



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

**Criminal Case No. 05 of 2024**

**BETWEEN:** THE REPUBLIC

**PROSECUTION**

**AND:** BRANLEN KAM

**ACCUSED**

**BEFORE:** Keteca J

**Date of Hearing:** 11<sup>th</sup>, 12<sup>th</sup>, 15<sup>th</sup> & 18<sup>th</sup> Nov 2024

**Date of Judgment:** 29<sup>th</sup> November 2024

**Case may be cited as:** Republic v Branlen Kam

**Catchwords:** Rape & Indecent Act in Relation to a Child under 16 years old: contrary to Sections 116(1)(b) and 117 (a) (b) (c) of the Crimes Act 2016. Accused electing not to give evidence

**Appearances:**

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

Counsel for the Accused: **S. Hazelman**

## JUDGMENT

### BAKGROUND.

1. The accused is charged with one count of Rape of Child under 16 years and three counts of 'Indecent Act in relation to a child under 16 years.'
2. The accused pleaded not guilty. He opted not to give any evidence.

### THE CHARGE ON THE AMENDED INFORMATION DATED 11<sup>th</sup> NOVEMBER 2024

3. The Information reads:

#### COUNT 1

##### *Statement of Offence*

**INDECENT ACTS IN RELATION TO CHILD UNDER 16 YEARS OLD:** contrary to Section 117(1) (a)(b)(c) of the Crimes Act 2016

##### *Particulars of offence*

**BRANLEN KAM** on an unknown date between 1 April 2022 and 30 April 2022 at Anibare District, intentionally touches TA, the touching is indecent namely, the act of putting his hand into TA's pants and touching her vagina, and Branlen Kam is reckless about the fact; and TA is a child under 16 years old.

#### COUNT 2

##### *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*

**BRANLEM KAM** on an unknown date between 1 December 2022 and 31 December 2022 at Denig District, did intentionally engage in sexual intercourse with TA and TA is a child under 16 years old.

#### COUNT 3

##### *Statement of Offence*

**INDECENT ACTS IN RELATION TO HILD UNDER 16 YEARS OLD:** contrary to Section 117(1) (a)(b)(c) of the Crimes Act 2016

##### *Particulars of offence*

**BRANLEN KAM** on an unknown date between 1 December 2022 and 31 December 2022 at Denig District, intentionally did an act towards TA, the act being indecent namely, the act of putting his erected penis into TA's mouth, and Branlen Kam is reckless about the fact; and TA is a child under 16 years old.

**COUNT 4**

*Statement of Offence*

**INDECENT ACTS IN RELATION TO HILD UNDER 16 YEARS OLD:**  
contrary to Section 117(1) (a)(b)(c) of the Crimes Act 2016

*Particulars of offence*

**BRANLEN KAM** on an unknown date between 1 January 2023 and 31 December 2023 at Denig District, intentionally touches TA, the touching is indecent namely, the act of touching TA's vagina over her underwear, and Branlem Kam is reckless about the fact; and TA is a child under 16 years old.

**THE LAW**

4. Provisions of the law mentioned here refer to the Crimes Act 2016 unless stated otherwise.
5. Rape of a Child Under 16 years old: Section 116(1)(a) (b) and (i) provides:
  - (1) A person commits an offence, if:
    - (a) The person intentionally engages in sexual intercourse with another person; and
    - (b) The other person is a child under 16 years old.

Penalty: life imprisonment, of which imprisonment term at least 15 years to be served without any parole or probation.

6. Section 8 states '**sexual intercourse**' means:
  - (a) the penetration, to any extent, of or by any part of a person's genitals with any part of the body of another person; or
  - (b) the penetration, to any extent, of the anus of a person by any part of the body of another person; or
  - (c) the penetration, to any extent, of or by any part of a person's genitals by an object, carried out by another person; or
  - (d) the penetration, to any extent, of the anus of a person by an object, carried out by another person; or
  - (e) oral sex; or
  - (f) the continuation of an activity covered by paragraphs (a) to (e).
7. Section 17 states, '**intention**' means:
  - (1) A person has 'intention' with respect to conduct, if the person means to engage in the conduct.
  - (2) A person has 'intention' with respect to a circumstance, if the person believes that it exists or will exist.

