



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 7 of 2017

THE REPUBLIC OF NAURU

v.

CARLOS BAETIONG

Before: Crulci J
For the Prosecution: F. Lacanivalu
For the Defence: R. Tagavakatini
Dates of the Hearing: 3 – 8, 10 August 2017
Date of Judgment: 14 August 2017

CATCHWORDS – Criminal – Deprivation of Liberty – Indecent Acts in Relation to a Child Under 16 years - Crimes Act 2016

SENTENCE

1. The complainant in this matter is a young girl of 11 years of age. The defendant is 71 years of age. In order to protect the identity of the victim her name has been suppressed and she is referred throughout this judgement as 'IJ'.
2. The defendant pleaded guilty to the offence of Indecent Acts in relation to a Child Under 16 years of age, contrary to section 117 of the *Crimes Act 2016* ("the Act") and was found guilty after trial of the offence of Deprivation of Liberty contrary to section 88 of the Act, and was convicted of both offences.

COUNT ONE

Statement of Offence

Deprivation of Liberty: Contrary to s. 88(1)(a), (b), (c)(i) of the *Crimes Act 2016*

Particulars of Offence

CARLOS BAETIONG on the 15th April 2017 at Nauru, intentionally detained a child namely **IJ** and he intended to unlawfully cause **IJ** to be confined.

COUNT TWO

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER 16 YEARS OLD: Contrary to s. 117(1)(a), (b), (c)(i) of the 50 of the *Crimes Act 2016*

Particulars of Offence

CARLOS BAETIONG on the 15th April 2017 at Nauru intentionally touched **IJ** and was reckless about the fact that **IJ** was a child under 13 years old.

3. The complainant had been playing with friends near her home when she was approached by the defendant who is known to her as they both live at Location, Denig District. He told her that there were some lollipops in one of the abandoned rooms at Block 7, so she followed him back to the room.
4. After entering the room the defendant prevented the complainant child from calling for help or leaving the room by binding her hands, blindfolding her, putting some cloth in her mouth, closing the doorway with roofing iron and threatening **IJ** that he would stab her with a knife

5. The defendant, having thus detained IJ and preventing her from leaving the room, removed her pants and underwear and indecently assaulted her by kissing her on the lips and on her neck, and using his fingers to rub her vagina.
6. A witness had seen the defendant talking with IJ and watched as they walked in the direction of the abandoned blocks; the witness was concerned when they did not reappear. The witness made his way downstairs from where he lives towards the abandoned blocks; he moves slowly as he uses two crutches to get about outside and has a wheelchair in his home,
7. The witness first approached a sealed up abandoned room and attempted to remove the door covering. This made some noise and the defendant appeared from the next room. The witness asked the defendant "*What you're doing?*" and the defendant replied "*Oh the girl just wanted to kiss me*".
8. The witness found IJ in the room, half-naked and attempting to cover herself up with her shirt. IJ told the witness that the defendant had indecently assaulted her. IJ told the Court that upon hearing the roofing irons move next door, the defendant had cut the ties binding her hand and she fell down, and removed her blindfold.
9. The witness took the defendant with him to report the matter, during which time the defendant was "*asking all the time for me to forgive him*". When seeing the witness' wife the defendant also apologised to her.

Prosecution Submissions

10. The prosecution draws the Court's attention to the maximum sentence of 10 years imprisonment for the offence of deprivation of liberty. A previous case involving Deprivation of Liberty is *R v Olsson*¹; in which a child was detained in the defendant's room for a couple of hours where she was indecently assaulted, the child was under the age of 13 years. There was no allegation that the child was bound or gagged as in this case. The defendant had previous convictions and was sentenced to three years imprisonment for that offence.
11. In relation to the offence of indecent assault of a child when under 13 years the maximum term of imprisonment is 15 years. The prosecution cites various similar cases² in this jurisdiction as authority for the proposition that the

¹ [2017] NRSC 47.

² *R v AB* [2016] NRSC 29; *R v Adam* [NRSC 4]; *R v FC* [2016] NRDC 53; *R v EF* [2017] NRSC 37.

sentences should be immediate consecutive terms of imprisonment which reflects personal punishment and general deterrence.

12. The *Nauru Family Health and Support Study*³ has been referred to in other decisions of this Court and indicates a significant percentage (30%) of those taking part in the study had been the victim of sexual abuse between the ages of 5 and 14 years.
13. Prosecution draws the Court's attention to the sentencing provisions of the Act in particular ss. 278 and 279, and list the following as aggravating features:
 - a) The age gap between the defendant and the victim;
 - b) The breach of trust;
 - c) The defendant's disregard for IJ safety, security and well-being;
 - d) IJ attendance at Court to give evidence and be cross-examined.
14. The defendant did plead guilty to the second count and has been remanded in custody since the 17 April 2017; these are matters which the prosecution accepts the Court also ought to take into account.
15. The defendant has a previous conviction of indecent assault of a child, and was dealt with by the Court around 2006. It is understood that he served some nine months imprisonment. Unfortunately as a result of a fire that affected both the correctional and police administration offices, exact details of the defendant's previous offending is not known.

