



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 7 of 2017

THE REPUBLIC OF NAURU

v.

CARLOS BAETIONG

Before: Crulci J  
For the Prosecution: F. Lacanivalu  
For the Defence: R. Tagavakatini  
Dates of the Hearing: 3 – 7 August 2017  
Date of Judgment: 8 August 2017

CATCHWORDS – *Criminal – Deprivation of Liberty – Indecent Acts in Relation to a Child Under 16 years - Crimes Act 2016*

## JUDGEMENT

1. The complainant in this matter is 11 years of age. The defendant is a neighbour of the complainant's relatives. He is 71 years of age. In order to protect the identity of the victim her name has been suppressed and she is referred throughout this judgement as 'IJ'.
2. The defendant pleaded guilty to the offence of Indecent Acts in relation to a Child Under 16 years of age, contrary to section 117 of the *Crimes Act 2016* ("the Act") and pleaded not guilty to the offence of Deprivation of Liberty contrary to sections 88 of the Act.

### COUNT ONE

#### Statement of Offence

**Deprivation of Liberty:** Contrary to s. 88(1)(a), (b), (c)(i) of the *Crimes Act 2016*

#### Particulars of Offence

CARLOS BAETIONG on the 15<sup>th</sup> April 2017 at Nauru, intentionally detained a child namely IJ and he intended to unlawfully cause IJ to be confined.

### COUNT TWO

#### Statement of Offence

**INDECENT ACTS IN RELATION TO CHILD UNDER 16 YEARS OLD:** Contrary to s. 117(1)(a), (b), (c)(i) of the 50 of the *Crimes Act 2016*

#### Particulars of Offence

CARLOS BAETIONG on the 15<sup>th</sup> April 2017 at Nauru intentionally touched IJ and was reckless about the fact that IJ was a child under 13 years old.

3. Agreed Facts [Exhibit 1] were put before the Court and in consideration of the Guilty pleas to Count Two there was an undertaking by Counsel to confine the questioning of the complainant, so far as reasonable, to the offence of Deprivation of Liberty.
4. "Agreed Facts:
  - 1) The defendant is Carlos Baetiong of Location Compound at Denig District.
  - 2) The victim is an 11 year old girl who was born in September 2005.
  - 3) She lives at Location Compound Denig District.
  - 4) Carlos entered the room and closed the door with roofing tin.

- 5) He touched IJ's vagina.
- 6) Justin Auwobo, 43 years old, who is a neighbor of Carlos living on the same block, was outside of the room and was trying to open a roofing iron.
- 7) Carlos heard Justin outside trying to open a roofing iron.
- 8) Justin saw IJ half-naked and approached Carlos.
- 9) The defendant was interviewed under caution by police on the 16<sup>th</sup> of April, 2017 where he admitted the following:
  - a) He kissed IJ on the lips and her neck.
  - b) He touched her vagina using four fingers and rubbed it on her vagina.
  - c) He touched her for his own pleasure."

#### *Complainant's evidence*

5. IJ lives at home with her mother and grandmother. She is eleven years old. At the time of the offences she was wearing a blue T-shirt and purple pants. She was on her way to swim in the sea with friends and the defendant called her to give her a lollipop.
6. When the defendant called her she went to him and he called her into the room. He then closed the door, tied her hands up above her head and blindfolded her with clothing. He put some of the cloth in her mouth.
7. IJ's hands were tied with '*like a wire*' that was black in color and used for electrical appliances. She was shown a length of black plastic-type wiring and identifies it as that used by the defendant.
8. IJ couldn't run away as the door was closed and he threatened to stab her with a knife. The knife is described as '*long like a bread knife*'. The defendant removed her pants and underwear and indecently touched her.
9. She could not run away as he had tied her hands and feet and could not call for help as the cloth was in her mouth. IJ's feet were tied after her arms were tied. When the defendant heard the door cover moving he cut the cable and she fell down.
10. Under cross-examination IJ denied that she asked the defendant for money. She denied that she had followed him, saying "*No, he followed me*".

