



**SUPREME COURT OF NAURU**

**[CRIMINAL JURISDICTION]**

**Criminal Case 18 of 2018**

**The Republic of Nauru**

**V**

**AD**

Before: Chief Justice Filimone Jitoko  
For the Prosecution: F.Lacanivalu, Office of the Director of Public Prosecutions  
For the Defense: R.Tangivakatini, Office of the Public Legal Defender

Date of Hearing: 28 May, 2019  
Date of Ruling: 30 May, 2019

***Catchwords:** Criminal Law – Breach of Probation – Requirement of application by the probation officer – Supreme Court’s inherent jurisdiction – Criminal Justice Act 1999 sections 15, 16.*

**DECISION ON BREACH OF PROBATION**

1. On 2 February 2019, this Court, after having found the defendant AD, guilty of the offence of indecent act in relation to a child under 16 years old, contrary to section 117 (1) (a) (b) (c) and (i)) of the Crimes Act 2016, sentenced the defendant to imprisonment for a period of 18 months less the 86 days he has been on remand. The sentence was to commence from 2 February 2019.

2. The defendant although still juvenile, has previous convictions of the same nature of offence and also involving children. In criminal case No. 14 of 2017 the defendant, AD was charged with the offence of indecent acts to a child under 16 years contrary to section 117 (1) (a) (b) (c),and (i) of the Crimes Act 2016. In criminal case No.15 of 2017, the defendant AD was charged with the offence of rape of a child under 16 years contrary to section 116 (a) (b) and (i) of the Crimes Act 2016. In both cases the defendant pleaded guilty. In convicting him and passing sentence and a probation order the court, as per Khan J, took into account the fact that the defendant was still a juvenile and a custodial sentence may have a detrimental effect on his adult life. The court referred to an earlier decision of Crulci J in R v CD Criminal Case No. 9 of 2017, as relevant in its decision. The probation order was for a period of 2 years, 11 months from the date of sentencing, 20 February, 2018. Relevant bail conditions includes inter alia,

*“(6) That he shall keep peace and be of good, behavior and commit no offence”*

3. In addition Khan J warned the defendant AD as follows:

*“I would to bring to the attention of AD the provision of Section 16 of the Criminal Justice Act 1999, wherein it is provided that should he breach the probation order of fail to comply with the orders made therein, and, should he commit another offence during the period of probation,, then he may be resentenced for both the offence of indecent act and rape that he was dealt with today.”*

4. The sentencing of the defendant AD on 2 February 2019 by this court to a term of imprisonment of 18 months, did not deal with his breach of the probation order in Criminal Cases No.s 14 and 15 of 2017. It is agreed that the defendant committed the offence in this present case during his probation period granted in the earlier cases. The court reserved its decision on the breach to allow counsel to make further submissions specifically with regards to the processes to be complied with under sections 15 and 16 of the Criminal Justice Act 1999.

5. Section 15 states as follows:

*“15. Breach of probation*

*(1) A probationer who breaches his probation is guilty on an offence and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding on hundred dollars.*

*(2) Where a probationer is convicted under this section, the court may, in addition to or instead of sentencing him under subsection (i), do all or any of the following:*

*(a) in respect of a probation order made under section 7 extend the period of probation by a specified period expiring not later than three years after the date on which that period began;*

*(b) in respect of a probation order made under section 8 – extend the period of probation by a specified period expiring not later than one year from the date of the expiry of the period of his community service;*

*(c) vary any conditions of his probation order;*

*(d) impose an additional condition;*

*(e) where an application has been made under section 16 – sentence the probationer in accordance with that section.*

*(3) Notice of an order made under this section shall be given by the Registrar of the Court to the Secretary for Justice.”*

6. Section 16 deals with sentencing for the original offence and states thus:

*“ 16 – Sentence for original offence*

*(1) where a probationer, including a probationer who in addition to being released on probation has also been sentenced to pay a fine:*

*(a) is convicted of another offence committed during the period of probation ; or*

*(b) is charged with a breach of his probation order,*

*a probation officer may apply to the court to sentence him for the offence for which he was released on probation.*

*(2) Notice of an application under subsection (i) shall be served on the Probationer.*

*(3) An application under this section shall be made:*

*(a) where the probation order was made by the Supreme Court- to the Supreme Court; and*

