



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

Criminal Case No. 24 of 2021

BETWEEN: THE REPUBLIC

PROSECUTION

AND: XAVIER NAMADUK

ACCUSED

BEFORE: Keteca J

Date of Submissions: 13th & 19th September 2024

Date of Sentence: 04th October 2024

Case may be cited as: Republic v Xavier Namaduk

Catchwords: Indecent Act in relation to child under 16: contrary to Section 117(1)(a)(b)(c) of the Crimes Act 2016

Appearances:

Counsel for the Prosecution: **M. Suifa'asia**

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

SENTENCE

A. BACKGROUND

1. On 30th August 2024, the accused was found guilty on two counts of *'Indecent Act in Relation to a Child under 16 years old'* and one count of *'being found in a certain place without lawful authority or excuse.'*
2. The facts are that on two separate occasions, the accused intentionally touched the victim's breasts and genitals. It was further found that on those two occasions, the accused did not have the consent of the owner of the property to enter or remain on that property.

B. MAXIMUM PENALTY

3. For the Section 117(1)(a)(b)(c) offence of '*Indecent Act in Relation to a Child*' the maximum penalty is 30 years imprisonment of which term one third is to be served without any parole or probation. For the Section 164 offence of being found in a certain place without authority or excuse, the maximum penalty is- 1-year imprisonment.

C. ANTECEDENT

4. The accused was born in 1982. He is 42 years old now. He was 39 when he committed the offence.
5. He has no previous convictions.

D. SUBMISSIONS BY THE PROSECUTIONS

AGGRAVATING FACTORS

6. There is an age disparity between the accused (39 Years) and the victim- 12 years old at the time of the offence.
7. There is a breach of trust as the accused has a twenty-year relationship with the victim's aunty and has known the victim for a long time. They lived as a close-knit family for years.
8. The accused committed the offence at the victim's family home where she should feel safe when alone.
9. The accused did not only indecently assault the victim outside her home but also inside her bedroom when he entered the house without lawful authority or excuse.

MITIGATING FACTOR

10. The accused has no prior convictions.

E. SENTENCING PRINCIPLES

11. Counsel refers to the following provisions under the Crimes Act 2016:
 - i. Section 277- kinds of sentences;
 - ii. Section 278- Purposes of sentencing;
 - iii. Section 279- General Sentencing Considerations;
 - iv. Section 280- Sentencing Considerations- Imprisonment;

F. SENTENCING TARIFF

12. Counsel refers to the following cases:

- i. *R v Raididen* [2024] NRSC 2- the accused picked up the victim and took her to his house. They undressed. They kissed. The accused attempted to penetrate the vagina of the victim. There was no penetration. The victim complained to her mother when she had difficulty urinating. This was after she had sexual intercourse with another person. *The accused was sentenced to 30 years imprisonment with 10 years to be served before parole or probation.*
- ii. *R v Tongaran* [2022] NRSC 20- The accused was the stepfather of the victim. He pleaded guilty to one count of the same Section 117(a)(b)(c) offence. The victim was 13 years old. The accused was sleeping with his wife, the victim and her younger brother. The accused slept next to the victim. He touched her thigh and her vagina area. She woke up and told her grandmother. *The accused was sentenced to 30 years imprisonment and 10 years to be served without parole or probation.*
- iii. **'Being Found in a certain place without lawful Authority or Excuse'**-*R v Doguape* [2024] NRSC 13- The accused was convicted for this Section 164(a)(i) & (b) offence. The accused had been drinking with some friends at Anabar District. In the early hours of the next morning, he was found in a house at Anetan District where three children were sleeping. The parents of the children were away. The accused entered the house through an unlocked backdoor. The accused remained in the room and slept as the children left the room. *Considering the nature of the offending, though self-induced, the accused appeared to be unaware of what he did, I sentenced the accused to six months imprisonment and suspended the term for two years.*

13. Counsel refers to *R v Tsiode* where the Court said-

"... it is indeed a very disturbing and worrying trend in this country that almost all sexual abuses are committed by close family members like yourself.."

G. VICTIM IMPACT STATEMENT

14. The victim shared that she gets angry when she recalls what the accused did to her. It would spoil her mood for the day. She has lost trust in men, and has to be careful being around older men; even family members. She wants to move on with her life.
15. Her mother feels the same. This incident has also affected her relationship with her sister- the accused's defacto wife.

H. COMPARABLE CASES

16. On maximum and minimum penalties, Counsel refers to *R v Raiden* [2024] NRSC 2 where my brother Judge A/CJ Khan said the following:
'I do not have any discretion as to the term of imprisonment as it is prescribed by s.117 of the Act which states that:
"A penalty of 30 years imprisonment, of which imprisonment term at least one-third to be served without parole or probation."

