



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

**Criminal Case No. 15 of 2023**

**BETWEEN:** THE REPUBLIC  
**PROSECUTION**

**AND:** IGNAZIO-IYONGO AUBIAT  
**ACCUSED**

**BEFORE:** Keteca J

**Date of Submissions:** 2 July 2024

**Date of Judgment:** 12 July 2024

**Case may be cited as:** Republic v Ignazio-Iyongo Aubit

**Catchwords:** Indecent Acts: Contrary to Section 106(1)(a)(b)(c)(ii) of the Crimes Act 2016; Evidence of Accused Unchallenged

**Appearances:**

Counsel for the Prosecution: **S. Shah**

Counsel for the Accused: **R. Tom**

**JUDGMENT**

**BACKGROUND**

1. The accused is charged with the following offences:

**COUNT 1**

**Statement of Offence**

IGNAZIO- IYONGO AUBIT between the 14<sup>th</sup> June and 14<sup>th</sup> July 2023, at Nibok District in Nauru, intentionally touched Joy Tokaibure and the touching was indecent

and IGNAZIO- IYONGO AUBIT is reckless about that fact and Joy Tokaibure did not consent to the touching and that IGNAZIO- IYONGO AUBIT is recklessly indifferent to consent of Joy Tokaibure.

## **COUNT 2**

### **Statement of Offence**

**INDECENT ACTS:** Contrary to Section 106(1) (a) (b)(c) (ii) of the Crimes Act 2016

### **Particulars of Offence**

**IGNAZIO-IYONGO AUBIAT** on the 04<sup>th</sup> August 2023, at Nibok District in Nauru, intentionally touched Joy Tokaibure and the touching was indecent and IGNAZIO-IYONGO AUBIAT is reckless about that fact and Joy Tokaibure did not consent to the touching and that IGNAZIO-IYONGO AUBIAT is recklessly indifferent to consent of Joy Tokaibure.

2. The trial was held on 22<sup>nd</sup> and 23<sup>rd</sup> April 24. On 14<sup>th</sup> June 2024, I ruled that there was a case to answer and for the matter to proceed to the next stage of the trial.

## **THE LAW**

3. Section 106(1)(a)(b)(c)(ii) of the Crimes Act 2016 provides:  
‘A person (the defendant) commits an offence if:  
(a) The defendant intentionally touches another person;  
(b) The touching is indecent and the defendant is reckless about that fact; and  
(c) The other person does not consent to the touching and the defendant:  
(i) Knows that fact; or  
(ii) Is recklessly indifferent to consent of the other person.  
(iii) Penalty:  
(i) if aggravating circumstances apply- 20 years imprisonment;  
(ii) in any other case- 10 years imprisonment.
4. The elements of the offence are:  
‘The defendant  
Intentionally touches another person  
The touching is indecent  
And the defendant is reckless about that fact  
The complainant does not consent to the touching  
The defendant knows that the complainant did not consent  
Or is recklessly indifferent to the lack of consent’

## **THE EVIDENCE**

### **PW1- Joy Tokaibure**

5. A reserve police officer since 24 Feb 23. Identified the accused. 14<sup>th</sup> June-14<sup>th</sup> July 23, needed to go out and buy food for friends. As a reserve, she couldn't drive the police

vehicle. She asked the accused to drive her. Just the two of them in the vehicle. She sat on the front seat.

6. Accused touched her between her thighs. "Touched my crotch between my thighs.' She was shocked. She swore at him. His reaction? "He just laughed. **She did not consent to being touched.**
7. On 04<sup>th</sup> August 23- they were to do outreach. They were told to go home and return at 5pm. About half an hour after she got home, the accused arrived in a police vehicle to pick her up.
8. She got into the vehicle complaining why the pick-up was so early. She didn't have time to rest/ freshen up so she kept complaining when they left.
9. She sat in the front passenger seat. No one else was in the vehicle. He touched me again between my thighs and told me to stop complaining. I swore at him again, including- "your parents took away your shame when you were a kid? She later told a work colleague and her sergeant of what happened. She was not comfortable- "he touched my private part against my crotch – top corner of my thighs."

*Q- Did you consent to being touched between your thighs?*

*Ans- No, no consent. I was complaining. Then he touched me. That was the second time that he touched me.*

*Q- After the incidents, how has he been acting towards you?*

*Ans- At work, when alone he would say- "looking so nice, so good.' "I'm really into you, idolising you.'*

10. She did not feel comfortable at all with what the accused was saying to her. First told Sgt Esson Temaki after the second incident – that she felt uncomfortable with what the accused said and did to her.
11. She had to tell the sergeant as it was the second time and it may get worse. Sergeant advised her to speak to Superintendent Daniel. Sergeant saw Superintendent first. Then they walked in together. Superintendent Daniel asked me- " I heard what you told Sergeant." She said yes and that she was feeling very uncomfortable about the accused. For touching her twice and what he had been saying to her.
12. She also asked Sup Daniel if anything could be done about it. Sup replied- "Up to you, you can press charges." She said she wanted to press charges.

