



IN THE SUPREME COURT OF NAURU

AT YAREN

[CRIMINAL JURISDICTION]

Case No. 94 of 2016

Between

THE REPUBLIC OF NAURU

v.

EF

Defendant

Before: Crulci J

For the Prosecution: F. Lacanivalu

For the Defence: R. Tagivakatini

Date of the Hearing: 20 June 2017

Date of Decision: 21 June 2017

CATCHWORDS – *Criminal law – Crimes Act 2016 – section 117 Indecent Acts in Relation to a Child Under 16 years - SENTENCE*

SENTENCE

1. EF was convicted of an offence an Indecent Act in relation to a child under 16 years of age, contrary to the *Crimes Act 2016* (“the Act”). The defendant is the uncle of the victim. In order to preserve the child’s identity both the defendant and the victim’s names are reflected as letters. I make a suppression order in respect of the victim and defendant and order that the names should not be revealed.

COUNT ONE

Statement of Offence

Indecent Acts in relation to a child under 16 years: Contrary to section 117(3)(a), (b), (c) (ii) of the *Crimes Act 2016*.

Particulars of offence

EF on the 17th September 2016 at Nauru did intentionally do an indecent act towards YZ by licking her vagina and was reckless about the act and the said YZ is a child under 16 years old.

Section 117 of the *Crimes Act 2016* reads as follows:

117 Indecent acts in relation to child under 16 years old

(3) A person (the defendant) commits an offence if:

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

Penalty:

- (i) if the child is under 13 years old or aggravating circumstances apply—15 years imprisonment; or
- (ii) in any other case—12 years imprisonment.

(4) Absolute liability applies to subsections (1)(c), (2)(c) and (3)(c).

2. The maximum sentence available to the Court under this section is 12 years imprisonment, as the victim was between 13 and 16 years at the time of the offence.

BACKGROUND

3. In the early hours of the 17 of September, 2016, during the school holidays, the victim was sleeping outside her home on the veranda with her younger siblings.
4. The defendant had been drinking earlier in the evening at his house, and continued drinking with others in a Land Rover close by.
5. The victim was woken at 4.00 a.m. by the defendant who shone the light of his phone in her face. He instructed her to meet him at his house which is nearby. The victim complied as he is her uncle, but she was scared because it was late at night. He said to her words similar to '*I am marijuana*'.
6. At his house the defendant said he wanted to give her his mobile phone to use, but the victim rejected his offer; he offered it to her again and she again turned the offer down. She did so as she was afraid. She returned to her house and climbing back on the bed, went to sleep.
7. The defendant tried to wake her a second time, but she refused to wake up.
8. She awoke later and realized that she was not wearing her underwear and that someone was beneath her; she was being indecently assaulted. The defendant had his mouth on her vagina. She kicked out and defendant got up. He came around to her and said to her words to the effect that the victim should go with him to his place "*so that he can eat me properly*".
9. The victim located her underwear and shorts and got dressed. She sat on the bed in a distressed state; this was witnessed by another uncle who came out from the house. The victim reported the matter to her mother a few days later, the delay in reporting was due to her fears.
10. The case proceeded to trial upon the basis that the defendant accepted that something indecent had occurred by way of touching with his hand. The victim gave evidence and the defendant was convicted as per the particulars of the count.

PROSECUTION SUBMISSIONS

11. The prosecution draws the Court's attention to a study undertaken by the Department of Home Affairs into Nauru Family Health and Support which documented that over 30% of women who participated in the study reported they had suffered incidents of sexual abuse as a child when

between the ages of 5 and 14 years¹. This prevalence of offending against young female children supports, say the prosecution, the imposition of an immediate custodial sentence as punishment for the offence.

12. The prosecution have listed the following matters as aggravating features:
 - a) The relationship between the defendant and the victim points to a breach of trust;
 - b) The age difference between 29 (30) years and 14 years;
 - c) The defendant had been consuming alcohol and was intoxicated;
 - d) The offence occurred at night while family members were asleep or at work;
 - e) There was an element of coercion with the defendant offering the victim his phone.
13. The prosecution seek an immediate custodial sentence and point the Court to a number of previous cases² as a guide (some offences were under the previous *Criminal Code 1899*) for the length imprisonment.
14. The prosecution submits that in all the circumstances a term in excess of four years is appropriate.
15. The prosecution filed written submissions. The prosecution confirmed for the Court the victim's date of birth as August 2002; she had just turned 14 at the date of the offence.

Victim Impact Statements

16. The victim's mother says that she can see the offence has affected her daughter who has changed in her attitude towards her mother, and the victim now gets angry easily.
17. The mother herself has been affected by the defendant's actions as she finds it hard to believe that a close relative would do such a thing to her daughter. She doesn't wish to be related to him or have anything to do with the defendant. The mother also has now developed a general sense of distrust of people, whereas before she trusted everyone in her family.
18. YZ tells the Court in her victim impact statement that the actions of the defendant were a nightmare experience for her and it has made her hate him a great deal.

