



REPUBLIC OF NAURU

IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 29 of 2017

Between

THE REPUBLIC OF NAURU

Complainant

And

BRONTON NAMADUK

Defendant

Before: Chief Justice Filimone Jitoko

For the Prosecution: Ms L Tabuakuro, Public Prosecutor

For the Accused: Mr D Cecil

Mr R Tagivakatini, Office of the Public Legal Defender
(original counsel, withdrawn 11 July 2018)

Dates of Hearing: 10 July 2018, 11 July 2018, 13 August 2018 and 14 August 2018.

Date of Judgment: 22 August 2018

Case may be cited as: *Republic v Namaduk*

Catchwords: Causing child under 16 to engage in sexual activity –
Child witness – Change of counsel – s. 118 of *Crimes Act 2016* – Child protection – Amendment of count –
Withdrawal of charge – Representative count -

JUDGMENT

Introduction

- 1 The accused Mr Brnton Namaduk was initially charged with rape of a child under 16 years contrary to section 116 (1) (a) (b) and (i), and causing a child under 16 to engage in sexual activity under s 118 (1) (a) (b) (c) and (ii) of the *Crimes Act 2016* (the Act). His charges read as follows:

Count 1 (Representative Count)

Statement of Offence

Rape of a child under 16 years: contrary to section 116 (1) (a) (b) and (i) of the *Crimes Act 2016*.

Particulars of Offence

Brnton Namaduk from 12th May 2016 to 31st December 2016 at Nauru, intentionally engaged in sexual intercourse with ET a child under 13 years old without her consent, by putting his penis inside her mouth.

Count 2 (Representative Count)

Statement of Offence

Causing a child under 16 years old to engage in sexual activity: contrary to section 118 (1) (a) (b) (c) and (ii) of the *Crimes Act 2016*.

Particulars of Offence

Brnton Namaduk from 1st January 2017 to 31st May 2017 at Nauru, intentionally engaged in conduct in relation to ET a child under 13 years old, causing said ET to do an act of masturbation on him.

- 2 The accused was initially charged with both counts and entered pleas of not guilty to both offences.
- 3 On 13 August 2018, an amended information was filed by the prosecution. The prosecution withdrew Count 1 from the charges. It was submitted that due to the difficulty the child victim faced as a witness in giving evidence, pursuing further testimony in regards to the first count would be detrimental to the child's wellbeing. It was observed that giving evidence was noticeably traumatic for the child witness.

- 4 On the same date, the prosecution further amended the particulars of Count 2 – specifically amending the count from ‘masturbation’ under s. 118(1) (c) (ii) of the Act to ‘any activity that involves physical contact by the child with the person or a third person (including a dead person) for sexual gratification or sexual arousal of any person (whether of the people involved or some other person’ under s. 118(1) (c) (iii). The amendment of this count will be further addressed later under the heading ‘Consideration’.
- 5 The accused has been remanded in custody since 23 November 2017.

Relevant Law

- 6 The offence of causing a child under 16 years old to engage in sexual activity is defined under s. 118 of the *Crimes Act 2016* (the Act) as follows:
 - (1) A person commits an offence if:
 - (a) the person intentionally engages in conduct in relation to another person; and
 - (b) the other person is a child under 16 years old; and
 - (c) the person does so intending to cause or procure, or to make it easier to cause and procure, the child to do an act of any of the following kinds:
 - (i) sexual intercourse;
 - (ii) masturbation or sexual self-penetration;
 - (iii) any activity that involves physical contact by the child with the person or a third person (including a dead person) for sexual gratification or sexual arousal of any person (whether of the people involved or some other person);
 - (iv) any activity that involves physical contact by the child with an animal for sexual gratification or sexual arousal of any person;
 - (v) an act, for sexual gratification or sexual arousal of any person, involving undressing so that the child is clothed only in underwear;
 - (vi) an act involving nudity or exposure or partial exposure of a person’s private parts for sexual gratification or sexual arousal of any person;
 - (vii) any other act with, or towards, the child that is indecent, but that is not covered by subparagraphs (i) to (vi).

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.
- (2) Absolute liability applies to subsection (1)(b).

Note for subsection (2)

Although absolute liability applies to the circumstance that the other person is under 16 years old (which means the defence of mistake of fact under section 45 is not available), other defences apply to an offence against this section: see section 127.

- (3) The question whether an act is indecent is one of fact to be determined by applying the standards of an ordinary person.