#### Cross Examination

*Q- Traumatized after first incident?*

*Ans- I was shocked*

*Q- During that shock you did not report it till two months after?*

*Ans- Yes, thought it won't happen again- we were work colleagues*

*Q- You only reported it because Sup told you to do so?*

*Ans- You mean I'm making it up? No*

*Q- Your relationship with the accused after the first incident*

*Ans- I distanced myself from him*

*Q-After 14<sup>th</sup> July, you accompanied the accused on police duties?*

*Ans- Yes*

*Q- Not traumatised working with him?*

*Ans- Uncomfortable but I did my duties*

*Q- Referred to para 14 of her statement- explain the sexual oral advances*

*Ans- He came from behind me and embraced me from the back. Things he said to me- "you're looking good etc."*

*Q- Making this up?*

*Ans- Not making this up*

*Q- you're lying?*

*Ans- Not lying*

*Q-Second incident- traumatised?*

*Ans- Yes*

*Q- why didn't you report it?*

*Ans- I was a reserve. We were a team. It may affect my work or his work.*

*Q- Not reporting is teamwork?*

*Ans- Yes- Don't know what may happen to me*

*Q- a supervisor told you to fabricate this?*

*Ans- No*

*Q- second incident- how was your working relationship with the accused?*

*Ans- Distanced myself*

*Q- Why report to Sgt Esson?*

*Ans- My supervisor- that I was very uncomfortable- because after second incident the accused continued with oral, verbal approaches so I went and told my supervisor- Sgt Esson*

*Q- Took you two weeks?*

*Ans- Yes, I don't know police procedures*

*Q- What did Sgt Esson say?*

*Ans- That I need to speak to Sup Daniel*

*Q- Why speak to Sup Daniel?*

*Ans- Sgt told me to tell Sup Daniel*

*Q- What did you tell her*

*Ans- I told her what the accused did to me and I was uncomfortable in my work. I asked her how to deal with this as I don't want my work to be affected*

*Q- were you removed from PTC?*

*No*

#### Re- Examination

*Q- For the second incident, why sit in front? You didn't expect it to happen the second time?*

*Ans- It shouldn't happen. I did not expect it to happen the second time.*

PW2- Sgt Esson Temaki

13. 6 years in in NPF. Look after welfare and discipline. In court because of complaint of PW1. PW1 approached him that she had been harassed by the accused on several occasions. She had been receiving inappropriate remarks and unwanted touches on her private parts. She told him this on 18 Aug 23. He went directly to his superior, Sup Daniel and informed her of the matter. She directed that he brings PW1 to her.
14. PW1 and him attended to Sup Daniel's office. Sup Daniel said that any form of harassment is not allowed / not acceptable in the workplace PW1 had been working under him for six months. When complaint was received from PW1, he took it up with Sup Daniel as his immediate supervisor, an inspector was not at work.

Cross- Examination

*Q- Why wasn't this complaint taken through the disciplinary Unit?*

*Ans- Because taking it up with Sup Daniel- she would speak with other units.*

*Q- What do Standing Orders say?*

*Ans- Receive a complaint, go through the next level of command. Inspector not present, had reported higher.*

*Q- You recall reporting to Sup Daniel?*

*Ans- On the same day PW1 informed me.*

Re- Examination

15. Disciplinary offences listed in the Standing Orders not criminal in nature. PW1 said she was harassed, unwanted touches from accused on her private part. After being told that- he went straight to Sup Daniel. Sup Daniel asked PW1 if she wanted to advance the complaint. PW1 said yes. Sup Daniel reported it to relevant unit.

PW3- Sgt Marson Notte

16. He investigates sexual offences cases. He's the IO for this case. Got statements and took photographs. Identified photo booklet of vehicle where PW1 sat in the front passenger seat. PW1 said accused touched her, reaching from the driver's seat. Conducted the interview and charged the accused

Cross- Examination

17. He knows the accused a well behaved, smart, disciplined. He knows PW1 as funny, intelligent, smart, disciplined. Sup Daniel filed the complaint into the system. 'I don't judge the suspect in my investigation. I base it on facts and the evidence.'

*Q- Did you ask PW1 why she reported the matter on 16/08/23?*

*Ans- Domestic violence, sexual offence reports differ- some take months or years or days*

*No need for protective custody of PW1 as she said she distanced herself from the accused*

No Re- Examination

18. Mr Shah- seek an amendment to Count 1 on date of offence under Section 191 CPA- 30<sup>th</sup> May 2023- 14<sup>th</sup> July 2023.

