



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE No. 7 of 2020

BETWEEN

THE REPUBLIC

AND

HORASIO COOK

Before: Khan, J
Date of Hearing: 23, 24 June and 21 and 22 September 2020
Date of Judgement: 29 September 2020

Case may be cited as: Republic v Cook

CATCHWORDS:

Criminal Law – charge of indecent act on a child under 16 years old – whether something is indecent is a question of fact to be determined by the decider of the fact applying the standards of ordinary persons – Whether there is sufficient evidence to prove the charge.

APPEARANCES:

Counsel for the Prosecution: F Lacanivalu
Counsel for the Defendant: D Aingimea

JUDGEMENT

PART HEARD CASE

1. This is a part heard case. I heard the prosecution case on 23 and 24 June 2020 and adjourned the matter on 24 June for the completion of the defence case. On 26 June 2020, I departed Nauru. On 23 July 2020 my term of appointment as a judge of the Supreme Court expired. I was re-appointed on 27 August 2020 on fresh terms and conditions and was sworn in on 9 September 2020 under the new appointment. On 22 September 2020 this matter was listed for hearing. I informed both parties of the change in my position and gave them the option that I can only continue to preside over this case if they agree or I can hear it de novo or put it before another judge. Both parties agreed to me continuing with the trial.

INTRODUCTION

2. The accused is charged with one count of indecent act. The charge reads as follows:

Statement of Offence

Indecent acts in relation to a child under 16 years old; contrary to s.117(3)(a), (b), (c) and (ii) of the Crimes Act 2016.

Particulars of Offence

Horacio Cook sometime between 27 July 2018 and 13 November 2019 in Yaren District intentionally touched the breast of S.A.R. otherwise known as C.T., a child under the age of 16, and the touching was indecent and he was reckless about that fact.

3. I shall refer to CT's mother by her initial as well as her aunt, her cousin and her grandmother to ensure that the identity of CT is not revealed.
4. The defendant and the complainant's mother are in a defacto relationship for the last 3 years.
5. CT has been living with the defendant and her mother at the defendant's house in Yaren District when the relationship commenced until about 12 November 2019 when she went to live with her grandmother.
6. CT was born on 20 January 2005 and as at November 2019 she was 14 years 10 months old.
7. The prosecution's case is that between 27 July 2018 to 13 November 2019 the defendant indecently touched CT's breast. Although the charge is spread over a period of time – the prosecution's case is that there was only one act of touching.

8. The defendant denies that he ever touched CT indecently.

RELEVANT LAW

9. As to the relevant law I adopt what I stated in the case of the Republic v Hartman¹ where I stated as follows at [3], [4], [5] and [6]:

[3] S.117 of the Crimes Act 2016 (the Act) 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.
- 2) Not relevant
 - 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:

- 1) if the child is under 13 years old or aggravating circumstances apply – 15 years imprisonment; or
 - 2) in any other case – 12 years imprisonment.
- 4) Absolute liability applies to subsections 1(c), 2(c) and 3(c).

Note for subsection (4)

¹ NRSC 7; Criminal Case No. 16 of 2019, Khan J dated 4 March 2020

Although absolute liability applies to the circumstances 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 another 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 the standards of an ordinary person.
- [4] In all counts the word ‘reckless’ is used which is defined in s.19 of the Act as follows:
- 1) A person is ‘reckless’ about a matter if:
 - a) the person is aware of a substantial risk that:
 - i) in the case of a circumstance – the circumstance exists or will exist; and
 - ii) in the case of a result, the result will occur; and
 - b) having regard to the circumstances known to the person, it is unjustifiable to take the risk.
 - 2) The question whether taking a risk is unjustifiable is one of fact.
 - 3) If recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that fault element for the offence.

[5] FAULT ELEMENT

1. Fault element as mentioned in s.19(3) of the Act means as defined in s.16 of the Act as:
 - a) ‘fault element’ for a particular physical element may be:
 - i) intention; or
 - ii) knowledge; or
 - iii) recklessness; or
 - iv) recklessness indifference to consent; or

- v) negligence; or
- vi) another fault element specified in the written law that creates that offence.

[6] The Minister for Justice Honourable David Adeang MP in the second reading of the Crimes Bill 2016 stated as follows on ‘recklessness’:

“Clause 19 explains that a person is reckless in relation to a result if the person is aware that there is a substantial risk that the result will happen, and having regard to the known circumstances, it is unjustifiable to take the risk. A person is reckless in relation to a circumstance if the person is aware that there is a substantial risk that the circumstance exists or will exist, and having regard to the known circumstances, it is unjustifiable to take the risk.

