IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 3 OF 2022

BETWEEN

THE REPUBLIC — Prosecution

AND

TOMWELL RAIDINEN — Defendant

Before: Khan, ACJ
Date of Sentencing Submission: 15 March 2024
Date of Sentence: 22 March 2024

Case to be known as: *Republic v Raidinen*

CATCHWORDS: Indecent act of a child under 16 years old – Section 117 of the Crimes Act 2016

APPEARANCES:

Counsel for the Prosecution: S Shah
Counsel for the Defendant: V Clodumar

SENTENCE

INTRODUCTION

1. You were charged with one charge of indecent act contrary to s.117 of the Crimes Act 2016 (the Act) and after 9 days of trial you were found guilty of the offence.

2. I do not have any discretion as to the term of imprisonment as it is prescribed by s.117 of the Act which states that:

"A penalty of 30 years imprisonment, of which imprisonment term at least one-third to be served without parole or probation."

3. I discussed the significance of the maximum and minimum term previously in the case of *R v Togoran*[1] where I stated at [14] and [15]:

> [14] I discussed the relevance of maximum and minimum term in *R v Harris*[2] where I stated at [10] as follows:
>
> > *10. At [4.3] of the NJC article the relevance of mandatory minimum sentencing is discussed where it is stated:*
> >
> > *In Bahar v The Queen [2011] WASCA 249 the Court considered the interaction of statutory minimum penalties for offences against the Migration Act 1985 (Cth) with s 16A of the Crimes Act 1914. The Court held that mandatory maximum and minimum penalties reflect the seriousness of an offence for the purpose of s 16A and inform the proportionality assessment.*[3]
> >
> > *McLure P (Martin CJ and Mazza J agreeing) stated at [54]:*
> >
> > *[54] The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A (1). It would be positively inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the "just and appropriate" sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a "just and appropriate" sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be.* ***The statutory minimum and statutory maximum penalties are the floor and ceiling*** *respectively within which the* ***sentencing judge has a sentencing discretion*** *to which the general sentencing principles are to be applied (emphasis added).*
> >
> > *And further at [58]:*
> >
> > *[58] Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is*

[1] [2022] NRSC 20; Criminal Case 11 of 2020 (22 September 2022)
[2] [2021] NRSC 44 Criminal Case No. 25 of 2020 (21 October 2021)
[3] Bahar v The Queen [2011] WASCA 249, [54] (McLure P, Martin CJ and Mazza J agreeing)

appropriate and the worst category of offending for which the maximum is appropriate (emphasis added).

The Court in Bahar rejected the approach taken in the earlier Northern Territory case of The Queen v Pot, Wetangky and Lande by which a court was to firstly determine the appropriate penalty in accordance with general sentencing principles. If that produced a result below the mandatory minimum, the mandatory minimum was to be imposed. Bahar v The Queen [2011] WASCA 249 has subsequently been followed in New South Wales, Queensland, Victoria and the Northern Territory.

In Karim v R; Magaming v R; Bin Lahaiya v R; Bayu v R; Alomalu v The Queen [2013] NSWCCA 23 the Court held that to follow the approach in The Queen v Pot, Wetangky and Lande would undermine the principle of equal justice. This is because cases involving offending of different seriousness would thereby be given the same penalty.

In the Victorian case of DPP (Cth) v Haidari [2013] VSCA 149 the Court found that the imposition of a minimum sentencing regime modifies the application of the principles in s 16A, stating at [42]:

[42] [A]lthough the imposition of a minimum sentencing regime does not oust either the sentencing principles of the common law or the accommodation of those principles effected by s16A of the Crimes Act 1914 (Cth), it necessarily modifies both. Thus while 'the common law principles relating to, inter alia, general deterrence, totality and parity apply to the sentencing of federal offenders', minimum sentences may, especially when considerations of totality also apply, affect the sentencing court's approach to mitigating circumstances. The objective circumstances against which the gravity of people smuggling crimes is to be judged include, as an essential element, the fact that Parliament requires the imposition of minimum penalties for those offences.