¹ Nauru Family Health and Support Study "An exploratory study on violence against women", Nauru Ministry of Home Affairs, October 2014

² *R v Adam* [2007] NRSC 4; *R v FC* [2016] NRDC 53;

19. The victim previously trusted her uncle. His actions against her are inappropriate and she wants him to be punished for what he did. She also wants him to learn from the punishment, and wants other young females to be protected.

DEFENCE SUBMISSIONS

20. The defence filed sentencing submissions with the Court.
21. The defendant is now 30 years of age and has no previous convictions. He is self-employed as a fisherman and can earn \$60 per week. He was drunk at the time of the commission of the offence.
22. Counsel for the defendant accepts that there is a large age gap between the defendant and victim, and that as her close relative there is the matter of breach of trust.
23. The defendant asks the Court to take into account that he regrets his actions and understands that he has let down his family, especially his sister (mother of the victim) and society. He promises to reform after paying his debt to society and understands that a prison term is likely to be imposed.
24. The defendant initially spent 6 days on remand after his arrest, and has been on remand since 16 July 2017 following his conviction for the offence.
25. Counsel refer the Court to the sentence of *Republic v AB*³ where for indecent acts in relation to a child the defendant was sentenced to a term of 12 months imprisonment.

CONSIDERATIONS

26. The Court notes that in *AB* referred to above, the acts of indecency were of the defendant forcefully kissing the victim on her neck and leaving visible marks.
27. The Court is mindful of the provisions of sections 278, 279 and 280 of the Act:

278 Purposes of sentencing

³ *Republic v AB* [2006] NRSC 29

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;
- (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.

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; or

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

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

(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

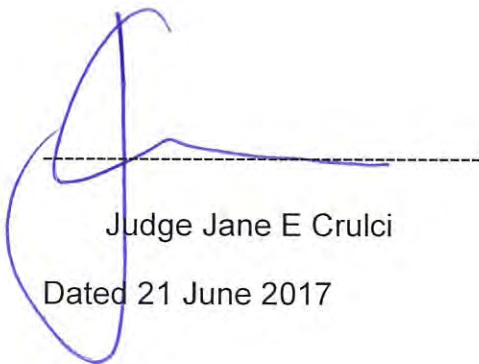
(b) a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.”

28. Whilst the defendant may be a first offender it is noted that on that evening he was persistent in his approaches to the victim, and irrespective of her best interests, continued with his attentions which resulted in the indecent assault.
29. The victim is to be commended for coming to Court and giving evidence. For any young girl of fourteen years, discussing such matters is understandably embarrassing, but to do so before a Court room of people who are not known to her requires a certain kind of courage.
30. The Court takes note that the offence took place in September 2016, and the trial in June is nine months later. The length of time between the two events added to the distressing experience of the victim and the Court notes that and regrets the delay.
31. Mindful of the sentencing provisions in the Act, the Court considers the following as aggravating features:
 - a) The stress of giving evidence at trial;
 - b) The impact of the indecent act of a young girl who is in her teenage years developing into a young woman;
 - c) The relationship between the defendant and the victim;
 - d) The consequential breach of trust;
 - e) The age difference between the defendant and the victim;
 - f) The persistence of the defendant in seeking to engage with the victim;
 - g) The offence took place at the victim's home, a place where she is entitled to be safe from harm;
 - h) The defendant was intoxicated;
 - i) The defendant attempted to induce the victim's cooperation with the gift of a mobile phone;
 - j) The prevalence of these types of offences in the community.
32. The following are found to be mitigating factors:
 - a) The defendant has no previous convictions;
 - b) The defendant is a young man with good prospects of rehabilitation;
 - c) The defendant helps to support his family through his work;
 - d) The defendant apologizes to the victim, his family, and the community.

33. The Court notes that the offence is charged under the *Crimes Act* 2016, and as such relatively few matters have been before the court under this section. Many of the cases refer to offences under the *Criminal Code 1899* where the maximum penalty for similar offences was substantially less.
34. Taking into account the serious nature of the charge and the particulars of the offence, the aggravating features, the need for personal and general deterrence, and to express the community at large abhorrence of such offending behavior the defendant, the Court determines that a sentence of five years imprisonment is the starting point for this offence.
35. Considering the factors in mitigation, that he is a young man who can go on to lead a productive, useful and law-abiding life, the prospects for his rehabilitation are good; further taking into account the time served on remand, the sentence is reduced by nine months.

ORDER

36. On the count of Indecent Treatment of a Child Under the Age of 16 years, the defendant is sentenced to four years and three months imprisonment forthwith.



Judge Jane E Crulci
Dated 21 June 2017