Elements of the offence

- 7 The ‘fault element’ of the offence of intention is outlined in s. 17 of the Act as follows:

17 Intention

- (1) A person has ‘*intention*’ with respect to conduct if the person means to engage in the conduct.
- (2) A person has ‘intention’ with respect to a circumstance if the person believes that it exists or will exist.
- (3) A person has ‘intention’ with respect to a result if the person means to bring it about or is aware that it will occur in the ordinary course of events.

- 8 However, under s. 118(2) it is stated that ‘absolute liability’ applies to s. 118(1)(b). Absolute liability is outlined in s. 24 of the Act as follows:

24 Absolute Liability

- (1) If a written law that creates an offence provides that the offence is an offence of absolute liability:
 - (a) no fault element is required to prove the physical elements of the offence; and
 - (b) the defendant may be found guilty of the offence regardless of any mistake or ignorance of fact under section 45 by the defendant.
- (2) If a written law that creates an offence provides that absolute liability applies to a particular physical element of the offence:

- (a) no fault element is required to prove that physical element; and
 - (b) the defendant may be found guilty of the offence regardless of any mistake or ignorance of fact under section 45 by the defendant.
- (3) The existence of absolute liability does not make any other defence unavailable.

Burden of proof

9 Under the Act, the burden of proof of the prosecution is outlined under s. 25 as follows:

25 Burden of proof on prosecution

- (1) The prosecution has a legal burden of proving each element of the offence.
- (2) The prosecution also has a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.
- (3) The legal burden of proof on the prosecution must be discharged beyond reasonable doubt, unless the written law in which the offence is set out specifies a different standard of proof.

10 The evidential burden of proof on the defendant is outlined in s. 26 of the Act, which states that:

26 Evidential burden of proof on defendant

- (1) Subject to section 27, a burden of proof that a written law imposes on a defendant is a burden (the 'evidential burden') of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.
- (2) A defendant has an evidential burden in relation to any of the following that is provided by a written law creating an offence (whether or not it accompanies the description of the offence) and on which the defendant wishes to rely:
 - (a) an exception;
 - (b) an exemption;
 - (c) an excuse;
 - (d) a qualification;
 - (e) a justification.

(3) The defendant no longer has the evidential burden in relation to a matter if evidence sufficient to discharge the burden is presented by the prosecution or the Court.

(4) The question whether an evidential burden has been discharged is one of law.

Background

- 11 The accused's application for bail was refused on 14 December 2017 by the Honourable Judge Vaai partly due to the accused's likelihood of interfering with police witnesses. Evidence was placed before the Court that the accused had made threats and kicked in the door of one of the police witnesses. For the protection of the community and in the public interest, his bail was refused.
- 12 A second application for bail was further made on 6 March 2018, where bail was once again refused. The accused has therefore been remanded in custody since 23 November 2017, being some 9 months since the date of this judgment.
- 13 The accused in this matter is a close relative of the alleged victim.

Child protection order

- 14 Before the commencement of the trial in this case, a separate matter was brought before the Court in relation to the protection of the alleged victim.
- 15 It was submitted to the Court, and later confirmed in the testimony of the prosecution and defence witnesses, that the alleged victim was being brought to the Nauru Correctional Facility by RT, to visit the accused who was held on remand there.
- 16 A further assessment was made as to the suitability of the child's Auntie's being able to adequately care for the child. It was found that there may be a presence of undue influence from numerous sides of the family upon the alleged victim. On 27 June 2018, an interim order was issued to remove the child from the care of her mother and to bring her under the care of the Director of Child Protection, Mr Cook.
- 17 On 17 August 2018, with the trial having concluded, no extension was sought on the protection order and the child was returned to her mother's care by the Director of Child Protection.

Application of change of counsel for the defence

- 18 On the morning of 11 July 2018, counsel for the defence, Mr Tagivakatini made an oral application to withdraw from the matter, as the defendant had refused to give further instructions to him as counsel. The defendant expressed that he wanted to change counsel as he did not believe he was being adequately represented. Ms Tabuakuro for the prosecution sought, in the circumstances, to preserve the proceedings as they stood. The matter was adjourned to the afternoon for further submissions.

- 19 A formal application for withdrawal of counsel by the defendant was brought. The Court allowed the application for withdrawal to be entertained, citing that the accused is entitled to terminate his instructions to counsel at any time.
- 20 The Court made specific instructions that it would not permit the new counsel for the accused to recall any of the witnesses that had already given evidence, for further examination. The Court granted time for the new counsel for the accused to be given instructions.
- 21 Leave was thereby granted for Mr Tagivakatini to withdraw as counsel on 11 July 2018.
- 22 The trial was adjourned as part-heard to allow for the transition of defence counsel. The trial was listed to resume for 2 days from 13th to 14th of August 2018.
- 23 On 13 August 2018, Mr Dale Cecil, a pleader, appeared as the defendant's new counsel.