11. IJ's said she was going to swim, and that she told her friends to wait for her but they went without her to swim in the sea.
12. IJ maintained that her hands and feet were tied. She explained that it was after the blindfold had been removed that she saw the wire above her from the ceiling. She was unable to scream or shout out, because her mouth was stuffed with something. The defendant had threatened her with a knife and he'd said he would stab her. She reiterated that Justin did hit the defendant to the head.
13. In answer to a question in re-examination IJ said that the defendant removed the blindfold from her face when he heard the aluminium roofing moving.

*Justin Auwobo*

14. This witness has limited mobility and entered the Court on crutches. Under oath he tells the Court that he lives at Location in Denig, in Block 8 on the top floor. He is married to Faafoi Auwobo and they have children.
15. The witness recalls the day in question: he was at home in his son's room watching television. After the power went out and it became too hot, he opened the door. His daughter and her friend come to the house, the friend was the complainant IJ. IJ left and went downstairs.
16. The complainant looked out of his room window he could see the defendant speaking to the complainant and noted that they turned back in the direction of Block 7. From where he was standing on the top floor he could see between the blocks and he was waiting to see them pass by between the blocks. The defendant was walking in front of the complainant.
17. When the witness did not see the complainant and defendant reappear in his line of sight between the blocks, he made his way out of the house and downstairs to investigate. When he got near to the front of Block 7 he could not see them and so went around the side of the block. There are abandoned rooms whose windows and doors are sealed up. The first door that he went to was sealed and it was the wrong room. He found them in the second room when the defendant came out.
18. He said to the defendant "*What you're doing?*" and the defendant replied "*Oh the girl just wanted to kiss me*".

19. The witness went inside the room and saw IJ standing there with her clothes on the floor; she was half-naked and covering herself up with her shirt. There was a knife under the window.
20. The witness asked IJ "*what has the defendant been doing to you?*" The complainant replied that he was touching her.
21. In order to get out of the room the witness had to physically remove the door down so that they could leave. He leant against his crutches whilst using both hands to pull the door down.
22. The witness stated that during this time the defendant was "*asking all the time for me to forgive him*".
23. The witness saw a Community Liaison Officer at a nearby block and told him what had happened and that the police should be called.
24. Under cross examination the witness denied that he had hit the defendant, and stated that he did not see the defendant holding a knife.

*Fafoi Auwobo*

25. The witness gave sworn evidence. She is the wife of the previous witness Justin Auwobo and works at the hospital as a nurse-aide. On the day in question she was called home by her son who told her that her husband needed her. She saw that her husband was with the defendant. She and her husband had a brief conversation.
26. When she went to leave, the defendant was standing at her door '*apologizing to her*'.
27. The witness went to where the complainant lives with her grandmother and mother and saw that the complainant was being bathed outside by her grandfather.
28. The witness did not want to discuss the situation in front of the grandmother because she has not been well and has high blood pressure, so sent a message for the complainant's mother to return. She then saw her husband and the defendant leave in a police car.

29. The grandmother called to the complainant and asked IJ questions in front of the witness. The complainant said as follows: *"that she had been playing with her friend and that the defendant called her and told her there were some lollipops in the empty rooms; that IJ went back to pick up the lollipops; there were no lollipops there; the defendant then closed her mouth and strip (sic) her."*
30. IJ was asked what happened and said *"that he had touched her private parts, inside"*. When she was questioned as to why she didn't shout for help she said *"the defendant put a cloth in her mouth and she couldn't scream; and that he had tied her hands up and with the t-shirt in her mouth she couldn't move or escape"*.
31. In answer to questions in cross-examination the witness said she herself did not go to the room at the abandoned place, and that her husband had not told her on that day what had happened. Her evidence to the Court is what the complainant had said had happened, and the complainant was at Location when the husband and the defendant had gone to the Police Station.
32. The complainant is in some way related to the witness, as the complainant's grandmother is the witness's cousin.

*Police witness Sgt. Iyo Adam*

33. The witness gave evidence on oath that he has worked as a police officer for eight years and is attached to the Criminal Investigation Unit. He is the officer in charge of this case. On the day in question he was off-duty when other police officers came to inform him about this case and so he went to the station where he met the witness Justin Auwobo and the defendant. He recorded the witness's statement.
34. The Officer was shown the crime scene. He was taken into the room where the incident took place at Location, abandoned Block 7. He did not take any photographs at the time because it was night and there was poor visibility.
35. The witness went back the next day the 16<sup>th</sup> of April, 2017 to the crime scene and took photos. At that time he was accompanied by the complainant, her parents, the grandmother and a female police officer. IJ showed them the scene and explained it to them.

