



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

Criminal Case No. 24 of 2021

BETWEEN: THE REPUBLIC
PROSECUTION

AND: XAVIER NAMADUK
ACCUSED

BEFORE: Keteca J
Date of Submissions: 26th & 29th August 2024
Date of Judgment: 30th August 2024.

Case may be cited as: Republic v Xavier Namaduk

Catchwords: Indecent Act in relation to child under 16: contrary to Section 117(1)(a)(b)(c) of the Crimes Act 2016

Appearances:

Counsel for the Prosecution: **M. Suifa'asia**

Counsel for the Accused: **R. Tom**

JUDGMENT

A. BACKGROUND

1. The accused is charged with two counts of 'Indecent Act in Relation to a Child.' He is also charged with one count of 'being found in a certain place without lawful authority or excuse.'
2. On 02nd August 24, I ruled that there was a case to answer and for the matter to proceed to the next stage of the trial.

B. THE CHARGE

3. The Information reads:

Count 1

Statement of Offence

INDECENT ACTS IN RELATION TO A CHILD UNDER 16: contrary to Section 117 (1)(a)(b)(c) of the Crimes Act 2016.

Particulars of Offence

XAVIER NAMADUK on the 17th of December 2021 at Yaren District Nauru, intentionally touched VA's breasts outside VA's house and the touching was indecent and XAVIER NAMADUK was reckless about that fact and VA does not consent to the touching and XAVIER NAMADUK knows that fact.

Count 2

Statement of Offence

INDECENT ACTS IN RELATION TO A CHILD UNDER 16: contrary to Section 117 (1)(a)(b)(c) of the Crimes Act 2016.

Particulars of Offence

XAVIER NAMADUK on the 17th of December 2021 at Yaren District Nauru, intentionally touched VA's breasts and her genitals inside VA's bedroom and the touching was indecent and XAVIER NAMADUK was reckless about that fact and VA does not consent to the touching and XAVIER NAMADUK knows that fact.

Count 3

Statement of Offence

BEING FOUND IN A CERTAIN PLACE WITHOUT LAWFUL AUTHORITY OR EXCUSE: contrary to Section 164(a)(i) and (b) of the Crimes Act 2016.

Particulars of Offence

XAVIER NAMADUK on the 17th of December 2021 at Yaren District in Nauru, entered a dwelling house and XAVIER NAMADUK did not have the consent of the owner, Joannah Akubor to enter or remain in the place.

THE LAW

4. Indecent Acts in relation to a Child under 16 years old: Section 117(1)(a)(b)(c) of the Crimes Act 2016-
 - (1) A person commits an offence, if:
 - (a) The person intentionally touches another person;
 - (b) The touching is indecent and the person is reckless about the fact; and
 - (c) The other person is a child under 16 years old.

5. Being found in certain places without lawful authority or excuse: Section 164(a)(i) and (b) of the Crimes Act 2016 provides:

A person commits an offence, if the person:

 - (a) Enters or remains in any of the following places;
 - (i) A dwelling house; and
 - (b) Does not have the consent of the owner to enter or remain in the place.

C.THE EVIDENCE

6. The prosecution called four witnesses.

PW1- VD- She's 15 years old. Birthdate- 27/12/2008. On 07th /12/21, her father asked her to cook rice. She also sniffed gas. She noticed someone behind her. The accused was taking a video of her. He said- 'you want me to tell your father? She ignored him. She hid the gas cannister.

He lifted her up, around her breasts. She said- *'Let go, I can get up myself.'* She walked to her room. Whilst lying down, covering her face, he came on top of her and told her to open her eyes. The accused started moving his hands over her breast and said- *' he'll report me to my father.'* She started crying. *He moved his hands to her groin area.* She pushed his hands away. *She did not feel safe and knew then that he was there for a different reason.*

He had a cigarette and offered it to her. She ran next door. She told Lilie Olsson that the accused gave her a cigarette and gas and what he did to her outside the house and in the room. She also told her mother the next day after she refused to go and get water from the accused's house. She refused as she did not want to see the accused again.

