



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Criminal Case No. 16 of 2019

BETWEEN

Republic

v

Alwyn Hartman

Before: Khan, J  
Date of Submissions: 10 and 11 March 2020  
Date of Sentencing: 13 March 2020

Case may be cited as: *Republic v Hartman*

CATCHWORDS: Criminal law – Charge indecent act – Custodial sentence – Totality principle to ensure that the sentence is just and appropriate.

APPEARANCES:

Counsel for the Prosecution: R Talasasa Jr (DPP)  
Counsel for the Accused: E Soriano

### SENTENCE

#### INTRODUCTION

1. You were found guilty of three counts of indecent acts contrary to s.117 of the Crimes Act 2016 (the Act) after a trial which lasted 2 days.

2. Having heard submissions from your counsel I now enter a conviction against you in respect of all three counts.

### FACTS

3. Count 1 relates to an incident when you were having a shower and you exposed yourself and masturbated in the presence of the victim, Count 3 relates to the incident where you carried the victim into your room and Count 4 relates to an incident where you touched her on her buttocks as you walked past her. At the time of offending the victim was under 11 years of age.
4. The victim lives with her family in a house which belongs to you and her grandmother who is your sister. She no longer lives with them. The victim's mother is your niece and she is married with 5 children. They occupy one bedroom and have built an extension of another bedroom – whilst you occupy one bedroom and other family members live in the other 2 bedrooms.
5. There is only one bathroom which is located outside and is shared by all the occupants. The incident on count 1 took place whilst you were in the shower and the victim went to fetch water from the water tank. The tap of the water tank is right opposite to the entrance to the shower and you exposed yourself whilst the victim was filling the water in a container.
6. The incidents on Counts 3 and 4 took place inside the house during the daytime.

### PENALTY

7. The penalty for the offence on Counts 1, 3 and 4 is 15 years imprisonment.

### YOUR PERSONAL CIRCUMSTANCES

8. At the time of the offence you were 53 years old, single. You have no children. You are a first offender.
9. At the time of the incident you were employed as a welder by Ronphos and you resigned as you have some medical issues with your hip.
10. After the incident on 17 May 2019 you have been living in Anabare in a container and survive on handouts as you have no income.
11. Although you were related to the victim through her mother, but you and the victim and her entire family never enjoyed close relationship. Despite living under the same roof, you effectively had no interaction with the victim and her family. Your counsel described your interaction as follows:

“... At its best, the interaction between the offender and victim was no different to the victim's interaction with other strangers.”

## VICTIM IMPACT REPORT

12. In the victim's impact statement filed by the prosecution on behalf of the victim it is stated that the victim has not been attending school this year because of the incident but in her evidence in court she stated that the reason she is not attending school this year is because she does not have a uniform.
13. The victim stated that she was very angry at you because of the incident and she was afraid that you would beat her up.
14. The incident has an adverse effect on her as she has become more reserved instead of being out and about and playing with children.

## SENTENCING SUBMISSIONS

15. The Director of Public Prosecutions has submitted that when the Act was enacted very strong emphasis was laid to protect the children who are victims of sexual offences. In his submissions he made reference to the second reading of the Crimes Bill 2016 by Honourable David Adeang where he stated:

“A major inclusion in this legislation is the greater protection in relation to sexual offences, particularly where children are victims. New offences have been included to address the criminal misuse of modern technologies and emerging trends in criminal behaviour.”

16. In his submissions the Director of Public Prosecutions relied on many case authorities including the following:
  - 1) Republic v AD<sup>1</sup> - where the juvenile offender was charged with one charge of indecent assault and was sentenced to 18 months imprisonment. The facts of the case were that the juvenile touched the victim on her vagina on top of her underwear. The juvenile was sentenced to 18 months imprisonment but he had two previous convictions – one for indecent act and one for the offence of rape.
  - 2) R v EF<sup>2</sup> - where the accused was 29 years old and the victim was 14 years of age. The circumstances of the offending were that the accused woke the victim up at about 4am after consuming alcohol and wanted to give his mobile phone to her and she refused to take it. She later went back to bed and slept and when she woke up she found that she was not wearing her underwear and the accused had his mouth on her vagina and he said to the victim that she should go to his house: ‘so that he could eat me properly’. The accused was a first offender and was sentenced to 4 years 3 months imprisonment.
  - 3) R v Baetiong<sup>3</sup> - the accused was charged for the offence of deprivation of liberty and indecent act under the Act – the accused was 71 years old and the complainant was a girl under 11 years of age. The accused enticed the complainant to go into a room so