Victim impact statement

16. IJ said that she was scared of the defendant but feels better knowing that he has been remanded as now she can go out and be with her friends and not be afraid.

Defence Submissions

17. Defence counsel confirms to the Court that the defendant is 71 years of age, married with children and grandchildren. He has lived in Nauru since 1981. Prior to being remanded in custody for this offence he was employed at the Hardware store.

³ Ministry of Home Affairs and Department of Women's Affairs, October 2014.

18. In written submissions the defence accepts the aggravating features being a large age gap between the defendant and child IJ, and that the offence was planned.
19. In mitigation the defence ask the Court to take into account the defendant's remorse and that he regrets his actions in letting down society and his family and the victim's family. The defendant understands that he must pay his debt to society for his action and wishes to reform himself.
20. The defendant pleaded not guilty to the first count as he disagreed with the complainant's version of the events, but accepts the Court's determination. Counsel cites the cases of *R v AB*⁴ and *R v Olsson*⁵ and asks the Court to consider imposing concurrent sentences as the offences were part of the same transaction and put forward a range of 3 to 6 years imprisonment.
22. As has been stated in previous cases before this Court (for example *R v Notte*⁶), the Court is mindful of the purposes and considerations when sentencing a defendant as laid down in ss. 278 – 280 of the Act.
23. Furthermore the Court reiterates the comments made in *R v Notte* in relation to the purpose of the Act in updating legislation and introducing new legislation to Nauru as outlined by The Minister for Justice, The Honourable David Adeang M.P., on the 12 May 2016 when introducing the Crimes Bill to the House:

“The criminal laws of a country establish a standard of conduct by which all people must abide. It provides a means to maintain public order, protect people and their property and, for those who violate it, the Crimes Bill ensures they are punished in a just manner. Therefore it is important that Nauru's criminal law reflects the standards of conduct and morality that are not only appropriate for today's society, but reflective of the society we want to have. The current Criminal Code 1899 was written in Queensland to reflect both a different time and context. The time has come for Nauru to replace this Code with a law that is adapted to our time and our culture.

The Crimes Bill simplifies, modernizes and strengthens the criminal offences in Nauru. A major inclusion in this legislation is greater

⁴ [2016] NRSC 29

⁵ [2017] NRSC 47

⁶ [2017] NRSC 53

protections in relation to sexual offences, particularly where children are victims. New offences have also been included to address the criminal misuse of modern technologies and emerging trends in criminal behaviour.

Penalties for sexual offences, particular relating to children, have been increased to protect those that are most vulnerable from being abused.”⁷

24. In this case the Court finds the following to be aggravating features:
- a) The disparity in age between the complainant and the victim (60 years);
 - b) The breach of trust;
 - c) The element of planning and premeditation of the offence;
 - d) The actions to immobilise IJ so that the defendant could assault her;
 - e) The assault ceased only because of the intervention of a witness;
 - f) The effect of the offending on IJ's physical and psychological wellbeing;
 - g) IJ gave evidence in court and was subjected to cross-examination;
 - h) The defendant has previously been convicted and imprisoned for a similar offence.
25. The mitigating features of this case are:
- a) The defendant pleaded guilty to the offence of indecent assault and so spared the victim from having to give detailed evidence on that offence;
 - b) The defendant through his counsel expressed remorse to the victim's family and promises to reform after paying his debt to society;
26. The Court is mindful of the totality principle and must determine a sentence in accordance with the Act that in all the circumstances reflects punishment for the defendant, serves as an effective deterrent, and signifies the community's condemnation of such offences.
27. Considering the guidelines referred to above, I conclude that the starting point for the offence of deprivation of liberty in this case should be six years. The sentence for the indecent assault is four years.
28. The Court rejects defence counsel submission that the sentence for indecent assault should be wholly concurrent with the sentence for deprivation of liberty. Whilst it is correct that these offences occurred in the same room on the same

⁷ Ibid., at [25]

day, the offences are quite distinct in character and to have been bound and gagged in the manner she was, must have been on any viewing of it a terrifying experience for IJ. To be then subject to the distress of an indecent assault requires that the sentences are consecutive to reflect the defendant's offending behaviour.

29. The Court gives credit for the mitigating factors and the total sentence is reduced to nine years imprisonment.

30. ORDER:

- 1) Count One: For the offence of Deprivation of Liberty the defendant is sentenced to five years imprisonment.
- 2) Count Two: For the offence of Indecent Assault the defendant is sentence to four years imprisonment.
- 3) Count One and Count Two are to be served consecutively.
- 4) The name and identity of the complainant IJ is to be suppressed.
- 5) The total term of imprisonment imposed is nine (9) years the term dated to commence on the 17 April 2017.


JUDGE OF THE SUPREME COURT
JUDGE JANE E. CRULCI
Dated 14 August 2017
JUDICIAL OFFICER
OF NAURU