The Queen [2011] WASCA 249, [54] (McLure P, Martin CJ and Mazza J agreeing)*

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 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.*

15. The sentence that I should impose on you is in between the maximum (ceiling) and the minimum term (the floor) and in *R v Harris* I stated at [25] as follows:

*[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.*

#### VICTIM IMPACT STATEMENT

16. The victim impact statement states that the complainant has been emotionally and psychologically disturbed and she feels very angry and betrayed because you breached the trust as her stepfather.
17. Because of your relationship with the complainant's mother and the fact that you have a child with her you will no doubt come into contact with the complainant and any interaction with her, which in my view is unavoidable, will cause the complainant extreme discomfort and remind her of what you did to her.

#### YOUR PERSONAL CIRCUMSTANCES

18. You are 37 years old married with one child. This is your second marriage. You were previously married in 2000 and separated in 2005 and during that marriage you adopted a child.
19. You are a first offender and were employed as a labourer at Egigu Corporation earning \$500.00 per fortnight.
20. The Chief Probation Officer in his report states that you have followed all the instructions and directions of the Correctional Officers whilst being in remand and you have expressed great regret for your actions.

#### GUILTY PLEA

21. You pleaded guilty before the trial stated and therefore spared the complainant from reliving through the entire incident and for this, I will give you credit.

#### SENTENCE

22. If it was not for your guilty plea, I would have seriously considered increasing the 10 year minimum imprisonment term because of the overwhelming evidence against you.
23. You will be sentenced to a term of 30 years imprisonment and I order that one-third of the sentence (10 years) is to be served without parole or probation.

#### PRE-TRIAL DETENTION

24. S.282 A of the Act does not allow the Court to give any discount in determining the “final term of imprisonment”. I stated earlier that my sentencing powers are limited between the maximum 30 year and the minimum term of 10 years but I wish to state for the record that you spent a period of 1 year 5 months in custody to date whilst awaiting your trial and sentence.

#### PRESIDENTIAL POWER

25. The only option to you to seek an early release before the 10 year period is to seek the Presidential Pardon under Article 80 of the Constitution which provides:

##### Article 80

##### 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 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

26. As this is the first case under the new sentencing regime for indecent act in relation to a child under 16 years old contrary to section 117(1) (a), (b) and (c) of the Crimes Act 2016, I have no doubt that it will be given the widest possible publicity in the media and other sources. 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 ‘DT’ and not by his actual and real name.

DATED this 22 day of September 2022



Mohammed Shafiullah Khan  
Acting Chief Justice