I discussed the significance of the maximum and minimum term previously in the case of *R v Togoran*[1] where I stated at [14] and [15]:

[14] I discussed the relevance of maximum and minimum term in R v Harris[2] where I stated at [10] as follows:

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. [3]

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).

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] WASC 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. '

I. SUBMISSION BY THE ACCUSED

17. Counsel submits as follows:

- i. The accused is engaged to the sister of the victim's mother. They have 3 children aged 24, 13, and 12 respectively. They have two grandchildren.
- ii. He states that the penalty for this offence is 15 years imprisonment if aggravating circumstance apply and in any other case, 12 years imprisonment. **This is erroneous as the penalty was increased in October 2020.**
- iii. The accused has no previous convictions. He is remorseful. There was no injury caused to the victim.

- iv. The offence did not involve penetration and the accused has been in remand for 3 years. He is a well-respected member of the community.
- v. A lenient term of imprisonment is appropriate here.

18. I have also considered the letters of support for the accused submitted by the following:

- i. Pastor Michael Sosefo- AOG, Nauru;
- ii. Senior Elder Gavin Dekarube- Fishers of Men Pentecostal Church;
- iii. Elizabeth Debao- Secretary O.L.I.C

19. The above religious leaders all state that the accused has been a regular attendee at the Correctional facility church services conducted by these religious groups. They all seek the leniency of the Court.

J. DISCUSSION

SENTENCING GUIDELINES

20. I have considered the following provisions of the Crimes Act 2016:

- i. Section 277- Kinds of sentences;
- ii. Section 278- Purposes of sentencing;
- iii. Section 279- Sentencing considerations;
- iv. Section 280- Sentencing considerations- imprisonment;
- v. Section 282- Power to reduce penalties
- vi. Section 282A - Pre-trial detention not to be considered for offences under Part 7

21. Taking all the sentencing guidelines into account, **I convict the accused on all three counts.**

22. The question before me is how long should the accused be imprisoned for?

23. I refer to the *R v Raiden [2024] NRSC 2* quoted above where my brother Judge A/CJ Khan states at [2]:

“I do not have any discretion as to the term of imprisonment as it is prescribed by s.117 of the Act which states that:

“**A penalty of 30 years imprisonment**, of which imprisonment term at least one-third to be served without parole or probation.”

24. With respect, I take a different view. Section 117 actually provides- ‘**A maximum term of 30 years imprisonment**, of which imprisonment term at least one third to be served without any parole or probation.’ I interpret this to mean that 30 years imprisonment is the maximum term. I further opine that the penalty provision is not a mandatory term of 30 years imprisonment where there is no discretion on the court to award anything less.

25. I also consider Section 282 of the Crimes Act 2016 which provides:

(1) Where under this Act, an offender is liable to life imprisonment, a court may nevertheless impose a sentence of imprisonment for a stated term.

(2) Where, under this Act, an offender is liable to imprisonment for a stated term, a court may nevertheless impose a sentence of imprisonment for a lesser term.

26. Applying Section 282, I hold that 30 years imprisonment is the maximum penalty. I “may nevertheless impose a sentence of imprisonment for a lesser term.”
27. Noting the heavy penalty that is prescribed by parliament for sexual offences against children, and considering the relative prevalence of this offence in this jurisdiction, I take a glimpse at the deterrence and rehabilitation factors as a purpose of sentencing. Under Section 278(b) of the Crimes Act 2016- it provides:
“to prevent crime by deterring the offender and other people from committing similar offences.”
28. In *R v Radich* [1954]NZLR 86 (CA) the court said (at 87):
“We should say at once that this last argument omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment.”
- The court added:
“If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.”
29. On rehabilitation as a purpose of sentencing, Section 278(d) provides:
“to promote the rehabilitation of the offender.”
30. In *Yardley v Betts* (1979) 22 SASR 108, King CJ said:
“The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.”
31. Noting the above cases, I will be failing in my duty if I pass a lenient sentence here. Other would be offenders or persons of similar impulses should be reminded that **“if they yield to them, they will meet with severe punishment.”**
32. In any event, parliament has prescribed that the maximum penalty for this offence is 30 years imprisonment and at least 10 years to be served before parole or probation.

K. CONCLUSION

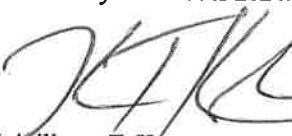
33. Considering all the above, and with the hope that the accused, aspiring offenders, and other persons with similar impulses would be deterred from committing similar offences, and that the accused *'has the potential moral fibre to provide a sound basis for rehabilitation,'* I sentence the accused as follows:

- i. Count 1- 15 years imprisonment;
- ii. Count 2- 15 years imprisonment;
- iii. Count 3- 6 months imprisonment.

34. The sentences are concurrent to each other.

35. The accused will serve at least 10 years imprisonment before parole or probation.

DATED this 04th day of October 2024.


Kiniviliame T. Keteca

Judge

