



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

Criminal case No. 03 of 2024

BETWEEN: THE REPUBLIC

PROSECUTION

AND: BR

ACCUSED

BEFORE: Keteca J

DATE OF SUBMISSIONS: 22nd April, 2024

DATE OF SENTENCING: 26th April 2024

CASE MAY BE CITED AS: *Republic v BR*

CATCHWORDS: Indecent Acts in Relation to a Child under 16 Years Old contrary to Section 117(3)(a)(b)(c) of the Crimes Act 2016; Retributive aspect of sentencing a juvenile; Young offender's development.

APPEARANCES:

Counsel for the Prosecution: **A. Driu**

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

SENTENCE

INTRODUCTION

1. On 22 March 2024, 'the accused', BR was charged with Indecent Acts in relation to a Child under 16 years Old contrary to section 117(3)(a)(b)(c) of the Crimes Act 2016.
2. On 16 April 2024, the accused pleaded guilty to the charge. The court confirmed with his counsel that he fully understood the charge and his plea of guilty was unequivocal.

3. The accused agreed to the Summary of Facts which was read out, interpreted in Nauruan and filed in court.

TIME SPENT IN CUSTODY

4. The accused was arrested on 02nd March 2024. He has been in custody since. Today, 26th April 24, he has spent 54 days in prison.

MAXIMUM PENALTY

5. Section 117(3)(a)(b)(c) of the Crimes Act 2016 provides:

“(3) A person commits an offence, if:

- (a) the defendant intentionally does an act towards another person;
- (b) the act is indecent and the person is reckless about the fact; and
- (c) the other person is a child under 16 years old.

Penalty: a maximum term of 30 years imprisonment, of which imprisonment term at least one third to be served without any parole or probation.”

ANTECEDENT HISTORY

6. The accused is 15 years old. He was born on 14th July 2008. His family resides at Buada District. BR is a Year 10 student at Nauru Secondary School. He has no previous convictions.

AGGRAVATING FACTORS

7. The victim is 8 years old. Thus, both the accused and the victim fall within the definition of “child” under section 8 of the Crimes Act 2016 and section 3 of the Child Protection and Welfare Act 2016 (CPWA) as they are below the age of 18 years. There is a 7 years age difference between the two.
8. The accused is the victim’s uncle. Arguably, there was a breach of trust here. The offence was committed in the victim’s home. She’s supposed to feel safe there.

MITIGATING FACTORS

9. The accused pleaded guilty at the earliest opportunity. He is remorseful. BR is a child. He was 15 years old when he committed the offence. He is a first offender. Since he was arrested on 02nd March 2024, he has been in custody. He has spent 54 days in remand.
10. He was assaulted by the parents of the victim after the incident. The court must consider this as stated in **Republic v Jackson Pickering**, Criminal Appeal No.1 of 2023, paras 16-18.

VICTIM IMPACT STATEMENT

11. The prosecution disclosed a victim impact statement of the victim and her mother. When the accused touched and put the victim on his lap, she did not like it. She was scared. What the accused did to her with his penis- 'it was bad and I didn't like it.'
12. The mother of the victim saw what the accused was doing. She was shocked. She screamed. She was angry and disgusted at what the accused did to her daughter. She wanted to kill the accused. She slapped him 2 or 3 times.
13. When the victim thinks about the episode, she becomes afraid. According to her, it happens often. Her mother believes that the accused has destroyed her daughter's life. She wants justice for her daughter and for BR to pay for his crime.

SENTENCING PRINCIPLES

14. Section 277 provides:

Where a court finds a person guilty of an offence, it may, subject to any particular provision relating to the offence and subject to this Act, do any of the following:

- (a) *record a conviction and order that the offender serve a term of imprisonment;*
- (b) *with or without recording a conviction, order the offender to pay a fine;*
- (c) *record a conviction and order the discharge of the offender;*
- (d) *without recording a conviction, order the dismissal of the charge for the offence; or*
- (e) *impose any other sentence or make any order that is authorized by this or any other written law of Nauru.*

15. The purposes for sentencing provided under section 278 are:

- (a) *to ensure that the offender is adequately punished for the offence;*
- (b) *to prevent crime by deterring the offender and other people from committing similar offences;*
- (c) *to protect the community from the offender*
- (d) *to promote the rehabilitation of the offender;*
- (e) *to make the offender accountable for the offender's actions;*

(f) to denounce the conduct of the offender; and

(g) to recognize the harm done to the victim and the community.