Her father and mother were both at work when she was cooking rice.

Cross-Examination

She's been sniffing gas for a long time. The accused has seen her sniffing gas before and reported on her to her mother. Her mother had spanked her. She got into trouble a lot of times in 2021 at school. She was suspended at times for smoking. She knows the accused and his girlfriend well. She's stolen clothes from the accused before.

When she sniffs gas- *'she feels dizzy and lots of spinning around.'* She sniffed the same type of gas she used to cook rice' but a different cannister.

Accused took a video of her whilst she was sniffing gas. She did not black out.

Q- 'Accused picked you, helped you to your room, because you were slouched over?'

Ans- Incorrect

Q- You started shaking in the room?

Ans- No

Q- Rice was burning?

Ans- **I noticed the rice smelling when accused was fondling me**

Q- You're a problem child, lying? Stealing? Sniffing Gas?

Ans- Yes

Q- When the accused said he had video footage, you made all this up?

Ans- No, incorrect

Q- Allegations, touching you, you were not in correct state of mind?

Ans- **No, I knew- clear mind**

Q- Effect of gas still affected you and you alleged all these against the accused?

Ans- No, Incorrect

Q- Your mind is affected from sniffing gas?

Ans- I don't remember

Crt- When did you start sniffing gas?

Ans- Year 8

PW2- Lilie Olsson- on 17/12/21, she met PW1. They were training mates for powerlifting. PW1 told her that the accused videoed her as she was sniffing gas. PW1 also said that the accused touched her in the room. PW1 did not say where the accused touched her. She believed PW1 as she was crying.

Cross- Examination

She believed PW1 as she was crying whilst relating her story. They both went training at a gym that evening.

PW3 JA is the mother of the complainant. PW1 is her first born. Her birthdate is 27/12/08. On 18/12/ 21, she asked PW1 to go and fetch water from the accused's place. PW1 did not want to go. PW1 said that the accused did something to her the day before- touched her private parts. She relayed what PW1 said to her husband. Accused is her sister's boyfriend. She reported the matter to police on 18/12/21.

Cross- Examination

She knows that PW1 sniffs gas. Accused had reported on PW1 sniffing gas before. Her husband and the accused are friends. PW1 had been suspended from school for carrying a lighter and a cigarette roll.

PW4- Kauwe Taumea- Teacher- aid at Yaren school. PW1 approached her asking for her sister. PW4 told her that her sister had gone with other kids in a car. PW1 went back to their house. The accused then returned with the kids in the car. The accused was still in his work clothes.

Accused's daughter Junet asked her where PW1 was. She told Junet that PW1 was in her house. Junet then called out to her father that PW1 was in her house. *The accused approached and asked her on where PW1 was. She responded that PW1 was in her house.* Accused then went to PW1's house. She saw the accused enter the front door of PW1's house.

Cross Examination

Accused was wearing his work clothes- Bula Shirt and shorts. The Accused came back out after about 3 minutes.

Re- Examination

She was guessing on the three minutes.

PW5- Sgt Lady Jane Hilo- report received from victim's mother. PW5 was the initial investigator. Attended to the report with Inspector Fernando. Got the statement of the PW1 and Inspector Fernando arrested the accused. Accused was not interviewed. He did not want to be interviewed.

Cross-Examination

Q- Record of interview to bring out evidence of accused?

Ans- Yes

Attended to Correctional facility on 23rd Dec 21 to conduct interview of the accused. The warden said that the accused did not want to be interviewed. She applied for the accused to be remanded as they needed further investigation. She had the powers to see the accused but the

accused refused to come out to be interviewed. She did not want to force him. That's his right.

CASE TO ANSWER

7. On 02nd August 24, I ruled that there was a case to answer. **The accused opted to give evidence on oath.**

DW1- He worked for the Education Department as an assistant manager- Asset Management. His fiancé works for DFAT. He accompanied his fiancé to Taiwan in 2016. His fiancé worked there for two years. He assisted the Ambassador when delegates, medical patients and students arrived in Taiwan.