Sub-clause (2) makes it clear that the question whether taking a risk is unjustifiable is a question to be determined by the decider of the fact on the evidence.

If ‘recklessness’ is a fault element for physical element of an offence, proof of ‘intention’, ‘knowledge’ or ‘recklessness’ will satisfy that fault element.”

INDECENT TOUCHING ACT

10. I again refer to the Republic v Hartman and I adopt what I stated at [44], [45], [46], [47], [48], [49], [50], [51] and [52] where it is stated as follows:

[44] The word ‘indecent’ has not been defined in s.117 of the Act and it is stated in s.117(6) that:

“The question whether touching or an act is indecent is one of fact to be determined by applying the standards of an ordinary person.”

The Minister for Justice the Honourable Adeang stated in the second reading of the Crimes Bill as follows:

“Whether something is indecent is a question of fact to be determined by the decider of fact applying the standards of an ordinary person.”

[45] In cases where the Court sits with jury – the jury decides the facts applying the standards of an ordinary person. In Nauru criminal trials in the Supreme Court is by a judge alone - see s.188 of the Criminal Procedure Act 1972.

[46] In *Peters v The Queen*² a case which dealt with dishonesty it was stated by the High Court as follows:

“Where it is necessary to decide whether an act is dishonest, the judge should identify the knowledge, belief or intent said to render it dishonest and instruct the

² [1998] 192 CLR 493

jury to decide whether the accused had that knowledge, belief or intent, unless the word 'dishonest' is used in a special sense in the legislation creating the offence, instruct them that, if they decide that he did, they have to determine whether, on that account, the act was dishonest based on the standards of ordinary, decent people."

[47] The elements of this offence are set out at page 2 of the written submissions filed by the Director of Public Prosecutions where it is stated as follows at [6]:

"What the prosecution has to prove beyond reasonable doubt are:

- 1) Counts two, three and four:
 - a) a person;
 - b) intentionally touching a child;
 - c) the touching is indecent;
 - d) the person is reckless about the indecent touching;
 - e) the child is under 16 years.
- 2) Count one:
 - a) Person;
 - b) Intentionally does an act towards a child;
 - c) The act is indecent;
 - d) The person is reckless about the indecent act;
 - e) The child is under 16 years old.

[48] The identity of the accused is not in issue and RH is under 16 years of age. What is in issue is whether the accused 'intentionally' touched or did the 'act' towards RH.

[49] In *R v Court*³ it was stated by the House of Lords at page 228 as follows:

"It cannot, in my judgement, have been the intention of Parliament that an assault can, by a mere mistake or mischance, be converted into an indecent assault, with all the opprobrium which a conviction for such an offence carries. To take one of the less imaginative examples discussed in the course of the arguments, it may be a common occurrence during travel on London Tube during rush hours for a person to suddenly realise belatedly that the train has stopped at the very station where he wishes to alight, without his having taken the wise precaution of getting closer to its doors. Such a person may well in his anxiety to get out, rather than be carried on to the next stop, use unnecessary force in pushing his way through his fellow passengers. If he thus came into contact with a woman, then he would be guilty of having assaulted her. If something that he was carrying, such an umbrella, became caught up, as it might well do, in her dress as he pushed past, thus tearing away her upper clothing, he would in my judgement be guilty only of an assault. He would not be guilty of an indecent assault. The contrary result

³ [1988] 2 ALL ER 221

would appear to be possible if the Court of Appeal's test was applied. It would certainly follow, if the submission made in their cases by counsel both for the appellant and prosecution were right, that to establish the mental element in the offence of indecent assault no more need to be established than for common assault."

[50] It was stated in *R v Court* at page 225 as follows:

"The judge having heard submissions by counsel directed the jury that the prosecution had to prove firstly that the appellant's conduct was such that 'it would appear to an ordinary observer as an affront to modesty'; 'conduct which contravened right-thinking people's ideas of standards of decent behaviour' and secondly that the appellant had 'an indecent intention in doing what he did'."

STANDARDS OF ORDINARY PERSON

[51] In *R v Court* it was stated at page 230:

"The assault which the prosecution seeks to establish may be of a kind which is inherently indecent. The accused removes, against her will, a woman's clothing. Such a case, to my mind raises no problem. Those very fact, devoid of any explanation, would give rise to the irresistible inference that the accused intended to assault his victim in a manner which a right-minded person would clearly think was indecent. Whether he did so for his own personal sexual gratification or because, being a misogynist, or for some other reason, he wished to embarrass or humiliate his victim seems to me to be irrelevant. He has failed, ex hypothesi, to show any lawful justification for his indecent conduct. This, of course, was not such a case. The conduct of the appellant in assaulting the girl by spanking her was only capable of being an indecent assault. To decide whether or not right-minded person might think that the assault was indecent, the following factors were clearly relevant: the relationship of the accused to his victim (were they relative, friends or virtually complete strangers?), how had the accused come to embark on this conduct and why was he behaving in this way? Aided by such material, a jury would be helped to determine the quality of the act, the true nature of the assault and to answer the vital question; were they sure that the accused not only intended to commit an assault on the girl, but an assault which was indecent; was such an inference irresistible?"