16. The general sentencing considerations are set out in section 279. It provides-

“(1) In deciding the sentence to be passed, or the order to be made, in relation to a person for an offence against the law of Nauru, a court shall impose a sentence or make an order that is of a severity appropriate in all circumstances of the offence.

(2) In addition to any other matters, the court shall take into account whichever of the following matters are relevant and known to the court:

(a) the nature and circumstances of the offence;

(b) any other offences required or permitted to be taken into account;

(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character, the course of conduct;

(d) any injury, loss or damage resulting from the offence;

(e) the personal circumstances of any victim of the offence;

(g) any victim impact statement available to the court;

(h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;

(i) if the person pleaded guilty to the charge for the offence, that fact;

(j) the degree to which the person cooperated in the investigation of the offence;

(k) the deterrent effect that any sentence or order may have on the person or anyone else;

(l) the need to ensure that the person is adequately punished for the offence;

(m) the character, antecedents, age, means and physical or mental condition of the person;

(n) the prospects of rehabilitation of the person;

(o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependents; or

(p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child, other than another offender or a victim of the offence, those circumstances.

~~(3) For the purposes of subsection (1), the appropriate severity of a sentence not only include mitigating factors but other aggravating considerations such as:~~

(a) deterrence of prevailing nature of common crimes;

(b) the impact on the victims and the community; or

(c) matters that in the opinion of the court are appropriate for the prevention of prevailing or certain nature of offences or protection of the vulnerable members of the community.”

17. The sentencing considerations for imprisonment are set out in section 280. Section 281 provides for the sentencing considerations for fines. The court has the power to reduce penalties under section 282. It provides:

(1) Where, under this Act, an offender is liable to life imprisonment, a court may nevertheless impose a sentence of imprisonment for a stated term.

(2) Where, under this Act, an offender is liable to imprisonment for a stated term, a court may nevertheless impose a sentence of imprisonment for a lesser term.

18. Section 282A provides that pre-trial detention is not to be taken into account for offences (Sexual Offences) under Part 7 of the Crimes Act 2016.

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1989 (UNCRC)

19. Article 37(b) of The United Nations Convention on the Rights of the Child 1989 provides:

“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

20. This Article 37(b) UNCRC 1989 provision is enacted in section 48(b) of the Child Protection and Welfare Act 2016 and reads:

“Notwithstanding the provision of any other written law to the contrary, the following apply to any criminal proceedings taken against a child:

a. No child may be sentenced to death or to life imprisonment under any written law and for any offence; and

b. A sentence of imprisonment may only be imposed against a child as a sentencing option of last resort.”

21. Section 6 of the CPWA 2016 is clear that:

“Any written law which relates to the rights of children, or which provides for processes relevant to dealing with children in any manner and in any context, shall be read and applied subject to the provisions of this Act, and in the event of any inconsistency between the provisions of this Act and any other written law, the provision of this Act shall prevail.”

22. The CPWA 2016 prevails over the Crimes Act 2016. This view is supported by the decision of this Court in *Republic v ERJ* [2023] NRSC 2; Criminal Case 23 of 2020 (03 February 2023).

TARIFF.

23. The section 117 offence of **Indecent acts in relation to child under 16 years old** carries a maximum penalty of 30 years imprisonment. At least one third of the term is to be served without any parole or probation.

24. The following cases of sexual offences against minors are noteworthy:

(a) *Republic v EA* [2018] NRSC 64

The accused, EA, was 15 years old. He was charged with 'Indecent acts in relation to a child under 16 years old' contrary to section 117(1)(a)(b)(c) of the Crimes Act 2016. The victim EG was 14 years old. She was drinking alcohol with eight youths including EA. EG got really drunk and fell asleep. Some persons had sexual intercourse with her whilst she was asleep. Three of these persons were charged and convicted of rape. EA was part of this group. He fondled the victim's breasts and private parts. EA pleaded guilty. No conviction was recorded. He was sentenced to a probationary order pursuant to the court's powers under section 7 of the Criminal Justice Act 1999. EA was released on probation for a period of 3 years, less the time spent in remand. Conditions of the probationary order:

- i. Within 24 hours, to report to the probation officer or the deputy registrar and shall further report when so required;
- ii. To reside at his parents address; and
- iii. To keep the peace and be of good behaviour and not to commit an offence during the probationary period.