He also worked for RPC and attended different courses. He received Certificates of Completion for "Sexual Harassment Prevention" and "OS- Mental Health Awareness" in 2015. He also received a Bronze Medallion for Life Saving.

He is close to the parents of PW1. His fiancé is the sister of PW1's mother. The parents spoil PW1 as they did not discipline her when she did something wrong. PW1 misbehaves a lot. He has caught her sniffing gas before. She's stolen clothes and cigarettes from him before. He told PW1's mother about these incidents. PW1 was smacked by her mother.

PW1, her parents and him are like a big family. They visit his home- use our bathroom, showers, toilet and kitchen. He visits them too. He doesn't need permission to visit their house. If their electricity power is off, he would top it up.

On 17th Dec 2021, he was at work. His brother called him that he'd dropped off some fishing gear at his Yaren home. He went home to check his gear. He took the gear to PW1's Dad, his fishing partner. PW1's father was there, so was PW1. PW1's father had to go and meet his Minister at 12pm. He borrowed some tools from PW1's father. He had to fix the rear lights of his car. The parts had arrived with the fishing gear.

He drove his car to PW1's house. He called out to PW1's father as he needed a size 10 spanner. He saw the backdoor open. It's usually closed. He could hear some 'hissing' sound. He saw PW1 sniffing a gas cannister. She was pressing the cannister- spraying the gas into her mouth- down her throat. Three weeks prior- he caught her doing the same, reported it to her mother. Her mother was not happy. This time, he took the video as proof. Identifies the video- shows PW1 sitting outside the house sniffing gas.

PW1 was recalled and shown the video. Identifies herself holding a gas cannister- *" I put in my mouth- pressed it on my tooth- gas came out- I inhaled the gas. "*

Accused was taking the video. She didn't want her mother to see the video.

Re- Examination

Q- Why were you covering your face?

Ans- I knew I was caught so I covered my face.

Q- How many times you sniffed before video was taken?

Ans- First sniff/ inhale and he came around.

Q- How were you feeling when you covered your face?

Ans- I was scared that he caught me.

Q- First time what?

Ans- I just sat down, my first inhale, put it down, looked around, and he came around.

Video- is DEx- 4.

DW1- He observed PW1 sniffing gas for about 20 seconds before he started to take the video. She sniffed the gas about two times before he took the video. After taking the video, he went back into PW1's house. **He could smell the rice burning on the stove. He went outside to tell PW1.** She was sitting on a brick, head on her arms, face down.

"I walked up to her, told her to stand up- you've done enough sniffing."

Q- How did you approach her?

Ans- I just spoke to her. I held her hand, assisted her. I told her- 'You can't play dumb anymore.' She didn't respond. Maybe she was scared I had proof, she was sniffing.'

Q- Why did you help her up?

Ans- because she was just sitting there, facing down, looking at the ground.

Q- How did you help her up?

Ans- Picked her up by the elbows.

Q- What did you notice?

Ans- She was in a daze- unresponsive.

Q- Did she respond?

Ans- Not a word.

Q- You helped her into the house?

Ans- She walked by herself into the house- she held onto the walls.

Q- Why hold the walls?

Ans- Not sure- maybe she was like- 'drunk.' I saw her walk into her room.

When she was in her room, I smelt the rice burning. I went to check on her. She was lying on her bed, face up, both her hands covering her face.

Q- What did you do?

Ans- I noticed her legs- I thought she was going to have a seizure. I called her name. I pulled her hands away to check. I thought she was having a seizure. She opened her eyes and started laughing.

I told her- 'don't laugh and go and check on the rice, it's burning. She went and checked on the rice. The rice was burnt.

Q- What did you do?

Ans- When she went to check the rice, she didn't open the pot lid. She just stood there with both her hands covering her face. **I turned off the gas. She was just standing there pretending to cry.**

Q- Did you touch her in the room?

Ans- Touched her hands as I was calling her name. Nothing else.

