



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

**Criminal Case No. 16 of 2024**

**BETWEEN:** THE REPUBLIC PROSECUTION  
JIOJI GUCAKE ACCUSED

**BEFORE:** Keteca J

**Date of Sentencing Hearing:** 27<sup>th</sup> August 2025

**Date of Sentence:** 26<sup>th</sup> September 2025

**Catchwords:** Indecent Acts in Relation to a Child under 16 years old: Contrary to Section 117 (1) (a) (b) (c) Crimes Act 2016, Article 7 Constitution, Rehabilitation, Deterrence, Protection of the Community, Provision of reasons, Hardship to family.

**Appearances:**

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

Counsel for the Accused: **V. Clodumar**

**SENTENCE**

**BACKGROUND**

1. On 18<sup>th</sup> July 2025, the accused was found guilty of two counts of indecent acts in relation to a child under 16 years, Contrary to Section 117(1)(a) (b) (c) of the Crimes Act 2016 (the Act)
2. I found that the accused, in hugging, licking and kissing the complainant's neck, without her consent- accompanied by his suggestion that she lie down with him on her mattress- this has a sexual connotation. I found that these acts amount to the 'touching' being sexual in nature in both Counts 1 and 2. Noting that the gravamen of the offence of indecent assault is the element of indecency, I concluded that the hugging, licking and kissing of the complainant without her consent, with the suggestion that she lay with him, amounted to touching that were 'indecent.'

### MAXIMUM PENALTY

3. The maximum penalty for this offence is 30 years imprisonment. Of this, at least one third is to served without parole or probation.

### SUBMISSIONS BY THE PROSECUTION

4. Counsel referred to Section 106(1)(a)(b)(c)(ii) of the Act 2016 which is the **wrong** provision. The accused was not charged for that offence. He also referred to the following:
  - Section 278- purposes of sentencing.
  - Section 117(5) and (6) on whether an act is indecent or not. (I note that Counsel did not address this crucial issue in his closing submissions before my judgment on 18<sup>th</sup> July 2025..)
  - *R v Raididen* [2024] NRSC – the accused, who touched the 12-year-old complainant’s vagina with his penis, was sentenced to 30 years imprisonment with a minimum of 10 years to be served before parole or probation.
  - *R v Tongaran [2022] NRSC 20* – the accused pleaded guilty to indecently touching the 13-year-old complainant’s vagina. He was sentenced to 30 years imprisonment with 10 years to be served before parole or probation.
  - *R v Mwareow [2025] NRSC 38*- the accused pleaded guilty to indecently touching the breast and leg of the 13-year-old victim. He was sentenced to 15 years imprisonment with 10 years to be served before parole or probation.
  - *R v Kam* [ 2024] NRSC 5- the accused, the stepfather of the 9 year old complainant was sentenced to life imprisonment for rape and 15 years for each of the 3 counts of indecent assault.
  - On the ‘floor and ceiling’ of maximum and minimum penalties, Counsel refers to *R v Harris* [2021] NRSC 44 Criminal Case No. 25 of 2020 (21 October 2021). In this case, the accused was sentenced to 30 years imprisonment with 10 years to be served before parole or probation.
  - *R v Namaduk* [2024] NRSC 27- For indecently touching the 12-year-old victim’s breasts and genitals, the accused was sentenced to 15 years imprisonment with 10 years to be served before parole or probation. (I took a different view from that of my brother Judge Khan. I held that I had the discretion to award an imprisonment term less than the maximum of 30 years.)
  - Counsel referred to some decisions of the New South Wales District Court which are not persuasive nor relevant in this jurisdiction.
  - Section 125A of the Crimes Act 2016 is relevant here as the victim was in the ‘care, custody or trust’ of the accused.
  - In conclusion, Counsel submits that a harsh custodial sentence is appropriate here.

## SUBMISSIONS FOR THE ACCUSED

5. Mr Clodumar submits as follows:

- Section 277(kinds of sentences), 279(General sentencing considerations), 280 (Considerations on imprisonment), 282 (Power to reduce penalties) of the Act are relevant here.
- The gravity of the offence 'is at the lowest level of indecency.' It did not involve any '**overt** element of a sexual nature.' (Is Counsel suggesting that it would only be serious if the act was done covertly?)
- There was no physical harm to the complainant though there is the possibility of psychological harm' as stated in the Victim Impact Statement.' The victim would like to forgive the accused and move on with her life.
- Imprisonment has to be ordered. The time in remand and the finding of guilt 'is adequate punishment.' It provides a deterrent, it denounces his conduct and ensures his rehabilitation.
- An additional 2 months, making a total of 12 months imprisonment and deportation to Fiji will ensure that 'the community is protected from any other action by the accused.'
- Counsel agrees with my finding in *R v Namaduk* that the 30 years imprisonment term for this offence is the maximum and not mandatory.
- Article 10(4) of the Constitution provides that this court cannot award a penalty 'more severe than the maximum of 30 years imprisonment.' There is no minimum sentence set by Section 117. Applying Section 282(2) of the Crimes Act, I can award 6 years imprisonment and a convicted felon can be eligible for parole after 2 years.
- The accused's wife will depart Nauru after her contract in December 25. Counsel submits that if the accused is imprisoned in Nauru, he will not have any family members or close relatives to support him. This, according to Counsel may be in breach of Article 7 of the Constitution that provides – '*No person shall be subjected to torture or to treatment or **punishment that is inhuman or degrading.***' Counsel submits that being imprisoned in Nauru whilst his family are in Fiji makes the punishment, inhumane and thus violates Article 7 of the Constitution.
- Section 37(20) of the Constitution of Papua New Guinea provides- '*An offender shall not be transferred to an area away from that in which his relatives reside except for reasons of security or other good cause and, if such a transfer is made, the reason for doing so shall be endorsed on the file of the offender.*' In *State v Paliou* [2015] PGNC 142; N6036 (07<sup>th</sup> August 2015) – the court ordered that the offenders be relocated to a prison on Manus Island where their relatives were. According to Counsel, this provides an option for this court to order that the accused serves his sentence in Fiji. (Counsel did not refer to any law that would allow the court to order this.)

