



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Criminal Case No. 9 of 2018

BETWEEN

The Republic

Prosecution

AND:

UN

Defendant

Before: Khan, J  
Date of Hearing: 9, 10, 12 and 13 September 2019  
Date of Judgement: 16 September 2019

Case may be cited as: *Republic v UN*

CATCHWORDS:

Where the defendant is charged with the offence of rape of a child under 16 years of age pursuant to s.116(1)(b) of the Crimes Act 2016 – where absolute liability applies – where defence under s.127 of the Act not available to the defendant as the defendant admitted that the child was 14 years old.

Held: guilty of charge of rape.

APPEARANCES:

Counsel for the prosecution: RD Talasasa Jr.  
Counsel for the defendant: S Valenitabua

JUDGEMENT

INTRODUCTION

1. The defendant is charged with one count of rape which reads as follows:

Statement of Offence

Rape of child under 16 years old: contrary to s.116(1)(a), (b)(ii) of the Crimes Act 2016.

### Particulars of Offence

UN on 2 July 2018 at Nauru intentionally engaged in sexual intercourse with JC a child under 16 years of age.

2. The defendant was born on 29 June 2001 and at the date of the offence was 17 years old. The victim JC was born on 8 July 2004 and was 14 years old at the date of the offence.

### RELEVANT LAW

#### Rape of a child under 16 years of age

3. S.116 of the Crimes Act (the Act) 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 of age.

#### Penalty:

- 1) If the child is under 13 years old and aggravating circumstances apply – life imprisonment; or
- 2) In any other case – 25 years imprisonment.

#### Absolute Liability

s.116 (3) provides that absolute liability applies to subsection 1(b)

Note for subsection (3)

Although absolute liability applies to circumstances that the other person is under 16 years old (which means the defence of mistake of fact under s.45 is not available), other defences apply to an offence against this section: see section 127.

#### Defence under s.127

s.127(2) provides:

- (2) it is a defence to a prosecution for the offence if the defendant proves that:
  - a) The defendant:
    - (i) took reasonable steps to determine that age of the other person;
    - and

(ii) honestly believed on reasonable grounds that the other person was 16 years old or older; and

b) The other person wished to consent to the relevant conduct.

#### ELEMENTS OF THE OFFENCE

4. The onus is on the prosecution to prove the following:
  - 1) That the defendant intentionally engaged in sexual intercourse;
  - 2) That at the time of the offence the victim was under 16 years old.

#### BURDEN OF PROOF

5. The burden of proof is on the prosecution to prove every element of the offence beyond all reasonable doubt.
6. As I stated earlier, absolute liability applies to subsection 1(b) of s.116 which means that mistake of fact under s.45 of the Act is not available.

#### MISTAKE OF FACT OR IGNORANCE OF LAW

7. S.45 provides:

A person is not criminally responsible for an offence that a physical element for which there is no fault element if:

- a) When engaging in conduct making up the physical element, the person:
    - i) considered whether or not facts existed; and
    - ii) Was under a reasonable but mistaken belief, or ignorance of the facts; and
  - b) Had the facts existed the conduct would not have been an offence.
8. S.116(1)(b) being an absolute liability offence the onus is on the prosecution to prove all the elements beyond all reasonable doubt and thereafter a finding of guilt can be made against the defendant.

#### ABSOLUTE LIABILITY

9. S.24 provides:

- (1) If a written law creates an offence provides that the offence is an offence of absolute liability:
  - a) no fault element is required to prove the physical elements of the offence; and

- b) the defendant may be found guilty of the offence regardless of any mistake or ignorance of fact under s.45 by the defendant.
- (2) If a written law creates an offence provides that absolute liability applies to a particular physical element of the offence:
- a) no fault element is required to prove that physical elements; and
  - b) the defendant may be found guilty of the offence regardless of any mistake or ignorance of fact under s.45 by the defendant. The existence of this absolute liability does not make any other defense unavailable.

### ONUS ON THE DEFENDANT

10. Once the element of the offence is proved by the prosecution beyond all reasonable doubt the onus then shifts on the defendant to prove the defence under s.127(2) of the Act and the legal burden of proof is on balance of probabilities (see s.27 of the Act).