Q- If she had a seizure, would you know what to do?

Ans- Yes- I've been trained in First Aid.

I was wearing my work clothes.

Q- Evidence of PW1- you touched her breasts. What do you say?

Ans- No

Q- Her evidence – you touched her breasts and her groin?

Ans- Not true.

Q- After checking the rice, what did you do?

Ans- I noticed the packet of cannisters- only two left. I assumed one was used to cook the rice and one PW1 was using. I picked up the one she was using and put it on the table. It felt as if half full.

Q- Where did you go after talking to her?

Ans- Back to the front of the house working on my car. Then I went to pick my kids. **PW4 was sitting on backdoor of my house. I walked past her.**

Cross- Examination

Q- You called out to PW1's father when you came to get some tool?

Ans- My first visit.

Q- First visit brought fishing gear?

Ans- Yes, showed it and gave it to PW1's father.

Q- PW1's father left for work then?

Ans- I asked to borrow his tools. He said- 'don't be late as I have to leave at 12pm.'

Q- PW1's father left?

Ans- I don't know

Q- Came back for tools?

Ans- Yes. I called out for him. Asked for size of tool.

Q- He didn't respond?

Ans- Yes. I didn't know he left the house.

Q- You got the tool yourself?

Ans- That's when I noticed the back door was open and I could hear the 'hissing' sound.

Q- You went through the front door?

Ans- Yes.

Q- You knew that only PW1 was at home?

Ans- Yes

Q- You went to backdoor of PW1's house?

Ans- No.

Q- You touched her breasts?

Ans- No I didn't.

Q- She walked into the house? Told her to go and rest?

Ans- Yes.

Q- She was lying face up and face covered?

Ans- Yes.

Q- Climbed on her and tried to wake her up?

Ans- No

Q- You told her that you'll tell her father about sniffing gas?

Ans- No

Q- You touched her breasts?

Ans- No

Q- You ran your hands to her private parts?

Ans- No

Q- She pushed you and left the room?

Ans- No

Q- You offered her a cigarette?

Ans- No

Q- You told her to continue sniffing gas?

Ans- No

Q- Hissing sound- you walked silently/ quietly?

Ans- I was calling her father- no response.

Q- You went into the house?

Ans- Yes, backdoor was open, heard 'hissing' sound. **I thought PW1's father was in the house. I didn't know PW1 was at the house.** No one else there.

Q- You went to check on PW1?

Ans- No

Q- You did not report to PW1's mother about the gas on the same day?

Ans- Yes, she was not there.

Q- You did not report to the father on the same day about the gas sniffing?

Ans- He was not there as well.

Q- You didn't report to PW1's parents on the gas sniffing the next day?

Ans- Yes.

Q- You didn't report it because she would report on your touching?

Ans- No. Not because I was scared. Because we did not go out fishing as PW1's father was drinking all night.

Q- Not Ok to go into PW1's house when she's alone?

Ans- Not Ok.

Q- On that day sbe was alone?

Ans- Yes

ELEMENTS OF THE OFFENCE

8. COUNTS 1 & 2

'The accused

Intentionally touched PW1

The touching is indecent and

The accused is reckless about the fact; and

PW1 is under 16 years old.'

9. Ms Suifa'asia submits as follows- Count 1-

- i. The identification of the accused is not an issue.
- ii. The touching of PW1 on both occasions were intentional. On the first incident, for Count 1, outside the house, PW1 demonstrated how the accused came from behind her, put his arms 'under her arms- **he grasped her breasts.**' When this happened, PW1 said- 'let go, I can get up myself.'
- iii. The accused knew that PW1 was alone.
Section 17(2) of the Crimes Act defines 'intention' with respect to a circumstance, if the person believes that it exists or will exist. "The circumstances that the accused had committed the indecent act was when he is aware that he was alone with PW1'

- iv. The touching is indecent and the person is reckless about that fact- 'to help someone up does not require touching of the breasts- when lifting up someone from under the arms.' The accused said he lifted her up by her elbows. It is the word of the accused against PW1. Counsel submits that PW1's version should be believed as the accused did not report the gas sniffing to her parents. The Court is to infer that the accused 'is in a consciousness of guilt about the indecent act he committed on PW1.
- v. On whether PW1 is a child under 16 years - PW1 and her mother testified that her date of birth is 27 Dec 2008. She was 12 years old at the date of the incident., 10 days short of her thirteenth birthday.

