



**REPUBLIC OF NAURU**

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

**Criminal Case No. 26 of 2017**

Between

**THE REPUBLIC OF NAURU**

Complainant

And

**E.A (Juvenile)**

Defendant

**Before:**

Chief Justice Filimone Jitoko

**For the Prosecution:**

Mr J Rabuku, Director Public Prosecutions

**For the Accused:**

Mr R Tagivakatini, Office of the Public Legal Defender

**Date of Hearing:**

9 July 2018

**Date of Judgment:**

12 July 2018

**Case may be cited as:**

*Republic v EA*

**Catchwords:** *Indecent acts in relation to a child under 16 years old – section 117 Crimes Act 2016 – Purpose of sentencing – Sentencing considerations – Sections 277, 278, 279, 280 Crimes Act – Probation Order – No conviction recorded.*

## JUDGMENT ON SENTENCE

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### **Introduction**

- 1 The accused is charged with Indecent acts in relation to child under 16 years old contrary to Section 117(1)(a)(b)(c)(ii) of the *Crimes Act 2016* (the Act).
- 2 The accused entered a plea of guilty on 9 July 2018.

### **Summary of Facts**

The facts in support of the guilty plea are as follows:

- 3 In the early morning of the 13<sup>th</sup> of August 2017, around eight youths and men were drinking alcohol at what is called 'Beverly Hills' in Ewa District. Beverly Hills is a drinking spot in Ewa District that is frequented by the youths of Ewa. The spot is a bushy and secluded area where youths are able to drink alcohol away from the residential homes nearby.
- 4 Amongst the people drinking at Beverly Hills at this time, was the accused EA. The accused is a juvenile, born on the 5<sup>th</sup> of June 2002 and therefore 15 years and 2 months old at the time of offending.
- 5 At approximately 6a.m. in the morning, the complainant, EG, who was 14 years old and 2 months at the time, arrived at the drinking spot. She was dropped off by a friend on a motorcycle. EG was invited by the youths to the drinking party and she joined them. She was the only female at the party.
- 6 At some stage during this drinking party, EG became very drunk, blacked out and fell asleep. The prosecution's facts state that she was 'knocked out'.
- 7 Other people who were at the party had sexual intercourse with EG in turns while she was completely 'knocked out' from the alcohol she had consumed with them.
- 8 EA was part of the group, but did not have penetrative sexual intercourse with the EG. In the course of the victim being raped by the other accused persons, EA fondled the victim's breasts and private parts.
- 9 Three of the other people involved in the group were charged with Rape of a child under 16 years old contrary to section 116 of the *Crimes Act 2016* and sentenced to 7 years and 10 months imprisonment. Two of these were adults and one was another juvenile.
- 10 A medical report dated 13 August 2017 was conducted on the victim and supplied to the Court.

## Sentencing submissions - Defence

- 11 The offence under section 117 of the Act of Indecent acts in relation to child under 16 years old carries a maximum sentence of 12 years imprisonment. If the offence involves a child under 13 years old or aggravating circumstances apply, a maximum sentence of 15 years imprisonment applies. Section 117 states:

### 117 Indecent acts in relation to child under 16 years old

- (1) A person commits an offence if:
- (a) the person intentionally touches another person; and
  - (b) the touching 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.
- ... [subsections (2) and (3) omitted]
- (4) Absolute liability applies to subsections (1)(c), (2)(c) and (3)(c).

*Note for subsection (4)*

*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.*

- (5) In this section:
- ‘touching’ includes the following:
- (a) touching with any part of the body;
  - (b) touching a person through clothing or other material;
  - (c) using an object to touch a person.
- (6) The question whether touching or an act is indecent is one of fact to be determined by applying standards of an ordinary person.

