IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No.7 of 2024
Supreme Court Criminal Case No.11 of 2023

BETWEEN

VISION BIDINIMI ENGAR

Appellant

AND

THE REPUBLIC

Respondent

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. Palmer
Justice K.A. David

DATE OF HEARING: **26 August 2025**

DATE OF JUDGMENT: **4 September 2025**

CITATION: **Vision Bidinimi Engar v The Republic**

KEYWORDS: **Mandatory maximum sentence and mandatory minimum sentence, exercise of sentencing**

	discretion, onus on appellant to show identifiable error that sentence is manifestly excessive.
LEGISLATION:	**Sections 116(1)(a)(b), 277, 278, 279 and 280 of the Crimes Act 2016**
CASES CITED:	**Zradkovic v The Queen [2018] ACTCA 53; Singh v The State [2023] FJCA 94; Republic v Harris [2021] NRSC 44**
APPEARANCES:	
COUNSEL FOR the Appellant:	**S Hazelman**
COUNSEL FOR the Respondent:	**M. Suifa'asia**

JUDGMENT

INTRODUCTION

1. **DAVID J:** This is a decision on an appeal against sentence imposed by the Supreme Court of Nauru on 6 September 2024 in Criminal Case No.11 of 2023, The Republic v Vision Bidinimi Engar. The appeal was commenced by Notice of Appeal dated 2 October 2024 and subsequently amended by an Amendment to the Notice of Appeal filed on 24 July 2025 pursuant to r.36(1) of the *Nauru Court of Appeal Rules 2018*.

2. Following a trial on two counts of rape of a child under 16 years old contrary to s.116(1)(a)(b) of the *Crimes Act 2016* at which the appellant chose to remain silent after the conclusion of the prosecution case, on 23 August 2024, the Supreme Court

found the appellant, Vision Bidinimi Engar (the appellant) guilty of both counts and convicted him accordingly. The Supreme Court then sentenced the appellant to life imprisonment on both counts to be served concurrently with a minimum non-parole or probationary period of 18 years.

FACTS

3. The incontrovertible facts upon which the appellant was convicted are these. The two incidents occurred on the morning of 7 May 2023 in Aiwo District. While the complainant, SD (the complainant) was asleep in her bedroom, the appellant committed the two acts of non-consensual intercourse namely, oral contact with her genitals and penile vaginal penetration while covering her mouth. The complainant was 15 years old at the material time with a disability, being a dyslexic (suffering from dyslexia) and the appellant's first cousin, their mothers being sisters.

GROUNDS OF APPEAL

4. Four grounds of appeal were pleaded in the Notice of Appeal and these are:

    1. The sentence is manifestly excessive and disproportionate to similar offences;

    2. Insufficient consideration of mitigating factors and rehabilitation;

    3. Misapplication of aggravating factors under s.17 of the *Domestic Violence and Family Protection Act 2017*; and

    4. Failure to apply sentencing principles and consider a lesser sentence.

5. In the Amendment to the Notice of Appeal, the Notice of Appeal was amended as follows:

1. The first ground of appeal was amended to read:

   "The sentence is manifestly excessive."

2. The third ground of appeal was withdrawn in its entirety and would no longer be pursued.

6. As no objection was raised as to the competency of the Amendment to the Notice of Appeal, we find that its filing is in order and properly before the Court.

7. All three remaining grounds of appeal will be addressed together.

ORDERS SOUGHT

8. The orders sought by the appellant in the Notice of Appeal are:

1. The life sentences imposed for both counts be quashed and replaced with a determinate sentence.
2. The minimum term of 18 years imprisonment to be served before being eligible to be considered for parole or probation be reduced.

LEGAL ISSUE

9. The main legal issue that arises from the remaining three grounds of appeal for decision is whether the sentence is manifestly excessive.