The High Court considered a challenge to the mandatory minimum provisions imposed by s 233C(1) of the Migration Act 1985 (Cth) in Magaming v The Queen [2013] HCA 40. In dismissing the appeal, the majority of French CJ, Hayne, Crennan, Kiefel and Bell JJ commented at [47]–[48]:

> *In very many cases, sentencing an offender will require the exercise of discretion about what form of punishment is to*

be imposed and how heavy a penalty should be imposed. ***But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge made principles. Sentencing an offender must always be undertaken according to law.***

In Markarian v The Queen, the plurality observed that "[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks." ***The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.*** *(Emphasis added mine)*

Whether an offence falls within the least serious category is to be determined by reference to all relevant sentencing considerations, including matters personal to the offender. Thus, in Bahar v The Queen [2011] WASCA 249, the Court dismissed the Crown appeal against sentence, noting that the offenders had limited education, lived in impoverished circumstances, offended by reason of financial imperative, were easy prey to people smuggling organizers and were at the bottom of the smuggling hierarchy

[15] The sentence that I should impose on you is in between the maximum (ceiling) and the minimum term (the floor) and in *R v Harris* I stated at [25] as follows:

[25] I would like to send a clear message that the 15-year minimum sentence is one end of the yardstick and it can go up depending on the circumstances and seriousness of the offending. You are 29 years old now and by the time you will be eligible to be released from prison you will be over 44 years old.

4. Mr Shah submits that I shall increase the minimum term of 10 years and in support of his submission he relies on [22] of *R v Togoran* where it is stated:

[22] You pleaded guilty before the trial stated and thus spared the complainant from reliving through the entire incident and for this I will give you credit.

5. In this case the evidence is that you took VD to your house after having picked her up at 2am from a church in Bauda District. In the judgement I stated at [6] as follows:

[6] Later he drove her to his place in Anibare District through Topside Road. He took her into his bedroom and they got undressed. They held on to each other and kissed. He applied coconut oil on his penis and attempted to penetrate her vagina and DV felt his penis outside her vagina. They spent about an hour in his bedroom and left at about 4am.

6. There was no penetration of VD's vagina and yet she complained to her mother that she had difficulty urinating.
7. It came out in evidence of VD that she had sexual intercourse with another person after this incident and she started to experience difficulty in urinating thereafter. I will not discuss that case in any detail as it is already pending before the Court but I shall refer to this as an intervening incident.

VICTIM IMPACT STATEMENT

8. The victim impact statement states that the victim has been emotionally disturbed since the incident and does not trust anyone anymore.

YOUR PERSONAL CIRCUMSTANCES

9. You are 30 years old and separated from your wife. You have 3 children.

10. You were employed as a carpenter by Central Meridan Inc and were earning approximately $3,000.00 per month.

THE SENTENCE

11. I am not persuaded that I shall increase the minimum term of 10 years imprisonment. You are convicted and sentenced to 30 years imprisonment and you will become eligible for parole or probation after serving 10 years.

PRE-TRIAL DETENTION

12. You have been in custody since 25 March 2022 which is almost 2 years to date and s.282A of the Act precludes me from taking that into consideration in reducing your prison term.

PRESIDENTIAL PARDON

13. I stated in *R v Togoran* as follows at [26] and this applies to you as well.

> [26] The only option to you to seek an early release before the 10 year period is to seek the Presidential Pardon under Article 80 of the Constitution which provides:
>
> Article 80
>
> **Grant of Pardon**
>
> The President may:
>
> a) Grant a pardon, either free or subject to lawful conditions, to a person convicted of an offence;

b) Grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence;

c) Substitute a less severe form of punishment for any punishment imposed on a person for an offence, or remit the whole or part of a punishment imposed on a person for an offence or a penalty or forfeiture on account of an offence.

DATED this 22 day of March 2024

Mohammed Shafiullah Khan
Acting Chief Justice