19. Court- Application allowed.

### **CLOSE OF PROSECUTION CASE**

20. The prosecution closed its case. Counsel for the defendant sought to apply for a no case to answer. The court ordered that counsels file submissions by 21<sup>st</sup> May 24.

21. I recorded the following on my ruling on the no case to answer application-

*'6. On 07th May 24, counsel for the defence filed a motion seeking to recall the complainant, PW-1. The ground for the application, as stated in paragraph 2 of the defendant's (a police officer) affidavit is that, he did not disclose to his counsel that he had met the complainant "once or twice after the first allegation of indecent assault."*

*7. The nature of that meeting is not disclosed in the affidavit.*

*8. The prosecution objected to the application that the complainant be recalled. In the affidavit of Sergeant Marson Notte, he submits that the defendant is a former police officer. He should have given full instructions. Counsel for the defendant should have "taken full and proper instructions while preparing for the trial." Sergeant Notte adds that "recalling the complainant, would further traumatize her to relive the incident.'*

*9. The application was heard on 31st May 24. I agreed with the prosecution. The motion was dismissed.*

*10. Mr Tom again failed to file any written submissions in support of his contention that there is no case to answer.*

22. On 14<sup>th</sup> June 2024, I ruled that there was a case to answer and the matter to proceed to the next stage of the trial.

### **EVIDENCE of THE ACCUSED**

23. 31 years old. Worked at Police Training Unit (PTC) responsible for discipline and drills Since his recruit, he never got along with Sup Daniel. He made two reports against Sup Daniel. The first- during a training exercise, a recruit was injured. He was admitted to hospital and disabled to this day. He reported to Professional Standards Unit that Sup Daniel was the head of police training and she did not do anything concerning the injured recruit

24. On 15<sup>th</sup> August 23, reported on a theft- Sup Daniel removed some air conditioning units. He reported an argument he had with Sup Daniel to the Commissioner of Police (CP). CP

gave him three days off so CP will speak to Sup Daniel. The day after, 16<sup>th</sup> August, Sup Daniel filed the report against him- the allegations he's facing now.

25. Counsels were to file closing submissions by 28<sup>th</sup> June.

26. They did so by 02<sup>nd</sup> July 24.

### **CLOSING SUBMISSIONS**

27. Mr Shah for the prosecution summarised the evidence of PW1, PW2 &PW3. He referred to Section 117(5) on the definition of ' **touching**' and (6) on 'whether touching or an act is indecent is one of fact to be determined by applying the standard of an ordinary person.'

28. Mr Shah then referred to *Republic of Nauru , Thoma* [2017] NRSC 86 where Mr Justice Va'ai said:

'There is no fixed definition for indecency. Indecency is that which offends against currently accepted standards of decency: AG v Hunter (1971) 2 SASR. If what was done is something that the community generally regard as indecent then the act is indecent.'

29. Counsel then concludes that:

' (i) It has led sufficient evidence to prove all the essential elements to establish a prima facie case against the accused;  
(ii)The cross- examination could not discredit any part of the witness' testimony; and  
(iii) The court had the opportunity to observe the demeanour of the witnesses

30. Even though different tests would apply, the above conclusions are the same that Mr Shah submitted in his response to the no case to answer application. It is also apparent that Mr Shah did not mention whether the legal burden under Section 25 Crimes Act 2016 have been discharged.

31. Interestingly, counsel for the prosecution did not include in his submissions the evidence of the accused himself. In particular, he failed to mention that when the accused gave his evidence, his counsel did not bring PW1's allegations to him. Thus, the accused did not deny the allegations against him.

32. Mr Shah, somehow, slightly made up for this oversight by submitting at the hearing of his closing submissions that the 'evidence remain unchallenged.' Whose evidence, and how it's unchallenged is left to the court to determine.

### **DEFENCE COUNSEL'S SUBMISSIONS**

33. Mr Tom summarised the evidence of the all prosecution witnesses.

34. On the evidence of his client, he writes:

' The evidence of DW1 is that he has been a police officer for the Nauru Police Force for 2 years as a reserve and 1 year holding the rank of Constable.  
He holds the role of fitness instructor, disciplinary and drills.  
DW1 trains the reserve and the recruits and sometimes the regular officers. He is under Sgt Darius then Inspector Illona and Daniel.  
DW1 stated that Daniel and her( sic) was not in good relationship since recruit.  
DW1 was recommended by Commissioner of Police and the Deputy of Commissioner of Police.' ( *Counsel does not say what the recommendation was for*)

35. In his conclusion, Mr Tom submits:

'the prosecution has failed to prove beyond reasonable doubt the dates indicated as prosecution has between dates which were further amended during trial' (*what does this mean?*)

'The prosecution has failed to corroborate the dates of the incident because they did not call officers who were listed in the Witness List to confirm the incident.'