- (3) A person has 'intention' with respect to a result, if the person means to bring it about or is aware that it will occur in the ordinary course of events.
8. Indecent Act in relation to a child under 16 years old: Section 117(1)(a)(b)(c) provides:
- (1) A person commits an offence, if:
- (a) The person intentionally touches another person;
- (b) The touching is indecent and the person is reckless about that fact; and
- (c) The other person is a child under 16 years old.

#### **THE EVIDENCE**

9. PW1( T.A)- The complainant is 11 years old. The accused is her stepfather. After her parents separated, she lived with her mother and her stepfather.
10. First incident- About April 2022, at Anibare, they were sleeping outside. They lay with her, her mother, the accused and Kishani, a female cousin, next to each other. The accused started touching her private parts, over her clothes. She pushed his hand away. She turned away from him. The accused pulled her towards him and told her not to tell anyone.
11. Second incident- About December 2022, at Location, Denig, her mother had gone to work. After having a shower, she went into her room to change. The accused knocked on the door. She said for him to wait as she was still changing. The accused got angry and said he needed to go into the room to get something. She wrapped a towel around herself. The accused pushed her onto a bed. She got up and went to her brothers in the lounge. The accused signalled for her to go back into the room. The older of the two brothers, Jeff went outside. The accused locked the front door from the inside. He pulled PW1 into the room. He pushed her onto the bed. He took off his pants. He got on top of her. He rubbed his penis on her vagina. He penetrated her. He had sex with her. It hurt. He covered her mouth with his hand. He got up and put his pants on. Her mother knocked on the main door and the accused opened it. She asked her mother to stay with her as she changed. Her mother went back to work.
12. Third incident- About December 22, at Location, she was sleeping. Her mother was at work. Her youngest brother was sleeping on her arm. She felt something on her mouth. The accused put his penis in her mouth. He was kneeling next to her, completely naked. She turned her head away from him.
13. Fourth incident- In 2023, they returned from a funeral. She was sleeping on the base of a bed. Her mother, the accused, her brother and sister were

sleeping on a mattress. She felt something on her private part. She switched on a lamp. She saw the accused. He had his hand on her thigh. He said that he thought PW1 was Prisha, her mother. She pushed him away. She was afraid. She did not tell anyone. She told her grandmother that it hurt whilst urinating. Her aunty took her to RON hospital.

14. **Cross Examination-** PW1 is no longer going to school. Her mother had beaten her for not looking after her younger siblings. She went to hospital because it hurts when she pees. Doctor said the pain was because of sexually transmitted disease. When she talked to the police, she remembered clearly what happened to her.

Q- The last time he penetrated you was Dec 22?

Ans- Yes. Other times, he just touched me.

Q- Dec 23 never happened?

Ans- It also happened.

She was referred to her police statement on incident 1- paragraph 9, and agreed it was true that the accused put his hand inside her pants and touched her vagina.

She was referred to her police statement on incident 2- and agreed that it was true.

She was referred to her police statement on incident 3 – paragraphs 22-29 and agreed it was true.

She was referred to her police statement on incident 4 –paragraph 50 and agreed it was true.

Q- Suggest that the accused never touched you between 1<sup>st</sup> April 22- 30<sup>th</sup> April 22?

Ans- I recall he did touch me. I didn't make it up.

Q- Dec 22, accused did not have sexual intercourse with you?

Ans- I'm the one- it happened to me.

Q- Dec 22, accused did not put his penis on your mouth?

Ans- I felt it.

Q- Jan 23- Dec 23- accused did not touch you over your underwear?

Ans- Yes – he touched me.

**(I noted that PW1 was very confident and steady whilst being cross examined)**

15. **Re- Examination-** Referred to [45]-[48] of her police statement. She read this out and said all are true.

16. PW1's police statement is exhibited as PEX-1.

17. PW2- she took PW1 to hospital because she had pains in her stomach down to her vagina. The doctor said that her pain was because of an infection transmitted from an adult. He also said that PW1's not a virgin. She and PW1's mother reported the matter to police.