Redaction of names of witnesses

- 24 In order to protect the identity of the victim as per s. 55(1)(b) of the *Child Protection and Welfare Act 2016*, the names of witnesses related to the victim have been redacted to their initials. Prosecution witness number two is a refugee in Nauru. Due to potential issues arising from his name being published in the online judgment, the Court has also decided to redact his full name from this record. He has the initials MNUP and will hereafter be referred to as 'Mr P'. The court finds it in the public interest to publish the name of the accused and has therefore done so throughout the judgment. The relevant part section 55 of the above Act states as follows:

55 Special requirements applying to court proceedings

- (1) Despite the provision of any other law to the contrary, court proceedings involving children must be undertaken in accordance with the following requirements:
 - (a) the hearing of the cases must be expedited and prioritized as far as is practicable;
 - (b) measures must be applied and enforced to protect the child's privacy, including closed court proceedings and **bans on publishing the child's identity or any information leading to identification of the child;**
(emphasis added).

Facts

- 25 No agreed facts were submitted in relation to this case and as such all elements of the offence were in dispute.

- 26 It is alleged by the prosecution that sometime between 12 May 2016 and 31 December 2016, the accused caused ET to open his trousers, take out his penis and touch it, and he did so for his own sexual gratification.
- 27 During this time period, the alleged victim was 8 years old.
- 28 The alleged act is said to have occurred in the security booth of Anibare Lodge where the accused person worked and the alleged victim often came to visit. It was submitted by the prosecution that ET was often left with the accused at the booth when the mother went to work. Evidence from the defence was that ET was never left there for a period greater than 7 minutes, on the occasion that the mother went to get food from nearby restaurants. This evidence was contradicted in testimony by prosecution witnesses.
- 29 The offence was reported to the police in November 2017. The time period for the representative count is broad, as the age of the alleged victim made it difficult for her to pinpoint the exact date of the offence occurring. The alleged victim testified that the offence occurred sometime in the year before it was reported to the police. Further evidence by both prosecution and defence witnesses provides that the accused was working at Anibare Lodge in the year of 2016. The Court therefore accepts the alleged offence occurred in 2016.
- 30 Prosecution led evidence that the alleged act was witnessed by two men and recorded by one of them on video. It is not known who took the video, or who the other man present was. The video was then seen by Mr P and two others. One of the men that saw the video has since passed away and another was unable to testify as he was a refugee who was resettled to the United States.
- 31 The offence was brought to light when a third person allegedly saw the video. Prosecution witness two, Mr P, a resident of Anibare Lodge, was shown the video by another man residing there. At the material time, Mr P was working at the Nauru Primary School (NPS) when he saw and recognised the alleged victim ET at the school. Mr P states that he then informed another staff member at the school in relation to what he had seen in the video. This staff member then alerted the aunts of ET (prosecution witnesses three and four).
- 32 This then led to a sequence of events, including the medical examination of ET and the subsequent police report made by Mr P, ET and JN.

Prosecution Case

Evidence from the alleged victim – ET (PW1)

- 33 The Court heard evidence from four prosecution witnesses. The first witness for the prosecution was the alleged victim in this matter, the juvenile ET. An application for a closed court was made in relation to ET's testimony and the court so granted due to the nature of the offence and the vulnerability of the child witness.

- 34 The testimony of the alleged victim required numerous breaks, as can reasonably be expected from a young child giving evidence of sexual abuse.
- 35 ET gave evidence that at that time of the offence she was left by her mother at her relative's work at Anibare Lodge as she often was when her mother went to work herself. She said she was "8 or 9 years old" at the time but she can't remember exactly which one. She recalls it was sometime in the year before she made the report to the police.
- 36 She was in the security booth of Anibare Lodge, which is a shipping container converted into an office type space. Inside the security booth was ET, the accused and two other unidentified refugee men.
- 37 The accused was standing and told ET to unbutton his pants and to take out his penis. She told him that she did not want to do this. When she told the accused she did not want to touch it he said "No, please touch it. Touch it".
- 38 Eventually she went over and unbuttoned his pants and took out his penis. The accused then told her to touch his penis with her hands. She did as she was told. She describes she felt bad when she was touching his penis and that she was scared.
- 39 After some time, ET describes that the accused's eyes rolled up and "white jelly" came out of his penis. She described that before the jelly came out, the accused put his penis on her face and therefore the jelly came out on to her face.
- 40 For the duration of the act, one of the refugee men present was filming.
- 41 During ET's testimony, prosecution exhibit one was tendered. The exhibit was a drawing made by ET on 17 November 2017 at the Nauru Police station. ET explained that the drawing was of her and the accused. She referred to the circle drawn on the accused's pants as being the 'top' of his penis. The area of the circle illustrated where the 'jelly' came out. The illustration showed lines from the top of the penis of the accused to her face and mouth area. ET explained this was how the 'jelly' came out and went on to her and her face.
- 42 It was put to ET by counsel for the defence that her JN threatened her with a knife and forced her to give the evidence that she gave to the police. ET stated that she was not forced to give evidence by JN. She further gave evidence that while she had a fear of her JN due to her strictness; she was not forced to give the story.
- 43 ET stated that she told her mother about what the accused had done to her after being told by JN to do so. She gave evidence that when she told her mother about everything that happened, her mother started crying.