SUBMISSIONS

10. The appellant submits that the sentence is manifestly excessive as it resulted from the Supreme Court's failure to; apply relevant sentencing principles and

placing insufficient consideration to mitigating factors including rehabilitation of the Appellant which constituted sentencing errors. The submission is predicated upon four fronts:

1. While the offence of rape of a child under 16 years old is indeed grave, the learned trial judge erred in concluding that it necessitated the imposition of the maximum sentence of life imprisonment without any structured justification.
2. The imposition of the maximum sentence of life imprisonment in the absence of a structured reasoning process did not meet the well-established common law principles for the imposition of discretionary common law life sentences that were pronounced in *Attorney-General's Reference (No.32 of 1996) (Whittaker) 1 Cr. App. R. (S) 261* and *Chapman [2000] 1 Cr. App. R. (S) 377* (two-stage test in *Whittaker* and *Chapman*) and which were adopted and applied by the Fiji Court of Appeal in the case of *Singh v The State [2023] FJCA 94.*
3. A statutory maximum sentence is reserved for the worst possible cases of an offence depending on the peculiar facts and circumstances of each case and the present case did not fall under the worst category and a determinate sentence ought to have been imposed when a sentence of 15 years imprisonment would have been appropriate.
4. Despite the appellant placing before the Supreme Court compelling, verifiable and extensive set of mitigating factors supported by a Pre-Sentence Report and his submissions, the Supreme Court disregarded them entirely.

11. The respondent, the Republic (the respondent) contends that the three grounds of appeal have no merit and should be dismissed as:

1. The penalty for the offence under s.116(1)(a)(b) of the *Crimes Act 2016* is not discretionary, but a mandatory life imprisonment coupled with a mandatory minimum term of 15 years before being eligible for parole or probation as was pronounced by the Supreme Court in the case of *Republic v Harris [2021] NRSC 44;*
2. The Supreme Court considered the factors advanced in mitigation and aggravation of the offending and the respective submissions of the opposing parties in respect to those factors including the nature, gravity and circumstances of the offences; and
3. The Supreme Court reflected on the objective seriousness of the two distinct and separate offences taking into account the totality of circumstances of the offences when finding that aggravating factors far outweighed the mitigating factors including the question of rehabilitation.

CONSIDERATION

12. The appellant appeals from the original jurisdiction of the Supreme Court pursuant to s.29(1)(c) of the *Nauru Court of Appeal Act 2018* (the *Court of Appeal Act*). A right of appeal from a final judgment, decision or order of the Supreme Court in relation to sentence exists under s.29(1)(c) of the *Court of Appeal Act*.

13. This Court will not interfere with the Supreme Court's decision unless it finds that it fell into an error.

14. The onus is on the appellant to demonstrate the error.

15. Section 116(1)(a)(b) of the *Crimes Act 2016* reads:

> **116 Rape of child under 16 years old**
>
> (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 old.
>
> Penalty: life imprisonment of which imprisonment term at least 15 years to be served, without any parole or probation.

16. The appellant has relied on *Singh v The State, supra* to support his submissions that the Supreme Court should not have imposed the maximum penalty under s.116(1)(a)(b) in the absence of a structured evaluative process or reasoning justifying why a discretionary life sentence should be imposed and the present case did not fall within the worst category of the offence. In *Singh v The State* at [17] and [18] the Fiji Court of Appeal stated:

> [17] **ARCHBOLD 2020 Criminal Pleading Evidence & Practice** at 5A-730 at page 834 has the following passage on imposing life sentence in common law.
>
> *"The decisions in* ***Attorney-General's Reference (No. 32 of 1996) (Whittaker)*** *[1996] EWCA Crim 1797; [1997] 1 Cr. App. R. (S.) 261 and* ***Chapman*** *[1999] EWCA Crim 2056; [2000] 1 Cr. App. R. (S.) 377 established a two-stage test for the imposition of discretionary 'common law' life sentences:*

(1) the offender has been convicted of a very serious offence; and
(2) there are good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence.

This modified the three-stage test established in the earlier cases of ***Hodgson*** *(1968) 52 Cr. App. R. 113:*

(1) the offence(s) were grave enough to require a very long sentence;
(2) it appeared from the nature of the offences or from the defendant's history that he or she was a person of unstable character likely to commit such offences in the future; and
(3) if further offences were committed, the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.

The two-stage test in ***Whittaker and Chapman*** *was to be preferred to the three-stage test in* ***Hodgson; Ali*** *[2019] EWCA Crim 856."*

[18] There are also judicial pronouncements that the statutory maximum sentence is reserved for the worst possible cases of its kind (see **Harrison** [1997] UKHL 5; (1909) 2 Cr App R 94, **R v Amber** Crim LR 266) or the judge should be satisfied that there were exceptional circumstances warranting the maximum sentence (see **D.P.P v D** [2004] IECCA 8_2 (21 May 2004) & **DPP v G** [1994] 1 IR 587).

17. We concur with the appellant's submission that a statutory maximum sentence is reserved for the worst possible cases of an offence depending on the peculiar facts and circumstances of each case.