18. **Cross-Examination-** She and PW1's mother were present when PW1's statement was taken. She signed on PEZ-1.
19. PW6- Dr Michael Alua examined PW1 on 10<sup>th</sup> April 24. She had an abnormal discharge due to infection. Consistent with bacterial vaginosis.
20. **The accused opted to remain silent.**

#### SUBMISSIONS BY COUNSELS

21. Both counsels filed helpful submissions. I have considered them.

#### DISCUSSION

22. The allegations of PW1 against the accused are unchallenged. In *RPS v R [2000] HCA 3* Gaudron ACJ, Gummow, Kirby and Hayne JJ observed:

'In a civil trial there will very often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore, be open in such a case to conclude that the failure of a party (or someone in that party's camp) to give evidence leads rationally to the inference that the evidence of that party or witness would not help the party's case (*Jones v Dunkel (1959) 101 CLR 298 at 321 per Windeyer L*) and that:

*'where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.'*

At [27] they added-

***'By contrast, however, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting and apparently damning inference to be drawn from proven facts could come only from the accused. In the absence or explanation, the jury may more readily draw the conclusion which the prosecution seeks. As was said in *Weissenteiner v R (1993) CLR 217 at 227-8* :***

***'In a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when the evidence, if it exists at all, must be within the knowledge of the accused.'***

23. Having reminded myself of what the High Court of Australia above in *RPS v R [2000] HCA 3* I now consider all the evidence of PW1 adduced

in court and in her police interview. In her testimony in court, she was adamant and clear of what the accused did to her on four separate occasions. The thorough cross examination by the defence counsel did not sway PW1 from her testimony. She described how the accused touched her, licked her vagina and had sexual intercourse with her on several occasions. It is clear that the incidents described in the charges are only some of those occasions.

24. At paragraph [42] of PEX-1 she said- *'When I turned 10, I experienced been licked on my vagina by my stepfather. I remember been sexually abused many times on different occasions.'*

25. At paragraphs [61] – [63] of PEX-1, PW1 describes how the accused had sexual intercourse with her in 2023. She stated that the last time the accused penetrated her was in the month of December 2023.

26. In paragraph [64] of PEX-1, she states- *'I have been sexually abused many times on different occasions which I cannot recall all of them. He will insert his penis into my vagina until I felt slippery in between my thighs.'*

27. I refer to the elements of the of the offences. Provisions of the law refer to the Crimes Act 2016. Section 117:

i. Indecent Acts in Relation to a Child under 16 years old-

(1) A person commits an offence, if:

(a) The accused intentionally touches PW1;

(b) the touching is indecent and the accused is reckless about that fact; and

(c) PW1 is a child under 16 years old

28. I note the meaning of 'intention' in Section 17. It is clear from the evidence that the accused 'meant to engage in the conduct' i.e. by putting his hand into PW1's pants and touching her vagina in Count 1, touching her vagina over her underwear in Count 4 and putting his erect penis onto PW1's mouth in Count 3.

29. **Were the touching indecent in Counts 1, 3 & 4 and the accused reckless to that fact?** In *Republic v Ignazio-Iyongo Aubit*, Criminal Case 15 of 2023, I referred to:

*"[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.*

30. Based on the above observations of Justice Lee and the evidence of PW1, it is clear that the touching of PW1 by the accused- by putting his hand into PW1's pants and touching her vagina in Count 1, touching her vagina over her underwear in Count 4 and putting his erect penis onto PW1's mouth in Count 3, **all have sexual connotations.**
31. I find that the touching in Counts 1, 4, and the putting of the accused's penis in PW1's mouth in Count 3, are all indecent. I also find, in all three incidents that the accused was reckless about those facts as per the definition of 'reckless' under Section 19 of the Crimes Act 2016.
32. I also find that PW1 is a child under 16 years old.
33. The elements of Rape of a child under 16 years old – Section 116 are;
- '(1) A person commits an offence, if:
- (a) The person intentionally  
Engages in sexual intercourse with PW1; and  
PW1 is a child under 16 years.
34. I again note the meanings of 'intention' in Section 17 and 'Sexual intercourse' in Section 8. I find that the accused, meant to 'engage in the conduct' by penetrating PW1's vagina with his penis as in Count 2. This amounts to sexual intercourse. I further find that PW1, is a child under 16 years old.
35. Referring again to the *Weissenteiner v R (1993) CLR 217 at 227-8* above, with the accused opting to remain silent, I find that 'any hypotheses consistent with his innocence, ceases to be rational or reasonable,' in the absence of any evidence, if it exists at all, which in this case, is within the knowledge of the accused himself.
36. I therefore find that the prosecution has proved all the elements of the offences in Counts 1-4, beyond reasonable doubt.



**CONCLUSION.**

37.I make the following findings:

Count1- Guilty

Count 2- Guilty

Count 3- Guilty

Count 4- Guilty.

DATED this 29<sup>th</sup> day of November 2024



Kiniviliame T. Keteca  
Acting Chief Justice