### FACTS

11. On 2 July 2018 at around 8pm JC was riding a motor bike belonging to Marah Fritz driven by her friend Sigh Adire as a pillion passenger to a certain disco practice at Capalle & Partners container park at Anetan District.
12. The accused was riding his motor cycle in the opposite direction and he called out to JC and her friend Sigh stopped the motor bike.
13. The accused asked JC to drop him at his house at Anabar on the motor bike. Both the defendant and JC were known to each other at the time.
14. The accused gave his bicycle to Sigh and asked her to give it to Jawe.
15. The accused took over the driving of the motor bike whilst JC sat at the back as a pillion passenger.
16. The defendant drove the motor bike to Chad Park and he turned off the motor bike disconnecting two wires as the ignition was not working. He walked over to the beach and asked JC to come over to him. JC made an attempt to start the motor bike by joining the two wires but was unable to do so.
17. She later joined him at the beach. Her version of how the events unfolded is:

“He called me to follow him – he said it will be quick but I was afraid but then I asked him what is it. He said just come I want to show you something. It will not take long. I got off and went to him and then he quickly pulled me towards him and he then kissed me. I pushed him on his chest. He was facing me. I pushed him after he kissed me. After I pushed him, he kept pulling me. I said I have to go. I have friends that I have to pick up. He did not want me to go. He held on to me and kissed me again and laid me down on the sand then he got on top of me and he tried to pull my pants down. I tried to pull it up. I was wearing pink t-shirt and black leggings. It was soft material not

strong like jeans. Leggings cling to the body. It was tight and easy to take off. Because he was strong, he pulled me off my leggings. I was wearing underpants. He pulled off the leggings and the underpants to the knee. He inserted his penis inside my vagina and I felt it. But the actual thing – just felt the pain. I knew it went in but I felt the pain. I told him to stop but he did not want to. I tried to get up and he let me do so and I got up. I was cleaning myself and he asked me if could give him oral sex. I said no. He pushed me down and held me and grabbed my legs and placed them around his shoulders. He placed his hands on me and held my hands down and starting having sex again, this is after I cleaned myself. After that I told him to stop as it was very painful and he told me to relax my legs. When he was done, he got up and starting cleaning up. He told me that I was his now and I said how can I be yours when you did this to me.”

18. The defendant’s version is as follows:

“When we reached Chad Park, she started holding me. I got off the motor bike. I went straight to the beach and told her to come. She didn’t want to come to me. She said she wanted to go for a practice for the disco. I said no it’s going to be quick. Then she came to me. I asked for sex. She said no. I said please please. She told me to stop if it hurts and put it in slowly but I didn’t care. I was rough when we were having sex. She kept telling me to stop. I did not stop because it was nice. I didn’t know that she was in pain.”

19. When JC did not return to Capelle & Partners place, Marah Fritz who was a security officer there went looking for her as other girls who had already arrived. She went to look for her with Sigh and she saw her motor bike at Chad Park. She saw the defendant and JC standing next to the motor bike and as they drove closer the defendant ran away and she asked JC to get on her bike and drive it to Container Park and they followed her.

20. At the Container Park the other girls took part in the disco party to celebrate Anna Doguape’s birthday whilst JC stood and watched them.

#### REPORT TO POLICE

21. A report was made to the police on 2 July 2018 at around 11.30pm that the defendant had raped JC and the police search party was activated to search for the defendant. The defendant was not found at this house and he was later found on top of a tree and he refused to come down and had threatened to jump head down to kill himself.

22. A crowd gathered including JC’s father who had a steel bar whilst his uncle had 2 pit bull terriers. After a very lengthy negotiation the defendant came down from the tree and was rushed to the police station in a police vehicle. He was searched and locked in the cell and later interviewed.

#### MEDICAL REPORT

23. JC was medically examined on 3 July 2018 and according to the medical report a finding was made that she had a forceful penile penetration and white fluid like semen was found around the clitoris and at the labia areas.

### RECORD OF INTERVIEW

24. The defendant participated in a record of interview in the presence of his father, Larry Note, and it was put to him that he penetrated JC's vagina with his penis and he did not make any comments.

### DEFENDANT'S EVIDENCE

25. The defendant in his evidence stated that he knew that JC was 14 years old at the time of the incident and also stated that he was 3 years older than her. He said that at the incident he was 17 years old.


### SECTION 127 DEFENCE

26. Mr Valenitabua in cross examination suggested to JC and others that she was riding a motor cycle on the main road which she accepted. I believe that this was an attempt to establish the defence under s.127 of the Act, however, when the defendant gave evidence, he accepted that he knew that JC was 14 years old.
27. The defendant has not proved the defence available to him under s.127(2) of the Act and he has admitted that he knew that JC was 14 years old at the relevant time.

### CONCLUSION

28. I am satisfied that the prosecution has proved its case beyond all reasonable doubt against the accused in relation to the charge of rape and I find the accused guilty of the charge.

DATED this 16 day of September 2019

  
Mohammed Shafiullah Khan  
Judge