Count 2

- i. Identification is not an issue again.
- ii. Intentionally touches PW1. She took herself to the room. "He came on top of me- kept telling me to open my eyes and he had his hand over my breast. Still saying he will report me to my father. I started crying. After, his hands on my breast he moved down to my groin area." I pushed his hand away and I walked outside the room.' When asked- "How did you feel when he touched you on your breast and private part? She answered- **"That's when I know he was there for different intention. I did not feel safe."** Counsel submits that there isn't enough explanation by the accused to support his version that by looking at her legs, he thought PW1 was going to have a seizure. "He did not describe what exactly was the condition of PW1's legs that had triggered in his mind to think 'seizure.'
- iii. The touching is indecent and the person is reckless about that fact- Counsel submits that the accused was aware that she was alone in the house with him, believing that she was affected by the gas she sniffed and he could take advantage of her- the touching was indecent and the accused was reckless about that fact.
- iv. PW1 and her mother testified that her birthdate was 27 Dec 2008. She was 12 years old.

Count 3

ELEMENTS OF THE OFFENCE

'The accused Enters

A dwelling house

Does not have the consent

of the owner to enter or

remain in the place'

- i. Identification of the accused was not an issue.
- ii. Enters a dwelling house- the accused gave evidence that he entered the dwelling house of PW1's parents through the front door.
- iii. Does not have the consent of the owner- the dwelling house is owned by PW1's parents. PW1's mother said that the accused is a friend of her husband.

The accused will call from outside the house and her husband will go out to see him. **Who invited the accused into the house?** The accused was aware that PW1's father had left the house as he did not respond when the accused called from outside. There is no evidence that PW1's father 'allowed the accused to go into the house and remain there' in his absence. Counsel refers to the distinction between Section 164 Crimes Act 2016 and Section 387 of the Crimes Act 2009 of Fiji that was highlighted in *R v Doguape [2024] NRCA 3* –

'It should be noted that section 164 of the Crimes Act 2016 differs significantly from the corresponding offence in Fiji. Under section 387 of the Crimes Act 2009 of Fiji, the offence of trespass explicitly requires, beyond the basic conduct, a further intention to commit another offence. Distinctively, the Crimes Act 2016 of Nauru does not qualify the offence of being found in certain places without lawful authority or excuse, with an additional fault element to perform another act.' Counsel submits – "if one is found to have merely entered a dwelling house without the owner's consent (lawful authority or excuse), then one has committed the offence."

10. In conclusion, Counsel refers to *Republic v ERJ [2022] NRCA 2*, where the court of Appeal said-

'It should be noted that in this jurisdiction evidence of corroboration is no more required for sexual offences. Section 101 of the Crimes Act reads: 'A law is abolished if the law provides that the corroboration of the evidence of a witness is required for a conviction for an offence under this part.'

11. Who is the Court to believe? Counsel submits that PW1's evidence should be preferred for two reasons.

- i. PW1 had been punished before for sniffing gas when she was reported by the accused. She would not be making up a story to her friend PW2 and her mother PW3 just because the accused had videoed her sniffing gas; and
- ii. PW1 refused to go and fetch water from at the accused's house when sent by her mother, the day after the incident. In her words- 'I did not want to see him again after what happened. According to Counsel- 'This a natural reaction of disgust and disbelief of a distasteful action by the accused (a family member) who has betrayed PW1.

SUBMISSIONS BY THE DEFENCE

12. Mr Tom submits as follows:

- i. The reason for slouching down would be 'the cause of adrenaline rushing to her head coupled with the effects of the sniffing of a hazardous substance to a young child to be disabled both mentally and physically
- ii. PW1's version of the incident 'is distorted because of the effects of the gas sniffing which had affected her at the time of the incident and throughout her life as a young child.