## CONSIDERATION

6. I have considered fully the submissions by both Counsels and the plea of mitigation from the accused's wife. I have also considered Sections 277- 282A of the Act on sentencing.

7. Considering the totality of this case, the seriousness of the offending, the relevant case law and the submissions, **I convict the accused accordingly on both counts.**

### General Principles

8. In *R v Serra* (1997) 92 A Crim R 511 (NT CCA) in a joint judgment, the court said (at 525)”  
*‘[A] sentence should be the minimum required; the general principle in sentencing is that if less will do, more is superfluous.’*
9. On ‘Individual Justice’ (1995) 69 ALJ 421 at 424, Gleeson CJ said:  
*‘the punishment is supposed to fit not only the crime, but also the criminal.’*

### Reasons Must be Given

10. I remind myself that I must give reasons for the sentence I will pass- *WO (a child) v Western Australia* (2005) 153 A Crim R 352 (WA CA) (at 354[7] and *R v Thomson* (2000) 49 NSWLR 383; 115 A Crim R 104 (CCA) per Spigelman CJ at 394-395; 113-114 [42]-[44]. I referred to the above judgments in *Republic v Randolph* [2025] NRSC 32; Criminal Case 09 of 2024 (17 July 2025).
11. As part of my reasons, I refer to Section 278(b) of the Act that a purpose of a sentence is to ‘prevent crime by deterring the offender and other people from committing similar offences.’ 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 civilized 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.’*
12. 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.”*
13. Section 278 (c) (to protect the community from the offender) and Section 278 (d) (to promote the rehabilitation of the offender) may be considered together. In *Yardley v Betts* (1979) 22 SASR 108; 1 A Crim R 329 (CCA) the Court said (at 112; 333):  
*‘The protection of the community is also contributed to by the successful rehabilitation of the 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 the future, the protection of the community is to that extent enhanced.'*

14. From case law, a sentence of imprisonment is appropriate here. Counsel for the accused, agrees. The question is how long should the accused be imprisoned for? Counsel for the accused submits that Section 117 of the Act does not provide for a minimum imprisonment term. He suggests a term of 12 months imprisonment and that the accused be deported from Nauru.

#### **Article 7 of the Constitution.**

15. Article 7 of the Constitution provides –*'No person shall be subjected to torture or to treatment or punishment that is inhuman or degrading.'* Counsel for the accused submits that an imprisonment term in Nauru, with the accused's family members in Fiji, would amount to 'punishment that is inhuman.' Counsel adds that this will violate the protection from inhuman treatment afforded to all persons in Nauru under Article 7 of the Constitution. This submission is not supported by any case authority.
16. In *Ali v State* [2001] FJHC 169; HAA0083 of 2001 (21 March 2002), the High Court of Fiji considered a similar constitutional provision. Section 25 of the then Fiji Constitution stated:

*"Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane, degrading or disproportionately severe treatment or punishment".*

One of the issues for determination by the court was whether a sentence of 5 years imprisonment **"with a recommendation that he be given 5 strokes of the birch"** violated the above Section 25 right to freedom from cruel, inhumane, degrading or disproportionately severe treatment or punishment. The Court ruled that 'the provisions on corporal punishment under the Fiji Penal Code and the Criminal Procedure Code breached Section 25(1) of the then Fiji Constitution and were, therefore, unlawful. The court further held that corporal punishment in schools, based on the Fiji Ministry of Educations Guidelines also violated the same Constitutional provision and were unlawful.

17. From the above case, it appears that it is the form of punishment (5 strokes of the birch) that was held to be unconstitutional. There are no provisions for giving 'strokes of the birch' to prisoners in our laws. Even if there were such provisions, I would not be minded to recommend the caning of the prisoner in this case. Further, there is no evidence that the conditions of the Correctional Centre and the standard of care for inmates by our Correctional Officers are in breach of international standards that they amount to 'treatment or punishment that is inhuman or degrading.