[52] According to RH she hardly spoke to the accused and never played with him, although they lived under the same roof. There were times when accused will tell stories to RH and other kids when they were together. She said he is a kind man but on some days he is angry.

MATTERS NOT IN DISPUTE

11. The identity of the defendant is not in dispute nor it is in dispute that CT was under 16 years of age between the period 27 July 2018 to 13 November 2019.

12. The defendant and LT (CT's mother) have a female child born on 24 December 2018 who is the step-sister of CT.

HOW THIS MATTER SURFACED

13. CT first confided in her aunty VT that the defendant touched her breast. She later told her cousin AB. VT and LT are sisters. VT informed her mother MT (CT's maternal grandmother) about the incident.
14. Marjorie Karl, is a Counsellor for Women's Department, and works under MT. She received a call from MT who requested her to come over to her place on 12 November 2019 at around 10.30pm. She went to MT's house as requested.
15. Upon her arrival at MT's house she was told by MT that she had been informed of certain incident relating to CT and she wanted her to take CT and speak to her and ascertain as to what happened.
16. She came back to her office with CT, VT and MT's sister Ann Scotty. She sat in her conference room and asked CT whether she could talk to her in the presence of VT and Ann Scotty and she said that she was quite happy to do so in their presence.
17. She told Marjorie Karl that she was with the defendant, her 6-month-old sister and they were sleeping on the bed. She went off to sleep and she woke up and saw the defendant next to her. He touched one of her breasts, then she turned around and he touched the other breast; and then he slipped his hand under her bra and touched both breasts and then he stopped.
18. Marjorie Karl reported the matter to the police who carried out an investigation and interviewed witnesses including CT, VT, MT and AB.
19. The defendant was interviewed by the police on 15 November 2019 and he denied the allegations.

OPENING ADDRESS

20. The prosecution's opening address is that the incident took place between 27 July 2018 to 13 November 2019. On the day in question the defendant and CT were alone in the house and they went off to sleep on 2 mattresses. CT requested the defendant to sleep next to her as she was frightened of ghosts. They slept with their backs to each other – the distance between them was a few inches. CT realized that the defendant was caressing her breasts on top of her shirt and later he moved his hand under the shirt to touch her breast.

CT'S EVIDENCE

21. Her evidence is that when this incident took place, she was alone with the defendant. Her mother had gone to Thailand; that the defendant and her were sleeping with their backs to each other as she was frightened of ghosts.
22. After she fell asleep, she realized that the defendant was touching her breast. When she woke up, she saw that the defendant was asleep.
23. This is the version she related to VT and AB in November 2019 before VT informed her grandmother.
24. Her version of how the incident took place and who were present when this incident took place is in conflict with the version that she gave to Marjorie Karl. Marjorie Karl spoke to CT or interviewed her in the presence of VT and Ann Scotty. She gave evidence that when the incident took place CT was with the defendant and her 6-month-old baby sister; that they were sleeping on a bed; that she dozed off. She felt someone was touching her breast and she woke up and saw the defendant next to her.
25. The only thing in common between CT's version and Marjorie Karl's version is that the defendant touched her breast. Apart from that her version differs in that CT said that she was alone with the defendant and when she woke up she felt someone touched her breast – she saw that the defendant was asleep whilst Marjorie Karl's version states that the defendant was awake and was next to her and that there were 3 of them on the bed – CT, baby sister and the defendant.
26. In answer to the questions asked by the Court in relation to the account she gave to Marjorie Karl about the presence of the baby sister, she was very adamant that the baby sister was not born then. This is how she answered the questions to the Court:

Court: Yes, thank you. Just Christina, I wish to clarify one matter of you. I take your version to be that night you said the incident took place, there was only you and Horasio Cook, correct?

PW1: Yes correct.

Court: That's what you said and that is what is in your statement and that's what you told your aunty Victoria first and then later on the others?

PW1: Yes.

Court: Correct. Do you remember speaking to Marjorie Karl?

PW1: Yes.

Court: And she's the one who lodged this complaint to the police?

PW 1: Yes.