- iii. That PW1 only informed her mother of the incident a day after the incident because she did not want to do house chores as she had been a problem child.
- iv. The version of PW1 'is fabricated to ensure her safety from her father and that her mother is scared if her husband ever finds out she has been sniffing gas.
- v. PW2 said that she believed PW1 because she was crying.' Immediately after finishing crying PW1 and PW2 did not do anything about the incident and went to the gym instead.
- vi. PW1 'demonstrates her bad character by pretending to cry and producing lies.'
- vii. 'DW1 stated that upon returning, PW1's father had already left and also left the tool in the lounge.'
- viii. 'DW1 noticed PW1's legs shaking and then went into the room thinking that PW1 had encountered a seizure.'
- ix. 'DW1 then noticed PW1 **was normal** and instructed her to check the rice' because of the smell.
- x. Counsel refers to the following cases:
 - a) R v RD [2019] NRSC 21 Khan J said-
'S.101 of the Crimes Act abolished the need for corroboration and as such the victim's evidence alone is sufficient for me to convict the juvenile. Vaai J dealt with the issue of corroboration in R v Jan[3] and he stated at [32] as follows:
*"[32] Although the rule of practice relating to corroboration has been abrogated by s.101 of the Crimes Act 2016, it is my respectful view that I must in the circumstances of this case, in order to avoid a perceptible risk of miscarriage of justice, consider the evidence of the complainant in the usual way having in mind such **aspect of human nature and experience.**"*
 - b) In R v Debao[2019]NRSC 5 , Vaai J said-
'Section 101 Crimes Act 2016 provides that a law is abolished if the law provides that the corroboration of the evidence of a witness is required for a conviction for an offence under this Part. Despite similar provisions in Queensland, Australia, the High Court of Australia in Tully v R[2] and Robinson v The Queen[3] held that there are cases where there is perceptible risk of miscarriage of justice if the jury is not warned of the need to scrutinize the evidence of a complainant with great care before arriving at a conclusion of guilt. That is not because complainants in sexual cases, as a class are to be treated as intrinsically untrustworthy. The relevant provisions of the Queensland Criminal Code preclude such reasoning. And the same code does away with the former requirement to direct the jury that it would be unsafe to convict an accused on the uncorroborated evidence of the complainant. But those subsections do not prevent a judge from making a comment on the evidence given on the trial that is

appropriate to make in the interest of justice. It is the interest of justice that dictates whether a warning should be given[4]

DISCUSSION

13. The following are not in dispute:
- i. PW1 was home, alone.
 - ii. She was sniffing gas.
 - iii. The accused went to her house, uninvited.
 - iv. The accused took a video of PW1 sniffing gas.
 - v. The accused picked PW1 up from where she was sitting. **(what part of PW1's body he touched, is in dispute)**
 - vi. PW1 walked to her room.
 - vii. The accused entered her room.
 - viii. He touched her **(touched 'where' is in dispute)**
 - ix. The accused did not report the gas sniffing to PW1's parents on 17th Dec 21.
 - x. He did not report the gas sniffing to PW1's parents on 18th Dec 21 or on any other day.
 - xi. PW1 told her friend PW2 on the same day of what the accused allegedly did to her.
 - xii. It was PW1 that told her mother of what the accused allegedly did to her on 18th Dec 21, the day after the incident.
14. The main issue for determination is to who the court should believe; either the victim PW1 and the prosecution witnesses or the accused.
15. In such cases, the court will need to look at the evidence in totality and to check on any inconsistencies in the testimonies of the witnesses. The court will also assess how the witnesses contradict or support each other's versions of events.
16. On the submissions by Counsel for the Defence in paragraphs [12] (i), (ii) above, the Court notes that the Defence did not call any expert witness to testify and support the assertions they are making as to the possible effect of sniffing gas, if any, on the state of mind of PW1.
17. On the assertions in paragraphs [12](iii), (iv)(v) & (vi), the Court notes that these assertions were not put to PW1, PW2 and PW3 during cross examination.
18. The points raised by Defence Counsel in paragraph [12] (vii), (viii) & (ix) are covered below.