(b) *Republic v AD* [2018] NRSC27; *Criminal Case 14 of 2017* (20 Feb 2018)

The accused pleaded guilty to the offences of Indecent Acts in Relation to a child under 16 years old (Count 1) and Rape of Child under 16 years old (Count 2). The accused was 15 years old. The victims were a 6-year-old girl (Count 1) and a 9-year-old girl (Count 2). On Count 1, the accused touched her buttocks and pulled her pants down. On Count 2, the accused and the victim were sleeping in a room. He locked the door. He took off his pants and got on top of her, inserting his penis into her anus. The victim screamed in pain. A periodic assessment was done by the child protection officer. The report said that the accused had been on good behaviour. Having considered the Criminal Justice Act 1999, Khan J sentenced him to probation for 2 years, 11 months.

SUBMISSION BY THE PROSECUTION

25. Madam, DPP, Ms Andie Driu filed helpful and comprehensive sentencing submissions. After referring to the relevant legislative provisions and case authorities, her submissions may be summarised as follows:

- i. Each case will turn on its own facts.

- ~~ii. There is a breach of trust here. They are related. The Accused is 15 years old. The victim, 8. "...the disparity in their ages aggravates the offence, placing the victim at a susceptible age to exploitation by an older child or an adult with bad intention."~~
- iii. The victims 'innocence was stolen by the haughty behaviour of the accused.'
- iv. The incident happened in the family home 'with BR having little regard for the victim and her siblings present with them.'
- v. Had the mother of the victim not intervened, the 'offending could easily have aggravated.'
- vi. Any form of unwarranted and unlawful sexual acts is detestable.
- vii. More so 'when it is committed against a child, by those in a position of trust, and in the very surrounds (in the home) where one is to feel safe.'
- viii. Consideration must be given to adequate punishment to deter other like young offenders.
- ix. The court to 'impose an appropriate sentence fitting in consideration of the nature and circumstances of this case and the impact it has on the victim and her family.'

SUBMISSION BY THE DEFENCE

26. The Public Defender, Mr Tagivakatini also filed comprehensive and helpful written submissions. He also referred to the relevant laws and case authorities. In summary, he said:
- i. BR is remorseful and 'his contrition is supported by his early guilty plea.' He has had 'time to reflect on his actions and takes full responsibility for it.'
 - ii. BR was beaten up by the victim's father after the incident. The court is to consider *Republic v Pickering [2023] NRSC 15*- an attack on an offender may be considered in sentencing.
 - iii. BR's father has health problems. He's in his sixties. He was in Fiji for medical reasons when BR committed the offence. The parents, through a letter show their' anguish, regret, grief, sadness and concern not only for BR but also for the victim and her family'
 - iv. The offence of Indecent Acts in relation to child under 16 years old 'warrants the recording of a conviction and the only exceptional circumstance is that BR is a child.' Section 277(e) of the Crimes Act 2016 is relevant here.
 - v. A probationary sentence as delivered in *Republic v AD [2018] NRSC 27* would be appropriate in this case.

PRE- SENTENCE REPORT

27. The Chief Probation Officer submitted a detailed pre- sentence report. After interviewing the accused, his mother and a church leader he recommends that a non- custodial sentence will be appropriate here.

DISCUSSION ON SENTENCING

28. I have considered all the sentencing principles and considerations under the Crimes Act 2016. I have also considered very carefully the helpful submissions of Ms Driu and Mr Tagivakatini; in particular the relevant case law.
29. The pre- sentence report by the Chief Probation Officer and the Victim Impact Statement have also been considered.