18. As to whether, in the present case, the Supreme Court had any discretion not to impose the maximum penalty for the offence of life imprisonment, we concur with the respondent's submission that the maximum penalty under s.116(1)(a)(b) of the *Crimes Act* is a mandatory life imprisonment with a mandatory minimum term of 15 years before a prisoner is eligible for parole or probation. The penalty fixes a "yardstick" with a mandatory maximum (ceiling) and a mandatory minimum sentence (floor) within which a sentencing judge has a discretion to which the sentencing principles are to be applied.

19. It is in this regard that we affirm the approach and observations of the Supreme Court in *Republic v Harris, supra* at [7] to [10] in relation to meaning of maximum and minimum sentences. *Republic v Harris* was the first case in Nauru that dealt with the maximum and minimum sentences. There the prisoner pleaded guilty to a charge of causing a child under 16 years old to engage in sexual activity contrary to s.118(1)(a)(b)(c)(iii) of the *Crimes Act*, the maximum penalty of which was life imprisonment with at least 15 years to be served before being eligible for parole or probation similar to the penalty regime under s.116(1)(a)(b) of the *Crimes Act*. A sentence of life imprisonment with a minimum term of 15 years to be served without any parole or probation was imposed. At the time of the offence, the complainant was 11 years old and the prisoner was her first cousin., their mothers being siblings.

20. The observations above highlight the following salient points:

1. Legislatures do not enact maximum available sentences as mere formalities;
2. Judges need sentencing yardsticks;

3. Statutory maximum and statutory minimum penalties are the ceiling and floor respectively within which the sentencing judge has a sentencing discretion to which sentencing principles are to be applied;

4. Careful attention to maximum penalties will almost always be required because:

   (a) the legislature has legislated for them;

   (b) they invite comparison between the worst possible case and the case before court at the time; and

   (c) they do provide, taken and balanced with all other relevant factors, a yardstick.

21. We therefore disagree with the appellant's submission that the imposition of the maximum penalty is discretionary. Having found the appellant guilty of both counts of rape under s.116(1)(a)(b) of the *Crimes Act*, the Supreme Court was required by law to impose the maximum penalty of life imprisonment as the legislature had legislated for it. That was acknowledged and appreciated at [38] of the judgment where the Supreme Court stated:

> Considering the totality of the above, and the prevalence of this offence in this jurisdiction which led to the increase in the penalty by the legislature. I believe that I must impose the maximum penalty here.

22. We find that the appellant has failed to demonstrate that the Supreme Court committed a sentencing error in imposing the sentences of life imprisonment for both counts of rape under s.116(1)(a)(b) of the *Crimes Act*.

23.. In any event, common law principles are subservient to statute of Nauru and in the present case, in the form of the mandatory sentencing regime stipulated under s.116(1)(a)(b) of the *Crimes Act*.

24. In addition, the Fiji Court of Appeal decision of *Singh v The State, supra* is only of persuasive value and not binding on this Court.

25. The next question we ask is did the Supreme Court commit an error when in the exercise of its sentencing discretion imposed a sentence of 18 years imprisonment before the appellant could be eligible for parole or probation.

26. It is a trite principle of law that a judgment based on exercise of discretion may be set aside if an identifiable error occurred in the exercise of the discretion.

27. In deciding whether or not a sentence is manifestly excessive, the Australian Capital Territory Court of Appeal decision of *Zradkovic v The Queen [2018] ACTCA 53* has suggested that the following factors be considered:

1. the sentence is unreasonable or plainly unjust;
2. "manifest excess" is not established just because the appeal court would have imposed a more lenient sentence;
3. the legislated maximum penalty that applies to the worst case;
4. the objective seriousness of the particular offence;
5. the subjective circumstances of the offender;
6. relevant statutory provisions including the sentencing purposes; and
7. any sentencing pattern applicable to the offence type when deciding whether a sentence lies within the available range.

28. *Zradkovic v The Queen, supra,* is of persuasive value, but we adopt the factors suggested there and will apply them to the present case as we think they are appropriate to the circumstances of this country.

29. In deciding the appropriate sentences for the two counts of rape of a child under 16 years old, the Supreme Court considered the relevant provisions relating to sentencing under the *Crimes Act* namely, ss.277 (kinds of sentences), 278 (purposes of sentencing), 279 (sentencing considerations-general) and 280 (sentencing considerations-imprisonment). It is instructive that we set out the relevant provisions below.