Court: I just want to read a statement which says and it reads here, can you tell me what happened? And then it goes on, that night when you were settling down to sleep, before you fell asleep, her mother's boyfriend was lying down a bit far from her and her 6-month-old sister on the bed.

PW 1: That's a lie my sister is not born yet.

Court: That is what Marjorie has put in her statement and she is going to perhaps come to Court to give evidence that it was her, Horasio Cook and your 6-month-old sister.

PW1: No, I said it wasn't born yet. It wasn't born yet.

Court: So, this is what she is saying that you told her. You remember talking to her?

PW1: Yes

Court: In the presence of aunty Victoria

PW 1: Yes.

Court: You told her that your sister was on the bed as well.

PW1: No, she wasn't there, it's only us two.

Court: Yeah, but why did you tell her that the sister was on the bed as well?

PW1: I didn't tell her.

Court: You didn't tell her?

PW1: No,

Court: So, are you suggesting that Marjorie Karl made this up?

PW1: Maybe she heard wrong⁴.

27. It is abundantly clear according to CT that when this incident took place, she was alone with the defendant, the baby sister was not born then and her mother was in Thailand.

⁴ Page 12 of 56 Transcript

28. CT in her evidence was very consistent that when this incident took place her mother was away overseas. In her examination in chief she agreed that when her mother is overseas, she usually sleeps at aunty's place. The questioning was as follows:

FL: Now, you mentioned that your mum travels overseas for work.

PW1: Yes.

FL: Now when she travels overseas, where do you normally sleep?

PW1: My aunty's place.⁵

29. However, Mr Lacanivalu did not clarify as to whether she was at her aunty's place when her mother went to Thailand.

30. In her cross-examination by Mr Aingemea she said that when her mother went to Thailand, she was at aunty Laina's house right through. Her mother dropped her a day before she departed Nauru and went to collect her a day after her arrival in Nauru. In relation to this her cross-examination was as follows:

DA: You said that it was when your mother was in Thailand, is that correct?

PW1: Correct.

DA: So, your mother was overseas and you knew that she was in Thailand?

PW1: Yes.

DA: And you also said that it was before your younger sister was born?

PW1: Yes.

DA: Is it the younger sister that you had?

PW1: Yes.

DA: Yeah, so do you remember when your younger sister was born?

PW1: December 24.

DA: December 24, so can I suggest that it was December 24, 2018?

PW1: I'm not sure.

DA: But it was December 24?

⁵ Page 32 of 35 Transcript

PW1: Yes.

DA: So, then I just want to put that to you as a date anyway, alright, that your sister was born on December 24, 2018, okay?

PW1: Yes.⁶

DA: Can I put to you that during the time your mother was away, you stayed the whole time with aunty Laina?

PW1: Yes.

DA: So, from when your mother left until your mother came back you stayed at aunty Laina's place?

PW1: Yes.

DA: So, when your mother went to Thailand is it true that your mother took you to Aunty Laina's place for you to stay there?

PW1: Correct.

DA: After your mother came back from Thailand, she went and collected you from Aunty Laina's place?

PW1: Yes.⁷

CONSIDERATION

31. Exhibit P2 sets out the details of LT's travel itinerary. It states:

- a) Thailand - 27 July 2018 to 26 August 2018
- b) - 7 June 2019 to 20 June 2019
- c) - 24 June 2019 to 2 July 2019
- d) - 14 August 2019 to 25 August 2019

32. Although the charge states that the incident took place sometime between 27 July 2018 to 13 November 2019 there is clarity now that the incident took place before the baby sister was born. She was born on 24 December 2018. The only time before the baby's birth that CT's mother, LT, travelled overseas, and in particular to Thailand was between 27 July 2018 to 26 August 2018, when she would have been about 5 months pregnant.

33. CT by suggesting that the incident took place whilst her mother was in Thailand is a concoction because by her own admission, she was with aunty Laina for the whole period of her mother's absence.

⁶ Pages 4 and 5 of the Transcript.


⁷ Page 9 of 56 Transcript.

34. Her credibility was further impacted upon when she gave a different version to Marjorie Karl, who was the most independent prosecution witness. According to Marjorie Karl, she took down notes of what CT related to her and later gave evidence of the conversation with CT. CT suggested that Marjorie Karl perhaps got it wrong. Marjorie Karl is a Women's Counsellor and very highly qualified person.

CONCLUSION

35. From the reasons given above, I find that the prosecution has failed to prove its case beyond all reasonable doubt against the accused and I acquit him of the charge.

DATED this 29 day of September 2020.


Mohammed Shafiullah Khan
Judge