30. I remind myself of Article 37(b) of The United Convention on the Rights of the Child 1989 and section 48(b) of the Child Protection and Welfare Act 2016. Both provisions stress that in criminal proceedings against a child, a sentence of imprisonment may only be imposed as a sentencing option of last resort.
31. In *Curtis v Sidik and Najar* (1999) 9 NTLR 115, both accused persons were juveniles, aged 15 years and 14 years respectively. They were convicted for offences against the Migration Act (Cth) of Australia. In considering the question of custodial sentences against juveniles, Mildred J said (at 123; 6 [22]):
- “Generally speaking juveniles who are first offenders are not given custodial sentences unless the offence is a particularly serious one, such as murder, a rape, or armed robbery.”*
32. In this case, the offence of Indecent Acts in Relation to a child under 16 years old is equally a serious offence. So serious that Parliament prescribes a maximum penalty of 30 years imprisonment.
33. In *Simonds v Hill* (1986) 38 NTR 31, Maurice J said (at 33):
- “In the Juvenile Court the retributive aspect of a sentence is, at best of secondary importance. Even lower in the scale, if, indeed, it has any place at all, is **detering** others. The overwhelming concern is the young offender’s development as a law-abiding citizen. The court should be at pains to ensure that its sentences do not alienate its young clients. Particularly so in the case of a first offender.”*
34. This supports the general principle that in cases of juvenile offenders, greater weight may be given to a juvenile’s prospects of rehabilitation, at the expense of general deterrence.
35. I also consider that you were assaulted after you committed the offence. I agree with this court’s view in *Republic v Pickering* [2023] NRSC 15 that ‘recognises vigilante violence/violent retributions has to be considered in the sentencing.
36. I observed your disoriented appearance when you appeared before me. You looked lost, helpless and vulnerable.
37. You are a first offender. You have committed a very serious offence to another child. You breached her trust in her own home.

SHOULD A CONVICTION BE RECORDED AGAINST YOU?


38. I refer to *R v DBU* [2021] QCA 51 [CA 124/2020] where the Queensland Court of Appeal considered the statutory presumption of not recording a conviction under the provisions of the *Youth Justice Act 1992*. The court considered that “there can be no doubt that employment and rehabilitation are pivotal in reducing the risk of future offending.”
39. On the impact of recording a conviction, the court observed- “Clearly there is a connection between his chances of finding or retaining employment and his chances of rehabilitation.”

40. Bearing the above in mind, I note that if a conviction is recorded against you, it will remain in the Register of Records of Criminal Convictions for 15 years. Section 98(5) of the Criminal Procedure Act 1972, provides for this.
41. This means that you will be 30 years old before your conviction record becomes a **'spent conviction.'** If you have a conviction against your name, it would be difficult, bordering on impossible for a young person to get scholarships, visas to travel abroad for educational pursuits or for work opportunities. In short, many doors of opportunities both local and beyond the shores and pinnacles of Nauru will be closed to you. This will surely impact your rehabilitation, your chances of finding or retaining employment and your development to be a young productive adult.
42. The word 'conviction' is defined under the Interpretation Act 2011 to mean- *"a finding of guilt by a court, whether or not the conviction is recorded."*
43. In further considering that greater weight should be given to your prospects of rehabilitation and with the fervent hope that you develop into a law-abiding citizen, I find you guilty as charged but **I choose not to record a conviction against you.**

PROBATION ORDER

44. BR – under section 7 of the *Criminal Justice Act 1999*, you are released on a probation order with the following conditions:
- The probation order shall be for a period of three years;
 - Within 24 hours you shall report to **Chief Probation Officer, Jansen Agir** and shall further report as and when required by him;
 - You shall reside with your parents and shall notify the probation officer of any change in their address;
 - BR shall not reside at an address not approved by the probation officer;
 - BR, with the assistance of the probation officer, shall re- enrol in a school or pursue other modes of study that suits you;
 - BR shall not associate with specified persons or persons of a certain class that the probation officer has warned you in writing not to associate with; and
 - BR- you are to keep the peace, be of good behaviour and not to commit any offence.
45. BR- I remind you of the provisions of section 16 of the *Criminal Justice Act 1999*- if you are convicted of another offence whilst on probation or charged for a breach of this probation order- you may be brought back to this court to sentence you for this offence of indecent act. Remember that the maximum sentence for this offence is 30 years imprisonment.

DATED this 26th day of April 2024.


Kiniviliame T. Keteca
Judge