- 12 The defendant is charged with the lesser offence under 117(1)(a)(b)(c) and (ii) which attracts a maximum sentence of 12 years imprisonment.
- 13 The Court is referred by defence counsel to section 277 of the Act which sets out the kind of sentences the Court could impose on a person found guilty of an offence. Counsel refers to:

**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 defendant serve a term of imprisonment;
- (b) with or without recording a conviction, order the offender to pay a fine; or
- (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;
- (e) impose any other sentence or make any order that is authorised by this or any other law of Nauru.

- 14 Counsel specifically referred the Court to s. 277(e) of the Act whereby the Court has a discretion not to record a conviction if the circumstances of the case permit. Counsel concedes that exceptional circumstances must apply for this discretion to be exercised. It is submitted that the defendant's youth, his minimal involvement in the context of the broader offending, and his future prospects as an academic and athlete, constitute the exceptional circumstances necessary for the exercise of the discretion under s. 277(e).
- 15 Counsel for the defence further refers the court to the purposes of sentencing that are set out under s. 278 and the general sentencing considerations under s. 279. For completeness, I set out such matters:

**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 sentencing;
- (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) ...
- (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 of 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 victim of the offence) – those circumstances.

- 16 The defence counsel submitted that subsections (a) to (g) of s. 278 are applicable to the defendant.
- 17 Counsel further referred the Court to sentencing considerations for imprisonment under s. 280 and sentencing considerations for payments of fines under s. 281. In relation to s. 280, counsel for the defence submitted that the Court must take into account whether it finds a sentence of imprisonment necessary in the circumstances of this case, as set out in the Act:

**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.

- 18 Defence counsel submitted that the accused be given a lenient and non-custodial sentence to give proper effect to his ability to reform and the other factors in mitigation.
- 19 Defence submits that EA is 16 years old and is currently a Year 10 student at Nauru Secondary School. The defendant initially pleaded 'not guilty' to this offending, but after concessions were made by the Prosecution, he decided to take a progressive approach and change his plea. The defendant is a first time offender and was 15 years old at the time of offending.
- 20 Counsel for defence submits that the defendant's offending is between the low end of the scale and counsel implores the Court to consider a probationary order. It is submitted by the defence that a custodial sentence is not warranted due to the defendant's limited involvement in the overall offending, his youthfulness, his immaturity and his bright future prospects.
- 21 It is submitted that the defendant's offending was opportunistic, a result of peer-pressure and a 'one time incident'. It is noted that this was not a pre-planned offence. Counsel refers to the case of *Republic v AB*, where the defendant was in a position of trust over the victim, there was planning and there was systematic abuse over a period of time. The sentence in that case was one of 1 year imprisonment.
- 22 Counsel for the defence acknowledges that it is the Court's paramount duty to protect children and that every reasonable step should be taken to achieve this. It is submitted that the defendant:

*...has now learned the hard way that being in the wrong place at the wrong time has grave consequences, which has resulted in him being remanded and having this case hanging over his head. He has taken a wrong step and now seeks to prevent such involvement in the future, and [is] instead now trying to focus on his academic and sporting ambitions.*<sup>1</sup>

#### Mitigating Factors

- 23 The following are submitted in mitigation on behalf of the defendant:
- (i) the defendant acknowledges that he is charged with a serious offence and is remorseful for what he has done;
  - (ii) the defendant entered a plea of guilty to the charge (albeit late);
  - (iii) the defendant has saved the prosecution and the Court's time and expenses from a full hearing;
  - (iv) the defendant is a first time offender and still a minor;
  - (v) the defendant has great prospects and a bright future ahead;
  - (vi) the defendant promises not to re-offend and is willing to reform;

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<sup>1</sup> Paragraph 6.9 of Mitigation and Sentencing Submissions for EA.

- (vii) the defendant fully cooperated with police during the investigation stage;
- (viii) the defendant was remanded in custody for almost two months, from 16<sup>th</sup> August to 5<sup>th</sup> October 2017; and
- (ix) the defendant is a budding Australian Football League player, with very good prospects of succeeding in this sport in Australia.