Evidence from Prosecution Witness Two – Mr P (PW2)

- 44 As noted above, the name of this witness has been redacted as he is a refugee on the island. This has been done in order to protect his identity from authorities in his country of origin and in keeping with the standard of not identifying refugees by name in court judgments.
- 45 Mr P gave evidence in regards to the video of the accused forcing the alleged victim to perform sexual acts on him. Mr P describes seeing the video, where the accused made ET touch his penis and move her hands up and down it. He saw the video from another resident of Anibare Lodge, named Janghir who has since died. Another person who saw the video has since been resettled in America and was therefore also unable to give evidence in relation to the video.
- 46 In his evidence, he stated he has resided at Anibare Lodge since 2015 and has known the accused since he started working there. Mr P stated that the accused was often visited at work by RT, his daughter (ET) and his son. He stated that sometimes RT left and the daughter stayed.
- 47 He had seen ET on many occasions so he recognised her on the video. The day after seeing the video, he was working for a security company and was at Nauru Primary School, which the alleged victim attends. After recognising her at the school, he approached a cleaner and told her about what he had seen on the video involving the alleged victim and the accused.
- 48 About 5 to 6 months after telling the cleaner, he received a phone call. The phone call was from “three ladies” who asked about the video and what happened with the accused and his daughter. The ladies came to see him that day (approximately 14 November 2017) and he made the police report that same day.
- 49 The three ladies came to see him at Anibare Lodge. Around 10 to 20 minutes after they left, the accused came to find him. He went to hide at the Bay Restaurant and called the police. He was informed by someone that the accused was coming there, so he then returned to Anibare Lodge. He spoke to the security who asked him what happened and why the accused was looking for him. The security saw the accused coming back again, so they hid the Mr P in the security room and turned off the lights. He could see through the window that the accused was going into the rooms looking for him and then eventually he saw the accused kicking in the door to his room.
- 50 The witness expressed concerns about making the initial report, as well as giving evidence at trial. The accused had on multiple occasions “made trouble” for him, according to the witness. The witness was visibly anxious giving evidence in Court in front of the accused.
- 51 It was put to the witness in cross-examination that he made up the story about the video in order to get revenge on the accused. It was put to the witness that the accused was angry at him for dating his sister and bringing her to his room. The witness says he does not know who the accused’s sister is and that no woman has come to his room at Anibare Lodge.

Evidence from Prosecution Witness Three – BT (PW3)

- 52 BT is a relative of the victim and of RT. She found out about the video and the alleged offending when a lady who works at the tuckshop of Nauru Primary School, told her about what Mr P had told the cleaner about the video.
- 53 She confirms that she told her sister, RT about the video and what was on it. She describes that RT cried when she heard about it.
- 54 She describes the accused as being a bully. When cross-examined on her dislike for the accused, she stated that whilst she did not like him, she did not make up this story against him. She stated that the accused often came to her mother's house where he would become verbally abusive and swear at her mother.