277 Kinds of sentences

If 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 authorised by this or any other law of Nauru.

278 Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

(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 recognise the harm done to the victim and the community.

279 Sentencing considerations—general

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

(2) In addition to any other matters, the court must 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;

(f) the effect of the offence on 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 on 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 dependants;

(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.

280 Sentencing considerations—imprisonment

A sentence of imprisonment may be imposed on a person only if:

(a) in the opinion of the court:

(i) the person has shown a tendency to violence towards other people;

(ii) the person is likely to commit a serious offence if allowed to go at large;

(iii) the person has previously been convicted of an offence punishable by imprisonment;

(iv) any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or

(v) the protection of the community requires it; or

(b) a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.

30. The Supreme Court considered the submissions of opposing counsel and the aggravating (including those under s.37(a)(b)(g) of the *Domestic Violence and Family Protection Act 2017*) and mitigating factors including the antecedents, pre-sentence report, the seriousness of the offences, the degree of contrition or remorse or lack of, the victim's personal circumstances including that she was a person with a disability, the appellant pleaded not guilty to the two charges that necessitated a trial and victim was not spared the painful procedure of giving evidence while the appellant chose to remain silent and not give evidence, threatening behaviour of the appellant at the time of committing the offences and prevalence of the offence: see [5]-[38] of the Supreme Court's judgment on sentence. The Supreme Court rejected the appellant's submissions as less compelling and considered that the case taken in its totality was one of exceptional gravity and warranted the imposition of a severe sentence. That is echoed at [39] where the Supreme Court said:

> The sentence communicates Nauru society's condemnation of your conduct and represents a symbolic, collective statement that when you commit any sexual offence against a child, don't expect any mercy from this court. You will go to prison for a very long time.

31. In our respectful view, we consider that the Supreme Court met most of the criteria suggested in *Zradkovic v The Queen, supra,* except that the sentence in relation to the minimum sentence of 18 years to be served before the appellant is eligible for parole or probation is unreasonable or plainly unjust and this is not the worst possible case of its kind and not justified by any sentencing pattern applicable to the offence type. This appears to be the first case before this Court and another out of a few cases that have gone before the Supreme Court involving the offence under

s.116(1)(a)(b) of the *Crimes Act*. The Supreme Court considered some comparable cases including the cases of *Republic v Kanimea [2024] NRSC 7* and *Republic v Amwano [2020] NRSC 28* at pages 6 and 7 of the judgment. In *Republic v Kanimea, supra,* the prisoner was sentenced to life imprisonment and ordered to serve a minimum of 15 years before being eligible for parole or probation. In *Republic v Amwano, supra,* the prisoner was sentenced to 7 years imprisonment for the rape count. In that regard, that aspect of the sentence is a quantum leap from the minimum period of 15 years. The minimum sentence to be served before the appellant is eligible for parole or probation be 15 years. In our view, the sentencing judge erred in the exercise of discretion by fixing a non-parole period of 18 years, which exceeds the statutory minimum of 15 years by a significant margin, without adequate justification. While it is open to a judge to depart upward from the statutory minimum term in appropriate cases, such a departure must be grounded in a careful consideration of all relevant sentencing factors. In this case, the sentencing remarks disclose an undue emphasis on deterrence, while failing to give sufficient weight to the offender's strong prospects of rehabilitation, which was supported by the pre-sentence report. The judge's approach resulted in a sentence that was manifestly excessive in the circumstances.

32. We are satisfied on the material before us that an identifiable error occurred in the exercise of the Supreme Court's discretion. Consequently, it is concluded that the sentence was manifestly excessive.

33. Given this, it is not necessary to consider other submissions of counsel not specifically addressed.

34. In the circumstances, we will partly allow the appeal.

ORDERS OF THE COURT

35. The orders of the Court are:

1. The appeal is partly allowed.
2. The sentences of life imprisonment imposed by the Supreme Court for each count of rape of a child under 16 years old are affirmed.
3. The minimum term of 18 years' imprisonment to be served before the appellant becomes eligible for parole or probation on each count is quashed and set aside. It is substituted with a minimum term of 15 years' imprisonment on each count, to be served before the appellant becomes eligible for parole or probation.
4. The sentences for each count rape of a child under 16 years old shall be served concurrently.

Dated this 4 September 2025.

Justice Rangajeeva Wimalasena

President

Justice Sir Albert Palmer

NAURU COURT OF APPEAL

Justice of Appeal

Justice Kingsley A. David

Justice of Appeal