INCONSISTENT STATEMENTS

19. PW4 testified that she was sitting at the backdoor of her sister in laws house- the house where the accused and his fiancé lived-(next door to PW1's house). PW4's husband is the brother of the accused's fiancé and PW3 (PW1's mother). PW1 approached her looking for her sister. She replied that her sister had gone with other kids in a car. PW1 went back to their house. Three minutes later, the accused came back with the girls in a car. Junet, the accused's daughter asked her where PW1 was. She told Junet that PW1 was in her house. Junet called out to her father (the accused)

that PW1 was in her house. The accused also asked her- on where PW1 was. She replied that PW1 was in her house. Some inconsistencies arise here:

When cross-examined-

“Q- You knew that only PW1 was at home?”

Ans- Yes

Q- You went into the house?

Ans- Yes, backdoor was open, heard ‘hissing’ sound. *I thought PW1’s father was in the house. I didn’t know PW1 was at the house. No one else there.*

In the Defence’s submissions- **‘DW1 stated that upon returning, PW1’s father had already left and also left the tool in the lounge.**

The accused contradicts himself here. To one question he agrees that he knew that PW1 was at home. To a later question, he says- **I didn’t know PW1 was at the house.**

In the Defence’s submission- the accused knew that PW1’s father had already left.

This further contradicts his own evidence above where he said- ‘I thought PW1’s father was in the house.

From PW4’s testimony, the accused’s daughter Junet, after enquiring from PW4 on PW1’s whereabouts and getting a response- **Junet then called out to her father(the accused) that PW1 was in her house. After that, the accused also enquired with PW4 on the whereabouts of PW1. PW4 replied that PW1 was in her house.**

From the above, the accused knew that PW1 was at her home.

Yet, he states in his evidence – **“I didn’t know PW1 was at the house.”**

Further, why was the accused so concerned on the whereabouts of PW1 if his intent in going to PW1’s fathers house was to get some tool to repair his car?

Further, when asked-

Q- Not Ok to go into PW1’s house when she’s alone?

Ans- Not Ok.

From the above, knowing full well that PW1 was alone at her home and admitting in court that it’s not ‘OK to go into PW1’s house when she’s alone, the accused still went into the house.

This inconsistency in the accused’s evidence leads me to infer that the true intent of the accused’s visit to his neighbor’s house was to check on PW1.

20. PW1 testified that she’s had problems. She admitted being a problem child. She has sniffed gas for a long time. She has stolen and lied before. She has had problems at school many times. This resulted in her suspension from school. She was sniffing gas while the rice burnt on the day in question. PW1 was quite steadfast in her testimony whilst being cross examined. She was aware of her surroundings. She denied not being in the right state of mind. She was scared that she had been caught sniffing gas and videoed by the accused. When she went into her room, she lay face up, covering her face with her hands. (This was confirmed by the accused when he said- *“She was lying*

on her bed, face up, both her hands covering her face.” She was crying after the accused allegedly touched her in the room. (This is supported by the accused- when he said- *“When she went to check the rice- She was just standing there pretending to cry.”* Both the accused and PW1 testified that they smelt the rice burning. When PW1 was asked in cross- examination-

‘Q- Rice was burning?

Ans- I noticed the rice smelling when **accused was fondling me.**

On the burning rice, the accused had two versions in his testimony in court- 1st version- After taking the video, he went back into PW1’s house. **He could smell the rice burning on the stove. He went outside to tell PW1.**

2nd version- When she was in her room, **I smelt the rice burning. I went to check on her. She was lying on her bed, face up, both her hands covering her face.**

For the first version, this is before the accused picked up PW1 and she went to her room. For the second version, PW1 was already in her room. The accused smelt the rice burning and wanted to check on the accused who was lying face up in her room.