Evidence from Prosecution Witness Four –JN (PW4)

- 55 JN is also a relative of the alleged victim and RT.
- 56 JN gave evidence on the nature of the relationship between RT and the accused, citing that whilst they have been together since the alleged victim was 1 year old, they separated on numerous occasions.
- 57 She gave evidence that she took ET to the police station because of what ET told her the accused did to her. First she took ET to the hospital to have her checked out. Then she gave ET some time as she did not want to rush her. The next day, she asked ET if she was ready to go to the police, when she said she was, JN took her to the police station. She describes how ET told everything to the police herself.
- 58 JN gave her own statement to police as well. She stated that when she gave her statement and when ET gave her statement, they were interviewed in separate rooms.
- 59 JN gave evidence that when ET was around 2 or 3 years old, there were already rumours that the accused was "doing something" to her, while her mother was at work and he was taking care of her. The mother heard the rumour and then separated from the accused. JN said that not long after this, they got back together again.
- 60 JN describes telling ET to tell her mother about everything that had happened after they went to the hospital. After ET and her mother spoke privately, the mother came out and spoke with JN. It was stated that the mother had 'tears in her eyes' and that she said that she would keep the accused away. When JN said they should report it to the police, RT allegedly said no and "not to make it big, to just leave it there and she would just stop him from coming".

Closing Submissions

- 61 In closing, counsel for the prosecution described the accused as systematically sexually abusing the alleged victim over a period of many years. He was in a position of trust with the alleged victim as her close relative and broke this trust, taking advantage of a young vulnerable child.

- 62 On the issue of whether or not the alleged victim and the other prosecution witnesses had any motive to fabricate the story and their subsequent police statements, depositions and testimony, Ms Tabuakuro argued that this was unsubstantiated. The prosecution referred to evidence of Mr P who sees a video and the testimony of what he has seen compared to what the child victim describes as happening to her, is the same. The prosecution states that this is testimony from two unrelated and completely different parties, telling the same story.
- 63 Counsel for the prosecution submits that they have proven beyond a reasonable doubt that the accused caused the victim to take out his penis and touch it for his own sexual gratification.

Defence Case

- 64 On Monday 13 August 2018, at the close of the prosecution's case, counsel for the defence conceded that there was a case to answer. The accused was given his options for giving evidence under s. 201(b) of the *Criminal Procedure Act 1972*. The accused was asked whether he wished to give evidence on his own behalf or to make an unsworn statement or to refrain from doing either of these things and to call witnesses, or tender statements under the provisions of section 146, in his defence.
- 65 The accused and his counsel stated that he wished to remain silent. The defence called one witness in their case, RT.
- 66 RT stated that herself and the defendant are now engaged and have been together for a long time, since ET was around 1 year old. Contrary to this, in his affidavit dated 19 February 2017, the accused stated that he was single. Further evidence from other prosecution witnesses highlight numerous separations over the last few years. Nevertheless, they appear to be in a relationship at the time of giving evidence.
- 67 The counsel for the defence relied entirely on RT's testimony for their case and raised no other defences.
- 68 RT stated that she knew rumours about what the accused allegedly does to her daughter have been going around the island since 2011. In cross-examination she first stated that ET never told her anything about the alleged sexual abuse. Later, she changed this position and said that she was told something by ET, but that ET told her it was all lies.
- 69 RT stated that ET was once shown a porn movie by her cousin who said "look it's you and your [close relative/the accused]" and that after seeing that, she made up the story. This evidence contradicts some other statements made by the witness, where she also claims that her sisters made up the story and forced ET to tell it. This will be further explored under the heading 'Consideration'.
- 70 Overall, RT conceded that she had chosen to support the defendant in this matter as she supposedly knew that her daughter and all the other witnesses were lying. She denied that her

ongoing support for the defendant may have had an impact on her daughter and what she had told her mother.

- 71 RT agreed that she continued taking the victim to the see the accused in prison until corrections staff no longer allowed her to bring the child in to the facility. RT claimed she took ET to the facility upon her request, contrary to the testimony of ET, who said RT made her come in order to bring food to the accused.

Closing Submissions

- 72 In closing submissions by the defence, it was noted that “...*although the onus of proof is on the defence to raise a defence it is clear there was none*”,¹ which could be read as a concession to the charge. However, it is more likely referring to the fact that counsel for the defence did not ‘raise a defence’ per se.
- 73 Counsel for the defence claimed that evidence from the victim was given in fear of reprisal from her aunties, who Mr Cecil stated threatened ET with a knife. Further theories of motives for revenge and fabrication were put to the prosecution witnesses; the validity of these will be explored further under the heading ‘Consideration’.
- 74 Mr Cecil also made claims that the effect of the amended count meant that the accused “*never had a chance to plead to on ground of guilt or otherwise*” and that this simultaneously inconvenienced the defence who then had to seek alternative defence strategies.² This error in observation was corrected by the Court at the end of Mr Cecil’s submissions and will be discussed further below in relation to section 191 of the *Criminal Procedure Act 1972*.