36. The witness took photographs, [Exhibit 2]:
1. the overall view of abandoned Block 7;
  2. a view of the side of Block 7 – with a circle showing the room where the offence took place;
  3. a close up photographs of the room from the outside looking in;
  4. a photograph taken inside the room with markers showing the places where the victim and the offender were standing;
  5. a photograph of a black wire cable next to marker 4;
  6. a photograph showing the ceiling with cables hanging down (victim states she was tied there)
37. The black wire/cable is produced [Exhibit 3] to the Court. The witness was later handed the knife (identified by the complainant in evidence) but was not responsible for the location and seizure of the knife.
38. Under cross-examination the police officer identified the black wire/ cable that was indicated to him by the complainant. He was asked to estimate how high the ceiling of the room was and said it was about two arm's length above his shoulder.
39. The officer agreed at the time he did not find a knife and that it was given to the police at a later date.
40. The officer indicated that photo 6 shows electric cables hanging down from the ceiling in the middle of the room. He agreed that there is no steel wire in the cable Exhibit 3, and says that it snapped when it was put into the exhibit bag.

*Locus in quo*

41. The Court made a site visit to the scene accompanied by the Court clerk, defence and prosecution counsel, the defendant, the police and correction officers.

*Defence*

42. The defendant exercised his right to silence.

*Prosecution closing submissions*

43. Prosecution counsel submits to the Court that the complainant gave clear, cogent and reliable evidence, and was not moved by cross-examination. She maintained that her hands were tied after having been lured into the room by the promise of lollipops. The door was then closed she was threatened with a knife.
44. Being thus restrained the prosecution says the defendant intentionally detained the complainant and that was in order to commit Count Two. In so doing the defendant went above and beyond what was required to commit the offence of Count Two and submits to the Court that they are clearly two different offences.
45. The prosecution accepts that the burden of proof for the offence remains with them and they must prove the elements of the offence beyond reasonable doubt. Turning to the elements it is agreed that the defendant is Carlos Baetiong; that the complainant is a child; and the date of the alleged offence is the 15<sup>th</sup> of April 2017.
46. The evidence given by the witnesses' points to no prior disagreement between the witnesses and the defendant. There is no evidence that the complainant was coached by others for some reason. Furthermore the evidence of the complainant before the Court is consistent with what she told others on the date of the offence, in April earlier this year.
47. The prosecution submits that the defendant intentionally detained and caused the complainant to be confined in the following manner: he deliberately lured her to an abandoned room; when in the room he closed the door with metal roofing iron; he threatened her with a knife; he tied her hands and feet; she was blindfolded and had cloth stuffed in her mouth.
48. The defendant only cut the ties that bound her hands when he heard the aluminum roofing blocking the door being moved. The Court visited the scene and was able to see the height of the ceiling in the abandoned room and the wires hanging down. In all the circumstances the prosecution submits that the offence of deprivation of liberty is made out, and has been proven beyond reasonable doubt, and asks the Court to find the defendant guilty on both Counts.



*Defence closing submissions*

49. Counsel for the defendant accept that whilst the allegation of deprivation of liberty is a serious offence, the actions described to the Court in evidence are part and parcel of Count Two, the indecent assault on the complainant, and not a separate offence.
50. Defence counsel challenges as implausible that the incident happened as related by the complainant, drawing the Court's attention to the nature of the wire alleged to have been used to bind the complainants hands and the distance between the complainant's outstretched arms and the ceiling. Counsel asks the Court to find that this evidence is unreliable. The knife referred to by the complainant was not found at the scene but was only handed in to the police some two weeks later.
51. These inconsistencies in relation to the cable and knife should, say defence counsel, create doubt in the Courts mind as to whether the offence of deprivation of liberty is made out and asks the Court to dismiss the first count and find the defendant guilty on his own plea of Count Two.

