

IN THE HONIARA CENTRAL MAGISTRATES COURT DISTRICT OF  
SOLOMON ISLANDS  
(Criminal Jurisdiction)

CRIMINAL CASE NO. ~~1242~~ <sup>2</sup> of ~~2018~~ <sup>2019</sup>

BETWEEN:

REGINA

Complainant

AND:

FRED BONIATOMALEFO

*Before: Emma Garo Chief Magistrate*

*Mr. Benham Ifutoo Public Solicitors Office for  
defendant*

*Ms. Dalcy Belapitu Director Public prosecutions  
Office for the Crown*

*Date of hearing: 1<sup>st</sup> March 2019*

*Date of ruling: 16<sup>th</sup> April 2019*

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**Ruling**

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**INTRODUCTION**

1. The defendant is charged with the following offences:

- i) Count 1 Incest contrary to section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act 201;
  - ii) Count 2 Incest contrary to section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act 2016;
  - iii) Count 3 Incest contrary to section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act 2016.
2. The defendant pleaded not guilty to the charges. A short form preliminary inquiry was conducted on the 1<sup>st</sup> March 2019.
3. Section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act reads:

**163 Incest**

(1) In this section:

*"close family member"*, of a person, means any of the following persons:

- (a) a parent or grandparent;
- (b) a child or other lineal descendant;
- (c) a brother, sister, half-brother or half-sister.

(2) A person commits an offence if the person has sexual intercourse with another person who is a close family member of the person.

Maximum penalty:

(a) if the close family member is under 13 years of age - life imprisonment; or

(b) in any other case - 10 years imprisonment.

(3) It is a defence to an offence under subsection (2) to prove that the accused person was acting under the coercion of the close family member.

(4) It is a defence to an offence under subsection (2) to prove that the accused person did not know, and could not reasonably have been expected to know, that the other person was a close family member.

(5) A person commits an offence if the person attempts to commit an offence under subsection (2).

Maximum penalty:

(a) if the close family member is under 13 years of age - 7 years imprisonment; or

(b) in any other case - 5 years imprisonment."

2. The defendant pleaded not guilty to the charges on the 1<sup>st</sup> March 2019 and a short form pre-liminary inquiry was conducted.

3. Section 163(2) of the Penal Code (Amendment) (Sexual Offences) Act 2016 creates three categories of offences. The first category of offence is under section 163(2)(a) where the complainant is under 13 years of age, the maximum penalty is life imprisonment. The second category of offence under section 163(2)(b) of the Penal Code (Amendment) (Sexual Offences) Act 2016 is that in any other case- 10 years imprisonment. The third category of offence is as provided for under section 163(5) of the Penal Code (Amendment) (Sexual Offences) Act 2016.

4. The prosecution in framing out all the charges against the defendant failed to particularise in the statement of the law or the particulars of the offence which the specific provisions either (a) or (b) of section 163 that the defendant is alleged to have breached. This is serious because the failure by the prosecution to do this has made it impossible for the court to determine which law to commit the defendant to the High Court to stand trial for.

5. This court has time and again reminded lawyers from the office of the Director of Public Prosecutions to properly check the charges before they proceed with the trial or pre-liminary inquiry. This in my view is serious dereliction of duty on the part of the prosecution. There is sufficient evidence to show that the defendant has committed offences, but the failure of the prosecution to frame its

charges according law, must result in only one order the dismissal of the charges for being defective and the discharge of the defendant simply because this court cannot commit the defendant to stand trial before the High Court on an incomplete defective charge.

6. I have considered whether I should exercise the court's discretion to of the courts own motion amend the charges to reflect the evidence as submitted by the prosecution. I have decided against doing so because the ultimate duty to ensure that the proper charges are preferred against persons accused of committing crimes lie with the prosecution. I dismiss the charges for being defective and I discharge the defendant.

Dated this 16<sup>th</sup> April 2019



Emma Garo  
Chief Magistrate