Consideration

Evidence of the victim

- 75 The court in assessing the evidence of the victim has to be mindful of the fact that the victim is a child and a witness. In assessing the evidence of a child witness, the court is guided by two important considerations namely, the child’s competency and his/her credibility.
- 76 A Canadian Study concluded that child witnesses are more likely when testifying, to make errors due to various reasons, such as limitation of memories, communication skills and suggestive questions.³ However, the perception of the court was generally, that child witnesses are more honest than adult witnesses.

¹ Closing Submissions, Counsel for the Defence, p. 1.

² Closing Submissions, Counsel for the Defence, p. 1.

³ Judicial Assessment of the Credibility of Child Witnesses: Nicholas Bala, Karuna Ramakrishnan, Roderick Lindsay, Kang Lee – Alberta Law Review 2005 Apr 42(4) 995-1017.

- 77 In this instance, the child witness victim is now 10 years old. While she found being asked questions in court, even in protected surroundings and where she was shaded from direct visible contact with the accused, very frightful and distressed. In fact, the proceedings had to be adjourned to allow her to recover from crying in describing and re-living a particularly emotional and unpleasant experience. A few times there were pauses in the proceedings to allow the victim to compose herself.
- 78 In spite of all of this, the victim remained lucid throughout, both in her examination in chief as well as in the cross-examination. When she was not clear on questions, she answered almost all of them after clarifications were tendered.
- 79 The victim's explanation when asked of what happened at Anibare Lodge did not change from the story she had told the police much earlier and although the exact time and date is a blur, what transpired on that date remains very clear to her. The picture the victim drew at the police station of the accused's penis and the "jelly" coming out of it could not possibly be, something that the victim had made up. It was a picture of objects she had seen. They were images of things she had experienced.
- 80 The picture and images as well as the clarity of the victim's explanation all contribute to the issue of credibility. The court finds the evidence of the victim totally credible.

Video

- 81 The existence of a video taken inside the security house at Anibare Lodge showing the accused opening his pants and making the victim touch his penis, is told to the court by Mr P (PW2). According to him, he saw the video of the accused engaged in sexual activity with the victim.
- 82 Mr. P's evidence about the video is precise. He recognised the individuals in the video. He recognised the accused and the victim. He knows the accused as a security officer at Anibare Lodge where he too lived. He also recognised the victim ET by sight as he would often see her accompany the accused to work at the security house.
- 83 The contents of the video Mr. P was able to precisely describe to the court. The video was 20 to 30 seconds long. It showed the inside of the security house at Anibare Lodge. It showed the defendant, who appeared drunk, sitting with the victim ET beside him, and a bottle of vodka in one hand. It showed the victim opening the accused's pants and him helping to guide ET's hands to his penis.
- 84 The court finds Mr. P a totally credible witness and although the video is lost with the phone and now cannot be produced as corroborative evidence in support of the victim's story, the court believes that such video had existed. While it does not have any corroborative value, the evidence of its existence still lends authenticity to the overall behaviour pattern of the accused towards the victim.

Defence theories as to motive

- 85 During the presentation of the defence's case in their cross-examination of prosecution witnesses and examination in chief of the defence witness, counsel for the defence made numerous allegations that all the stories had been fabricated by the prosecution witnesses. It was alleged that PW1 lied because she was threatened by a knife, PW2 fabricated the story for revenge, and that PW3 and PW4 disliked the defendant and therefore fabricated the whole case against the accused. It was even alleged at one stage the DPP also had an interest in fabricating the story.
- 86 All of these allegations were not supported by any viable evidence that would cast doubt on the testimony of the prosecution witnesses. In fact the testimony of RT alongside defence theories of fabrication put forward in cross-examination, consistently contradicted each other.
- 87 RT (DW1) gave evidence that she was aware of rumours regarding the accused sexually abusing ET since 2011. This detracts from the defence theory that Mr P made up the entire story in order to seek some form of 'revenge' on the accused. Mr P had only lived at Anibare Lodge since around 2015 and the accused had worked there since approximately 2016. Notably in 2011, Mr P had never even been to Nauru (he has been on the island for approximately 5 years). This illustrates that allegations of a similar nature against the accused have persisted for around 7 years. Further, by giving this testimony, RT concedes that she had knowledge of similar allegations of child sexual abuse by her partner spanning multiple years up until formal allegations were filed.
- 88 Whilst the court cannot rule on the validity of such rumours and does not consider them as actual evidence in this matter, concessions by witnesses from both sides of knowledge of those rumours, does provide a contextual consideration for this case.
- 89 This was supported in evidence by the prosecution witness JN, who also described that allegations and rumours of the accused sexually abusing ET had been surfacing since the ET was 2 or 3 years old.
- 90 RT further gave evidence that she was aware that a cousin of ET had shown her a porn video and said "this is you and your [close relative/the accused]". The date or time of this alleged occurrence was not specified. However it does beg the question as to why such concerning things were being said and shown to a young girl and why the mother knew of this, but did not appear to find it problematic.
- 91 There were additional allegations by the defence of ET being threatened with a knife to "tell the truth". The knife was said to have been used by JN against ET. The theory of the defence shifted multiple times and allegations of who were present or witnessed the alleged threat also changed.
- 92 Initially RT began to give evidence about seeing the knife threat occurring, although this testimony was quickly objected to by the prosecution on the rule of *Browne and Dunn*,⁴ as the fact that RT was allegedly there, had not been put to any of the prosecution witnesses. Notably,