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<sup>1</sup> [2019] NRSC 1 - Jitoko CJ

<sup>2</sup> [2018] NRSC 37 – Crulci J

<sup>3</sup> [2017] NRSC 64 – Criminal Case No. 7 of 2017 – Crulci J

that he could give her lollipops. Thereafter he tied the complainant's hands, blind folded her and put clothing in her mouth, closed the door and threatened to stab her with a knife. The accused removed her pants, and he kissed her on her lips and her neck and rubbed his fingers on her vagina. The accused was sentenced to 5 years imprisonment for deprivation of liberty and 4 years imprisonment for indecent act and both sentences were ordered to be served consecutively.

#### SUBMISSIONS BY THE DEFENCE

17. Mr Soriano has submitted that the offending by the accused when compared to the offending in the cases referred to by the Director of Public Prosecutions is '... that the seriousness of the offending is at the lower end of the scale of gravity.' He relied on the case of *R v Thoma* Criminal Case No. 22 of 2017 (unreported) – where the accused was charged for the offence of an indecent act. The accused was 19 years old and the complainant was 7 years old. The indecent act was love bites on the complainant's neck and stomach. Vaai, J ordered the accused to perform 150 hours of unpaid community service work.

#### SENTENCING

18. Sentencing is a very difficult task and previous case authorities can be used as a guide, but each case is different on its own facts and gravity of the offending.
19. In *R v Timothy*<sup>4</sup> - it was stated at [14]:

[14] Both the prosecution and the defence have a very important role to play in making sentencing submissions. Their role is very well set out at [38] of *Barbaro* where it is stated as follows:

“If a sentencing judge is properly informed about the parties' submissions about what facts should be found, the relevant sentencing principles and comparable sentences, the judge will have all the information to decide what sentence be passed ...”

20. When the facts of this case are compared to the facts of the cases that I have referred to above, the level of offending in this case is indeed at the very low end of the scale of gravity. In relation to Count 1 there was no touching, it was only a case of an indecent act of exposure, whilst in Count 3 you carried the complainant into your room and were disturbed when a motor cycle arrived; and in Count 4 you touched the victim's buttock as you walked past her. So, the element of touching was very minimal.
21. Although the level of gravity of offending was low, but you committed these offences over a period of time and you were reckless as to the consequences of your acts, effectively you couldn't care less about the victim.

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<sup>4</sup> [2019] NRSC 8 Criminal Case No. 3 of 2019 – Khan J

22. I would like to send out a clear message to the community at large that any kind of sexual abuse of children will be treated seriously and upon conviction custodial sentence would invariably be imposed.
23. You are sentenced to imprisonment as follows:
- Count 1 - 15 months imprisonment
  - Count 3 - 15 months imprisonment
  - Count 4 - 15 months imprisonment

#### TOTALITY PRINCIPLES

24. I am obliged to consider the totality principles to ensure that the total sentence that you serve is just and appropriate.
25. In *R v Olsson and Ors*<sup>5</sup> - the Totality Principle was discussed at [21] where it is stated:

[21] In *Mill v The Queen*<sup>6</sup> the High Court described the totality principle by quoting from DA Thomas, *Principles of Sentencing* 2<sup>nd</sup> Edition (1979) at pages 56 and 57 as follows:

“The effect of a totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are dealt with and specific punishments in respect of them are being totted up to make a total, it always necessary for the court to take a last look at the total just to see whether it looks wrong’; ‘when .... cases of multiplicity of offences come before the Court, the court must not content itself by doing the arithmetic in passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentences for all the offences.’

This principle has a wider application than the case specified in the passage quoted above. Thomas points out at 57:

“The principle applies to all situations in which an offender may become subject to more than one sentence: where sentences are passed on different counts in an indictment or on different indictments, where the offender is subject to a suspended sentence or probation order, where he is already serving a prison term or makes an appearance in different courts within a short space of time. In all such cases ‘the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive’.”

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<sup>5</sup> NRSC 7 Criminal Case No. 17 of 2017 – Khan J

<sup>6</sup> (1988) 166 CLR 59



26. In the circumstances, I am convinced that a sentence of 15 months would be just and appropriate so I order that the sentences on Counts 1, 3 and 4 are to be served concurrently with each other.

DATED this 13 day of March 2020



Mohammed Shafiullah Khan  
Judge