### **Sentencing submissions - Prosecution**

- 24 The prosecution gave oral submissions in regards to sentencing on 9 July 2018.
- 25 First, the prosecution said that they will not object to a non-custodial sentence, given that the defendant was a juvenile and a first offender and conceded that he was charged with the lesser offences of indecent acts.
- 26 The prosecution conceded to the submissions of the defence and agree that the appropriate range of sentence to be imposed in this case would be one of 3 years' probation with conditions.
- 27 Further the prosecution supported the defence submission that the court may consider not entering a conviction due to the exceptional circumstances of the case as detailed in the defence submission.

### **Consideration**

- 28 The court has carefully considered both the defence and the prosecution submissions as to the most appropriate sentence the court may be willing to consider.
- 29 The defendant is 16 years old and was only 15 years and 2 months old at the time he committed the offence. He is still attending Nauru High School, is a keen Australian football league player and has represented the country Nauru, in the Under 16 team that toured overseas last season. He found himself in an unfortunate situation and company and, as counsel puts it, "peer pressure" forced him to commit the acts. He is remorseful, fully co-operated with the police investigation, and promised that he will not re-offend. He also was in remand for 7 weeks, between 16<sup>th</sup> of August to 5<sup>th</sup> October, 2017.
- 30 The court is forever mindful especially in the cases of minors and young adults to the sentencing provisions of the law as set out in detail above. There must be a balance in the court ensuring that the offender is punished by making him/her accountable for the act and the protection of the society on one hand, and the promotion of the offender's rehabilitation, especially in the case of the young, on the other.
- 31 It is satisfied in this case that EA should benefit from the more compassionate approach by the court in allowing the defendant not to be committed to prison and furthermore that whilst he had pleaded guilty, the court shall not enter a conviction against his name.



## Sentence

- 32 The court finds EA guilty as charged for the offence of indecent acts in relation to a child under 16 years old under section 117 (a) (b) (c) of the Crimes Act 2016.
- 33 However the court, in the exercise of its discretionary powers under section 277 and section 277(e) in particular, will not record a conviction against EA. It proposes instead to make a probationary order pursuant to the court's powers under section 7 of the *Criminal Justice Act 1999*.
- 34 Under the *Criminal Justice Act 1999*, I have the power under section 7 to make an order in the following circumstances:

### 7 Probation orders

(1) Where a person is convicted of an offence punishable by imprisonment the Court may, instead of sentencing him to imprisonment, make a probation order releasing the person on probation for a period specified in the order, being a period of not less than one year nor more than three years.

...

(3) Where the Court makes a probation order under this section, it may also sentence that person to pay a fine authorised by law.

- 35 Taking into account the powers vested in me above, I hereby make a Probation Order allowing the defendant EA to be released on probation for a period 3 years, less the time he had spent in remand.
- 36 Should the defendant breach any of the conditions of the Probation Order set out hereunder, he will be brought back before the Court to be re-sentenced for this offence.

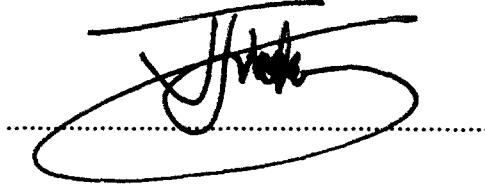
## Probation Order

I make the following orders as conditions in respect of that Probation Order.

1. The probation order shall be a period of around two years and 10 months with effect from today.
2. Within 24 hours you the defendant, shall report to Raelytta Daoc the acting probation officer or in her absence, to the Deputy Registrar, Irene Quadina Waidabu, and shall further report as and when required by either of the said officers.
3. Shall reside at the residential address of his parents at ....., and shall notify the probation officer of any change of address.

4. That you shall keep peace and be of good behaviour and commit no offence during the period of your probations.

Dated this 13 day of July 2018

A handwritten signature in black ink, appearing to read 'Jitoko', is written over a horizontal dotted line. The signature is enclosed within a large, hand-drawn oval.

Filimone Jitoko

Chief Justice