⁴ *Browne v Dunn* (1893) 6 R 67 .

no other witness had ever mentioned the presence of RT on that day at the material time. The Court therefore sustained the objection made by the prosecution.

- 93 In closing submissions, counsel for the defence stated that “*witnesses for both parties has [sic] proven that [the witnesses were] threatened with knives in order to be successful in prosecuting the Accused*”.⁵ This was not substantiated in any of the evidence of the defence or of the prosecution witnesses.

Amendment of information – s. 191 Criminal Procedure Act 1972

- 94 Section 191 of the of the *Criminal Procedure Act 1972* reads as follows:

191 Orders for amendment of information, separate trial, and adjournment of trial

- (1) Every objection to any information for any formal defect on the face thereof shall be taken immediately after the information has been read over to the accused person and not later.
- (2) Where, before a trial by the Supreme Court or at any stage thereof before judgment, it appears to the Court that the information is defective, either in substance or in form, or inappropriate to the facts disclosed by the depositions or the evidence received during the trial, the Court may make such order for the alteration of the information, either by amending the particulars of the offence or by substituting a new offence for the offence charged or by deleting any count or by adding a new count, as the Court thinks necessary to meet the circumstances of the case:

Provided that where the information is altered under the provisions of this section:

- (a) the Court shall inform the accused of the substance of the alteration and call upon him to plead to the altered information;
 - (b) the accused may demand that the witnesses, or any of them, be recalled and give their evidence afresh or be further examined, cross-examined or re-examined by the accused, or his barrister and solicitor or pleader if any, and, if any witness is recalled, the prosecutor shall have the right to cross-examine any such witness or, as the case may be, to re-examine him on matters arising out of any such further examination or cross-examination.
- (3) Variance between the information and the evidence adduced in support of it with respect to the date and time at which the alleged offence was committed or with respect to the description, value or ownership of any property the subject of the information is not material and the information need not be amended for any such variation, save where the variation is with respect to the

⁵ Closing Submissions, Counsel for the Defence, p. 1.

date or time at which the alleged offence was committed and the proceedings have in fact not been instituted within any time limited by law for the institution thereof.

- (4) Where the information is altered under this section or there is such a variance between the information and the evidence as is referred to in the last preceding subsection, the Court shall, if it is of the opinion that the accused may have been thereby misled and that the interests of justice require that the trial be adjourned so that he may prepare his defence afresh, adjourn the trial for such period as it considers necessary for that purpose.
- (5) Where an information is altered under this section, a note of the order for alteration shall be endorsed on the information, and the information shall be treated for the purposes of all proceedings in connection therewith as having been filed in the amended form.
- (6) [omitted]
- (7) Any power of the Court under this section shall be in addition to and not in derogation of any other power of the Court for the same or similar purposes.

95 In considering this section, the Court finds that while there was an amendment to the information, in terms of the abandonment by the prosecution of count 1 and the more serious of the two charges, the prosecution was perfectly at liberty to proceed with the second and the lesser serious charge. The substance of the second charge remained the same that is, causing a child under 16 years old to engage in sexual activity. The accused has already pleaded not guilty to this charge.

96 The court concluded that the amendment did not constitute an alteration to the information filed under section 118(1) (a), (b), (c) and (ii) of the *Crimes Act 2016* that would have required the court to observe the requirements set out under section 191(2) of the *Criminal Procedure Act 1972*.

Alternative verdicts – s. 273 Crimes Act 2016

97 The prosecution further directed the Court to s. 273 of the *Crimes Act 2016* which outlines its powers for alternative verdicts. This section reads as follows:

273 Alternative verdicts

- (1) If, on a trial for an offence mentioned in column 1 of the table in Schedule 1 (the '*first offence*'), the Court is not satisfied that the defendant is guilty of the first offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence mentioned in column 2 of the table in Schedule 1 in relation to the first offence (an '*alternative offence*'), the Court may find the defendant not guilty of the first offence but guilty of the alternative offence.

