



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 5 of 2020

BETWEEN

THE REPUBLIC

Applicant

AND

TOMWELL RAIDINEN

Respondent

Before: Khan, ACJ  
Date of Hearing: 29 June 2023  
Date of Ruling: 4 July 2023

Case to be referred to as: *Republic v Raidinen*

**CATCHWORDS:** Disclosure of document – Section 176 of Criminal Procedure (Amendment) Act 2020 – Where trial has already commenced and prosecution intends to tender the birth certificate of the child – Where under section 93 of the Births Deaths and Marriages Registration Act 2017 birth certificate is prima facie evidence of the information it contains – Whether the defendant would suffer any prejudice if late disclosure is allowed – Whether the defendant was informed of the age of the victim at the very outset – Where the evidence of proof of age can also be given by the mother of the victim – Application allowed as the defendant would not suffer any prejudice.

**APPEARANCES:**

Counsel for the Applicant: S Shah  
Counsel for the Respondent: V Clodumar

## RULING

### INTRODUCTION

1. The defendant is charged with one count of indecent act contrary to s.117 of the Crimes Act 2016 (the Act). Both the statement of offence as well as the particulars of the offence states that the defendant is alleged to have committed an indecent act on the victim who was under 16 years of age.
2. The accused was formally charged and brought before the District Court on 23 March 2022 and on the same day the matter was transferred to this Court.
3. The accused was served with two sets of disclosures, the first one on 24 March 2022 and the second one on 15 February 2023.
4. This matter was set down for trial between 26 to 30 June 2023 and the victim gave evidence in the examination in chief and is currently under cross examination by the defence counsel.
5. During the cross examination the prosecution made an application to serve a copy of the birth certificate of the victim by way of additional disclosure. Mr Clodumar objected to the service of the additional disclosure. However, leave was granted to the prosecution to file the additional disclosure and serve it on the defence so that I could hear full submissions as to whether the prosecution should be allowed to serve it on the defence.

### SERVICE OF DISCLOSURES ON DEFENCE

6. Previously the service of the disclosure of documents was governed under the common law principles until the enactment of s.176 of the Criminal Procedure (Amendment) Act 2020 which provides:

#### **DISCLOSURE AND NOTICE TO BE GIVEN**

- 1) The prosecution shall provide the disclosure documents, witness statements, expert reports, photographs and other disclosure documents to the accused person as soon as practicable after the accused person is charged and appears in court in the first instance.
- 2) The prosecutor shall, 14 days before the trial commences, notify and provide to the accused person or his or her legal representative:
  - a) a list of names and number of witnesses in subsection (1), that the prosecution will require to testify in the trial; and
  - b) a list of names and number of witnesses in subsection (1), that the prosecution will not require to testify in the trial.
- 3) The prosecution may be permitted to tender as exhibits in a trial an expert report, forensic accounts, photographs, maps or plans drawn by surveyors, electronically or digitally stored or transmitted data or record and such

other professional reports which are requiring the maker of such report, photographer or keeper of records to personally appear in Court to testify, provided:

- a) a notice in the prescribed form is shared to the accused person or his or her legal representative 21 days before the date fixed for trial; and
  - b) the accused person or his or her legal representative did not issue a notice in the prescribed form to the prosecution requiring one or more of the persons to be available for cross examination 14 days before the commencement or continuation of the trial.
- 4) The evidence intended to be tendered in subsection (3), shall be for the purposes of establishing:
- a) the existence of such evidence; and
  - b) the contents of such evidence, but the weight of such evidence shall be in the residual discretion of the court.
- 5) Notwithstanding subsection (3), the court has the discretion to allow admission of any evidence as it deems fit.
7. S.176(1) provides that the prosecution shall serve the disclosure documents “*as soon as practicable*” after an accused is charged and appears in court. No time limit is set on the service of the disclosure documents but in the ordinary course of events all material documents should be served on the accused before the matter is set for trial.
8. In this matter the trial has already commenced and Mr Clodumar objects to the birth certificate being served on the defence now. He submits that no reason has been advanced by the prosecution for the delay and that if the birth certificate is served now it will cause prejudice to the defence case as the initial failure to serve it left the option of the defendant relying on the defence available under s.127 of the Act – in that the victim is at least 13 years of age. Mr Clodumar submits that the application should be refused in the “interest of justice” as the offence carries a very severe penalty of 30 years imprisonment.
9. Mr Shah submits that all that the prosecution intends to do is to tender the birth certificate of the victim which in itself is a public document readily available at the office of the Registrar of Births, Death and Marriages; and that the inclusion of it in evidence will not be introducing new evidence.

### CONSIDERATION

10. In the charge filed in the District Court as well as the information filed in this court states that the defendant allegedly committed an indecent act on the victim who was under 16 years of age.

11. In the record of interview conducted on 23 March 2022, in which the defendant participated but chose to remain silent it was put to him at questions 10, 11, 12 and 16 that the victim was 12 years old at the time of the alleged offending.
12. In the two sets of disclosure documents served, the prosecution included a copy of the defendant's birth certificate, but for unknown reasons, the police decided not to obtain a copy of the victim's birth certificate when proof of her age was an essential ingredient of the offence.

### PROOF OF AGE

13. The victim's age can be proved by the prosecution, without relying on her birth certificate, through the evidence of her mother. On the basis of the mother's statement the victim confided in her about the incident and when she gives evidence of the complaint made to her she can also give evidence of the victim's age as her mother. see *Carter's Criminal Law of Queensland* page 2290 where it is stated:

The girl's age may be proved by testimony of a person present at her birth or by inference from the appearance of the person: and as is case of *Wallworth v Balmer* [1965] 3 All ER 721; [1966] 1 WLR 16. Often, however, appearance alone may not be enough and would need to be supported by other evidence.

### BIRTH CERTIFICATE – PRIME FACIE EVIDENCE

14. S.93 of the Birth Deaths and Marriages Act 2017 provides:

A birth, death or marriage certificate shall in any proceedings be received as prime facie evidence as proof of the information it contains.

15. Apart from the birth certificate, the prosecution would be required to adduce some evidence to link it with the victim – see *Carter's Criminal Law of Queensland* page 2290 where it is stated:

.... Where a copy of the birth certificate is produced, some evidence is required to identify the girl with the person referred to in the certificate: *R v Rogers* (1914) 10 Cr App R 276; 111 LT 1115; *R v Kimberley* (1924) 18 QJPR 57.

### DISCLOSURE

16. At page 4465 of *Carter's Criminal Law of Queensland* it is stated as follows:

#### **DISCLOSURE OBLIGATION**

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- 1) The chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.

- 2) Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an **ongoing obligation** for the prosecution to give an accused person full and early disclosure of –
- a) all evidence the prosecution proposes to rely on in the proceedings; and
  - b) all things in the possession of the prosecution, other than things that disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused. (emphasis added)

17. I am satisfied that the tendering of the victim's birth certificate at this stage of the trial will not prejudice the defendant as he was aware from the very outset of the police investigation that the victim was 12 years of age.

18. In the circumstances, I allow the prosecution's application to serve the birth certificate of the victim by way of additional disclosure.

DATED this 4 day of July 2023



Mohammed Shafiullah Khan  
Acting Chief Justice