RELEVANT LAW

52. Under the Act:

**88 Deprivation of liberty**

(1) A person (the 'defendant') commits an offence if:

(a) the defendant intentionally takes or detains another person; and

(b) the defendant intends to unlawfully cause the other person to be confined or imprisoned; and

(c) either of the following applies:

(i) the other person is an adult and does not consent to being confined or imprisoned, and the defendant is recklessly indifferent to consent of the other person;

(ii) the other person is a child.

Penalty:

(i) if the other person is a child—10 years imprisonment; or

(ii) in any other case—7 years imprisonment.

(2) Strict liability applies to subsection (1)(c)(ii).

53. **117 Indecent acts in relation to child under 16 years old**

(1) A person commits an offence if:

(a) the person intentionally touches another person; and

(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.

Penalty:

(i) if the child is under 13 years old or aggravating circumstances apply—15 years imprisonment; or

(ii) in any other case—12 years imprisonment.

54. **8 Definitions**

'**detain**': a person 'detains' another person if the person:

(a) forcibly restrains the other person; or

(b) uses any means to get the other person to remain in a particular place or with a particular person.

**CONSIDERATIONS**

55. The Court observed the following of the complainant IJ whilst she gave her evidence: IJ is eleven years of age but is very slight in build and small for her age. She gave evidence clearly and consistently and was not shaken by cross-examination. When describing having her hands tied she physically held her hands together above her head, and looked upwards when detailing that her hands were kept above her.

56. Although she gave evidence in a composed manner she was clearly affected by recounting the experience and sat much of the time with her legs pulled up against her body and wrapped in a large jacket. The Court views IJ as a witness of truth and accepts her evidence as credible.
57. Mr and Mrs Auwobo gave evidence of what they saw and heard and there is nothing to indicate to the Court that before this date that there was any animosity between them and the defendant as neighbours. There was no suggestion put to the witnesses in cross-examination that they had any reason to fabricate or embellish their evidence. The Court finds them to be credible witnesses.
58. In relation to Count One the prosecution must prove beyond reasonable doubt that the defendant carried out actions that have the effect of forcibly restraining the complainant child IJ, and used means to keep her in a particular place.
59. There is clear and unchallenged evidence before the Court that the defendant and the complainant were together in a room in an abandoned Block with the door closed. A door that needed considerable strength and effort to be opened to effect departure from the room. Although the defendant is not large in stature himself, he is considerably bigger than the complainant child IJ.
60. Further unchallenged evidence is that the complainant was found to be naked from the waist down; her clothing was nearby on the floor; and found nearby was black cable.
61. The complainant says to the Court that after she entered the room the defendant shut the door. IJ was unable to run away or shout for help because she was immobilised, blindfolded and gagged having been threatened by the defendant that he would stab her.
62. Evidence from the witnesses is that initially the defendant said that "*the girl wanted to kiss him*" and then he repeatedly apologized to the witnesses for his actions.
63. The defence raise in submissions as to whether the Counts are bad for duplicity. This could be the case if for example someone was stabbed multiple times and each act was charged with causing harm when the injuries were sustained the course of one attack. Here there are separate and distinct offences which have different elements requiring proof. The offences of

deprivation of liberty and indecent assault, whilst occurring on the same day and in the same room, are separate and distinct offences and the counts are not bad for duplicity.

64. Having visited the scene and observed the layout of the block and the abandoned room, and considering all the evidence before the Court I am satisfied so that I am sure that the actions of the defendant were to intentionally detain IJ and that he unlawfully caused her to be confined in the abandoned room. IJ is a child under the Act. I find the defendant guilty of the offence of Deprivation of Liberty and convict him on Count One.
65. The defendant pleaded guilty to Count Two, Indecent Acts with a Child Under 16 years of Age, and on the evidence before the Court I accept that plea and the defendant is found guilty and convicted of that offence.

#### DECISION

66. Held:

- 1) On Count One the Court finds defendant guilty of the offence of Deprivation of Liberty, and he is convicted of the offence;
- 2) On Count Two the Court finds the defendant guilty of Indecent Acts with a Child Under 16 years, and he is convicted of this offence.



Judge Jane E. Crulci

Dated 8 August 2017