- (2) A defendant may be found guilty of an alternative offence only if the defendant has been afforded procedural fairness in relation to that finding of guilt.

Note for this section

1. *Clauses (2) and (3) of Article 10 of the Constitution set out procedural requirements for a fair hearing.*
2. *A reference in Schedule 1 to an offence includes a reference to an offence under Division 3.4 (Extensions of criminal responsibility) that relates to the offence: see s 36.*

98 In consideration of this section the court notes that even if the prosecution does not prove its case on count 1, the rape of a child under 16 years, the court can still find the accused guilty of lesser offences under Part 7 of the *Crimes Act 2016*.

99 As described under section 273 of the Act above, Column 1 of Schedule 1 sets out the “first offence” while Column 2 lists the “alternative offences.” Part 7 under Column 1 deals with general sexual offences while Division 7.3, of which sections 116 and 118 of the Act are a part, covers sexual acts with children. Column 2, posing the alternative offences to Column 1, states:

“A person found not guilty of the offence charged may be found guilty of any other offence in Part 7 that is proven on the evidence, provided that the maximum penalty for the alternative offence is equal to or less than the maximum penalty for the offence charged.”

100 It is clear from one’s reading of these provisions that the court is free to find an accused guilty of any other sexual offences in Part 7 of the Act, if the prosecution is unable to prove guilt under the first offence, provided that the court is satisfied beyond reasonable doubt of the guilt of the accused. So in this instance, even if the prosecution was to fail in convicting the accused for section 116 (1) (a) (b) (c) and (i) offence, that is, if it had proceeded with the charge, the court can, in exercise of its powers under section 273, proceed to convict under section 118(a) (b) (c) and (ii) or (iii), provided that the court is satisfied beyond reasonable doubt of the accused’s guilt and, the penalty for the offence is equal to or less than the maximum penalty of the first offence.

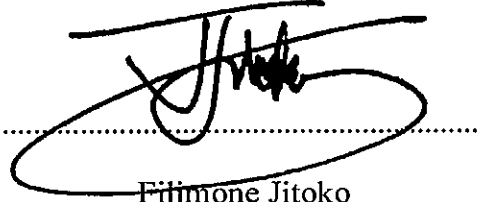
Conclusion

101 In consideration of all the evidence placed before it, the Court in the end, must be satisfied that the prosecution has discharged its burden or obligation of proof of the guilt of the accused in accordance with section 25 of the Act. The standard of proof is beyond reasonable doubt. It is for the prosecution to prove every essential element or essential fact that makes up the offence,

although it does not have the burden of proving beyond reasonable doubt every single fact that arises.

- 102 Subject to the evidential burden of proof on the defendant under section 26, there is no obligation on the accused to prove any fact or issue before the court. The fact that the accused chose not to give evidence does not alter this equation.
- 103 The accused is charged with the offence of causing a child under 16 years old to engage in sexual activity. All the elements of the offence are set out under section 118 of the Act. The essential element of the offence is one of intention to commit various acts, sexual in nature, that are enumerated under sub-section (1) (c) (i) – (vi). Included under this and relevant to the charge and facts of this case is:
- (c)(iii) activity involving physical contact by the child with the person for sexual gratification.*
- 104 “Intention” defined under section 17 of the Act is deemed to exist if a person means to engage in a conduct; believes that the circumstance exists or will exist; and the person means to bring a result about and is aware that it will occur in the ordinary course of events.
- 105 The other relevant element to the offence is the application of absolute liability for those accused of section 118 offences and the other person or victim is a child under 16 years old. Section 24 of the Act describes what constitutes absolute liability in the circumstance.
- 106 I am satisfied that the prosecution has successfully discharged the burden of proof placed upon it as to the guilt of the accused for the offence he is charged with. In my view the prosecution has established the accused’s guilt beyond reasonable doubt.
- 107 In the final, the Court finds the accused guilty of the charge of causing a child under 16 years old to engage in sexual activity, contrary to section 118(1)(a)(b)(c) and (iii) of the *Crimes Act 2016*.

Dated this 22nd day of August 2018



The image shows a handwritten signature in black ink, which appears to be 'Filimone Jitoko'. The signature is written over a horizontal dotted line. Below the signature, the name 'Filimone Jitoko' is printed in a standard black font.

Filimone Jitoko

Chief Justice