'The prosecution failed to include all material evidence to assist the court the truth of the matters.' (*Again, what does this mean?*)

## DISCUSSION

36. As summarised in paragraph [4] above-

[4.] *The elements of the offence are:*

*'The defendant*

*Intentionally touches another person*

*The touching is indecent*

*And the defendant is reckless about that fact*

*The complainant does not consent to the touching*

*The defendant knows that the complainant did not consent*

*Or is recklessly indifferent to the lack of consent'*

37. COUNT 1- PW1 said:

'Accused touched her between her thighs. "Touched my crotch between my thighs.'  
She was shocked. She swore at him. His reaction? "He just laughed. She did not consent to being touched

38. COUNT 2- PW1 said:

'She sat in the front passenger seat. No one else was in the vehicle. He touched me again between my thighs and told me to stop complaining. I swore at him again, including- " your parents took away your shame when you were a kid? She later told a work colleague and her sergeant of what happened. She was not comfortable- "he touched my private part against my crotch – top corner of my thighs."

*Q- Did you consent to being touched between your thighs?*

*Ans- No, no consent. I was complaining. Then he touched me. That was the second time that he touched me.'*



39. From the evidence and even in Mr Tom's closing submissions, it is clear that the above allegations were not put to the accused when he gave evidence. This evidence was not challenged at all.

40. The court accepts this evidence as factual accounts of what happened to PW1.

**Were the "touching" on both incidents indecent?**

41. In R v Harkin (1989) 38 A Crim R 296 (NSW CCA) Lee J said:

'[I]f there be indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas...'

42. Lee J added –

'The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury.'

43. Based on the above observations of justice Lee and the evidence summarised in [21] above, it is clear that the 'touched my crotch between my thighs' on the first incident and 'he touched my private parts against my crotch' on the second incident both have sexual connotations.

44. I find that the touching in Counts 1 & 2 were indecent.

**Did PW1 consent to being touched?**

45. In [6] & [9] above, PW1 clearly states that she did not consent to being touched on both occasions.

**Did the accused 'intentionally' touch PW1's crotch on both incidents?**

46. Section 17 of the Crimes Act 2016 define 'intention' as:

(1) A person has 'intention' with respect to conduct, if the person means to engage in the conduct.'

47. On the first incident, PW1 states-

'Accused touched her between her thighs. "Touched my crotch between my thighs.' She was shocked. She swore at him. His reaction? "He just laughed. She did not consent to being touched.

48. The touching was not the result of a 'flailing arm' which accidentally resulted in the accused touching PW1's crotch. If it was accidental, the accused would have said 'sorry'. Instead, the accused 'just laughed.'

49. On the second incident, PW1 states:

‘He touched me again between my thighs and told me to stop complaining. I swore at him again, including- “your parents took away your shame when you were a kid? She later told a work colleague and her sergeant of what happened. She was not comfortable- “he touched my private part against my crotch – top corner of my thighs.”

*Q- Did you consent to being touched between your thighs?*

*Ans- No, no consent. I was complaining. Then he touched me. That was the second time that he touched me.’*

50. On this occasion, the touching was followed by a remark. PW1 said- *He touched me again between my thighs and told me to stop complaining.*

51. Again, the touching was not the unintended consequence of an accidental movement of the accused’s hand due to their vehicle dodging another or a pedestrian or the same vehicle coming to an abrupt stop. It was clearly deliberate. The accused knew what he was doing. It was the second time that he had done this to PW1.

52. I conclude from the above that for Counts 1 & 2, the accused ‘meant to engage in the conduct’ of touching PW1’s crotch, the touching were intentional, the touching had sexual connotations and thus indecent and PW1 did not consent to the touching. All the elements of ‘Indecent Act: Contrary to Section 106(1)(a)(b)(c) (ii) Crimes Act 2016 are present.

53. I remind myself of the burden of proof under Section 25 of the Crimes Act 2016 and find that the prosecution has discharged the legal burden of proof beyond reasonable doubt on both Counts 1 & 2.

## CONCLUSION

54. I therefore find the accused guilty on both COUNT 1 and COUNT 2.

DATED this 12<sup>th</sup> day of July 2024

  
**Kiniviliame Keteca**  
Judge

The seal of the Supreme Court of Nauru is circular, featuring a central emblem with a sun, a star, and a banner. The text "SUPREME COURT OF NAURU" is written around the perimeter of the seal, with two stars on either side.