The court notes- the accused smelt the rice burning. This is after he had videoed PW1. He picked her up. She went to her room. He went back to repairing his car. Then comes the second version- ‘he smelt the rice burning when PW1 was in her room. That’s when he went to check on her.

A question that the court asks- *Why didn’t the accused switch the gas stove off when he smelt the rice burning on the first occasion? Why didn’t the accused switch the gas stove when he smelt the rice burning on the second occasion?*

The court notes that in his testimony- they were all a big family. Why does he need to tell PW1 about the burning rice when he, a family member, could have easily switched the gas stove off?

21. In the Defence’s submissions, they state that – DW1 went into PW1’s room when he noticed, whilst sitting in the lounge, that her legs were shaking.

This was not part of the accused’s evidence. As noted above, PW1 was already in her room. The accused smelt the rice burning then went into PW1’s room to check on her.

22. In the Defence’s submissions, they state that -“DW1 then noticed PW1 **was normal** and instructed her to check the rice’ because of the smell.’

This supports PW1’s version that she was aware of what was happening. **She had a clear mind- as given in her evidence.**

23. I remind myself of the observations of Vaai J in the cases above-*R v RD [2019] NRSC 21 and R v Debao[2019]NRSC 5*, in particular, in my assessment of the evidence of PW1, I must keep in mind **such aspects of human nature and experience.**

24. In this regard, although section 101 of the Crimes Act 2016 provides that ‘corroboration of the evidence of a witness’ is no longer required for a conviction for sexual offences, PW1 related what the accused did to her to PW2 on the same day. PW1 was distressed and was crying when she relayed this to PW2. Because of her distressed state, PW2 testified that she believed her. PW1 also told her mother the next

day about what the accused did to her. She did this after refusing to go and fetch water from the accused's house. In her words- *'She refused as she did not want to see the accused again.'* I agree with the submission of Ms Suifa'asia here that the refusal by PW1 - *'This a natural reaction of disgust and disbelief of a distasteful action by the accused (a family member) who has betrayed PW1.*

25. Considering all the above, the steadfastness in PW1's testimony, the inconsistencies in the accused's evidence, the demeanor and evidence of all the witnesses, I accept the evidence of PW1 and the prosecution witnesses as credible and reliable.

26. I ask myself the following questions:

Counts 1 & 2

- i. Did the accused intentionally touch PW1 within the meaning of Section 17 of the Crimes Act? From the evidence, I am satisfied that the accused 'meant to engage in the conduct' of touching PW1's breasts and her groin area as per the particulars of the offences in Counts 1 and 2.
- ii. Were the touching indecent and the accused reckless to that fact? In *Republic v Ignazio-Iyongo Aubiati*, Criminal Case 15 of 2023, I referred to "[41.] *In R v Harkin (1989) 38 A Crim R 296 (NSW CCA) Lee J said: '[I]f there be indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas...'*

42. Lee J added –

'The purpose or motive of the appellant in behaving in that way is irrelevant. The very intentional doing of the indecent act is sufficient to put the matter before the jury.'

27. Based on the above observations of Justice Lee and the evidence above, it is clear that the 'touched my breasts on the first incident and 'he touched my breasts and her groin area' on the second incident both have sexual connotations.

28. I find that the touching in both Counts 1 & 2 were indecent and the accused was reckless about that fact.

29. I further find that PW1 was below 16 years of age at the material time.

Count 3

30. Based on the evidence I find that the accused entered the dwelling house of PW3 and he did not have the consent of the owner to enter or remain in that place at the time of the incident.

31. Reminding myself of the burden of proof on the prosecution under Section 25 of the Crimes Act 2016 and the totality of the evidence, I am satisfied beyond reasonable doubt that the accused, on the day in question committed the offences as per the Information in this case.

CONCLUSION

32. I make the following findings:

- i. Count 1- Guilty
- ii. Count 2- Guilty
- iii. Count 3- Guilty

DATED this 30th day of August 2024


Kiniviliame T. Keteca
Acting Chief Justice