*(b) where the probation order was made by the District Court, or by the Supreme Court on appeal from the District Court – to the District Court.*

*(4) Where the application is dealt with by a judge or magistrate other than the judge or magistrate who released the offender on probation, the court shall, before sentencing, the offender, make such inquiries as the circumstances of the case as it considers reasonable, and may hear such evidence as it thinks relevant.*

*(5) The court hearing an application under this section may deal with the offender for the offence for which he was released on probation in any way in which a court could have dealt with him if he had just been convicted of that offence:*

*(a) other than again releasing him on probation; and*

*(b) in any case where he was also sentenced to pay a fine – other than by sentencing him to pay a further fine.*

*(6) An offender who is not sentenced or otherwise dealt with under subsection (5) for the offence for which he was released on probation shall continue to be on probation.”*

#### **Application of Section 16**

7. The submissions made by counsel and the view of this court appear to converge on the procedure necessary or required before the court can exercise its powers to re-sentence under section 16. The courts' powers, be it the Supreme Court or the District Court, under section 16 can only be triggered through the application of a probation officer to the court for the probationer to be sentenced for this original offence for which he was released on probation.
8. In this case there is no application before the court from a probation officer seeking for the defendant to be sentenced for the offences he had pleaded guilty to in Criminal Cases No.s 14 and 15 of 2017, on the ground that he has breached his probation order by being convicted of another offence.. It could very well be, and it appears to be so, that there was no probation officer identified and appointed to supervise and assist the probationer as required under sections 5 and 6 of the Act.
9. In my view, section 16 does not come into this operation in the absence of a probation officer's application. It maybe that section 16 was not intended to be construed so strictly in limiting its ambit, but it is, in the courts view, the only tenable interpretation to the provision. Except for sub-section (6) all the other provisions of section 16 deal with “the application” by the probation officer to the Court. It seems to the Court that section 16 was intended to deal with breaches of probation orders, where by means of the probation officers application; the alleged breaches are first to be proven to the Court's



satisfaction. It does not apply clearly where there been a later conviction in breach of the order and the court has taken notice of it; this notwithstanding section 16 (1).

10. There remains the inherent jurisdiction of the Supreme Court to, of its own motion, invoke the application of section 16 in the interest of justice. In addition, Khan J has specifically stipulated as a condition of the defendant's release on probation that:

*“ should he [ the defendant's] commit another offence during his period of probation, then he maybe resented for both the offence of indecent act and rape that he was dealt with today”*

11. However, given the apparent failure in the appointment of a probation officer to be responsible for the behavior and conduct of the probationer during the time of his probation, the court is reluctant to exercise such powers, in the circumstances.

#### **Application of Section 15**

12. Notwithstanding the shortcomings of section 16 of the Criminal Justice Act 1999 to address the breach of probation order, the Court is of the view, that section 15 is one of general application and allows the court to exercise its general powers to impose its sanctions for those found guilty of breach(s) of probationary orders. In particular section 15(1) imposes an imprisonment term of

*“not exceeding three months or to a fine not exceeding one hundred dollars”  
for a probationer who is in the breach of this probation.”*

13. Contrary to the submission by the defense, the defendant needs not be formally charged for the breach of his probation. The fact that he has already pleaded guilty and convicted to a later offence, and which offence was committed during the period of his probation, is proof enough of the breach.

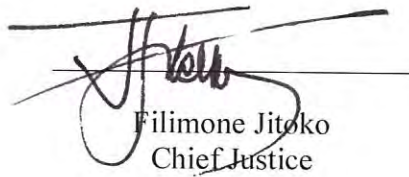
#### **Conclusion**

14. By committing the criminal offence of indecent act to a child under 16 years old contrary to section 117 (1) (a)(b) (c) and (i) the defendant is in clear breach of his probation conditions. For the reasons I have explained this court cannot avail itself of sanctions under section 16 of the Criminal Justice Act 1999, nor rely on the inherent powers it may possess. It nevertheless may exercise its powers under section 15 of the Act.
15. For breaching his probation, the defendant AD is sentenced to a term of three (3) months imprisonment.

16. This term is to be served consecutively to the defendant's imprisonment term of 18 months, less 86 remand days, he is currently serving.

*Ordered accordingly*

Dated this 30<sup>th</sup> day of May 2019

  
Filimone Jitoko  
Chief Justice