## Comparison with Papua New Guinea

18. Counsel for the accused raises the absence of any provisions in the Nauru Constitution relating to the imprisonment of offenders. He refers to the case of *State v Paliau* [2015] PGNC 142; N6036. In that case, the court looked at Section 37 (20) of the Papua New Guinea Constitution which states:

*‘An offender shall not be transferred to an area away from that in which his relatives reside except for reasons of security or other good cause and, if such a transfer is made, the reason for so doing shall be endorsed on the file of the offender.’*

The court held that sending the convicted murderers to prisons away from Manus Island breached this constitutional provision. On this contention, I note that comparing Nauru (which is predominantly a homogenous society) with Papua New Guinea (with 5 thousand different clans and 840 living languages and more than 10 million people) is stretching the application of Article 7 too far. Arguably, due to the diversity in Papua New Guinea, it will be prudent to keep prisoners in prisons close to their relatives who will, hopefully speak the same language. The same challenges do not exist in Nauru. There aren't 840 living languages to contend with. The English language is commonly spoken here. Most if not all the prisoners and Correctional Officers are conversant in the English language. I take judicial notice of the fact that there is a Fijian community on Nauru. They number close to or in the hundreds. They all speak the English and Fijian languages. Some speak Fiji Hindi. This Fijian community, like other Pacific communities is a culturally close-knit group of people. They have their church and provincial groupings. These groups meet on certain occasions. They celebrate their national day. At times they meet to welcome government or non- government officials from Fiji. Such meets are venues to empower, uplift one another, to visit the sick or provide solace for one who has lost a loved one. The accused's wife writes – ‘my contract on teaching ends this year and **I am not planning on renewing.**’ Even though, an imprisonment term may mean that the accused will be serving a sentence away from the ameliorating effects of visits from his wife (if she chooses not to renew her contract) and other loved ones, as is customary for Fijians, he will most certainly be visited by his fellow- Fijians and church-based groups on the island.

## Hardship to the Family

19. Does the possible ‘hardship to the family,’ as submitted by the accused's wife, have any bearing on the sentence that I will pass? In *R v Lux* (unreported, NSW CCA, 26 August 1988) Roden J said:

*‘It is unfortunate in the extreme when people with heavy family responsibilities put the welfare of those who depend on them at risk by involving themselves in criminal conduct which has the potential to produce prison sentences. When that natural consequence flows, in my view, it is inappropriate to seek to put the burden – and almost indeed to put the blame- upon the courts.*

*The comment has often been made that despite that sympathy and compassion to which I have referred, the courts cannot, by their sentencing decisions, create a class of people who are immune from the normal consequences of their criminal conduct.’*

20. In *R v Tilley* (1991) 53 A Crim 1 (Qld CA) Thomas J said:

*‘An offender cannot shield himself under the hardship he or she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental*

*factors. The public, which includes many people who struggle to bring up their children with moral standards, would be poorly served if the courts gave in to the temptation.'*

21. Considering all the above, I find that a long sentence of imprisonment in this case does not violate Article 7 of our Constitution.

### **Deportation of the Accused**


22. Counsel for the accused contends that part of the sentence should include an order that the accused serve his imprisonment term in Fiji. Both Counsels are not aware of any bilateral arrangements between Fiji and Nauru regarding prisoners. There are no domestic legislations or regional instrument that govern the incarceration of convicted felons in their countries of origin. In any event, the issue for deportation of any foreigner convicted of an offence and the service of a prison sentence outside Nauru is for the Executive arm of the State.
23. Counsel for the accused submits that an imprisonment term of 12 months will be an appropriate sentence here. The previous sentences awarded by this court for the same offence say otherwise. The fact that the accused in this case is a foreign national does not elevate him or put him in a class of people that makes him immune 'from the normal consequences' of his criminal conduct or the type of sentences that this court has awarded in the past for the same offence.
24. I remind myself of what Kirby J said in *Ryan v The Queen* (2001)206 CLR 267 at 302: *"A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of the offender. This objective requires that a sentence should also communicate society's condemnation of the particular offender's conduct. The sentence represents "a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within the substantive criminal law." (my emphasis)*
25. In passing this sentence, I consider what has been submitted in the accused's favour, the lack of any prior convictions, his prospects for rehabilitation, and his age. I also note the lack of remorse on his part.
26. Parliament has prescribed and this court has made abundantly clear in the past that those convicted of sexual offences against children will be severely punished. It is not a question of whether you will go to prison or not. Rather, it is a question of how long you will spend behind bars. The sentence that the accused will receive today is a clear testament that everyone is equal under the law; Nauru citizen or foreign national. The sentence denounces publicly the unlawful conduct of the accused. It reflects Nauru society's condemnation of such criminal conduct. It also represents a symbolic collective statement that when you indecently assault a child, be prepared to spend many years in prison.

**CONCLUSION**

27. Considering all the above, Jioji Gucake, you are sentenced as follows:

- i. Count 1- 15 years imprisonment;
- ii. Count 2- 15 years imprisonment, concurrent to Count 1.
- iii. You will serve at least 10 years imprisonment before being eligible for parole or probation.

**DATED** this 26<sup>th</sup> Day of September 2025.

  
**Kiniviliame T. Keteca**

**Judge**

