



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 2 OF 2021

BETWEEN

THE REPUBLIC

AND

LAKENA DEGIA

Before:	Khan, ACJ
Date of Hearing:	5, 6, 7 and 14 April 2022
Date of Written Submissions by Prosecution:	22 April 2022
Date of Written Submissions by Defence:	22 April 2022
Hearing of Submissions:	19 May 2022
Date of Judgement:	17 June 2022

Case may be referred to as: *Republic v Degia*

CATCHWORDS: Criminal Law – Whether admissions in the record of interview to be admitted when the caution under Judges’ Rule not administered – Whether the discretion should be exercised in favour of the defendant and what is the test for exercising the discretion – Whether the charges were adequately particularized where child witness gave evidence and could not recollect the year and time of the incident – Whether there were insufficient particulars of the charges.

APPEARANCES:

Counsel for the Prosecution:	R Talasasa
Counsels for the Defendant:	T Lee

AMENDED JUDGEMENT

INTRODUCTION

1. The accused is charged with two counts of indecent acts in relation to a child under 16 years of age. The charge states as follows:

COUNT ONE

STATEMENT OF OFFENCE

Indecent acts in relation to a child under 16 years old: Contrary to s.117(1)(a), (b) and (c)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Lakena Degia in Meneng District Nauru on an unknown date between 1 January 2018 and 31 December 2018 intentionally touched the private part of CG, the touching was indecent and that Lakena Degia was reckless about that fact, and the said CG was under the age of 13 years.

COUNT TWO

STATEMENT OF OFFENCE

Indecent acts in relation to a child under 16 years old: Contrary to s.117(1)(a), (b) and (c)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Lakena Degia in Meneng District Nauru on an unknown date between 1 January 2019 and 31 December 2019 intentionally touched the private part of CG, the touching was indecent and that Lakena Dagia was reckless about that fact, and the said CG was under the age of 13 years.

RELEVANT LAW

2. S.117 of the Crimes Act 2016 (the Act) states:
 - 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 of age.
3. The penalty for this offence is 30 years now – Crimes (Amendment)No. 2 of 2020 (23 October 2020) of which at least one-third is to be served without any parole or probation, however, the offences as per the information took place in 2018/2019 and the penalty was 15 years if child was under 13 years of age or otherwise 12 years imprisonment.

4. This is a strict liability offence.
5. S.117(5) provides:

 ‘touching’ includes the following:
 - a) touching with any part of the body;
 - b) touching a person through clothing or other material; or
 - c) using an object to touch a person.
6. S.117(6) provides the question whether touching or an act is indecent is one of fact to be determined by applying the standards of an ordinary person.

ELEMENTS OF OFFENCE

7. The elements of the offence are:
 - 1) The defendant touched CG as described in s.117(5);
 - 2) That the touching was intentional;
 - 3) The touching was indecent applying the standards of an ordinary person;
 - 4) CG was under 16 years of age at the time of the offence.

BURDEN OF PROOF

8. Under s.25 of the Act the prosecution bears the burden of proving all the elements of the offence and the legal burden of proof on the prosecution is beyond all reasonable doubt.

FACTS

9. The identity of the accused is not in dispute and it is not in dispute that the victim CG (victim) was born on 10 November 2008 and was under the age of 16 years at the time of the alleged incident.
10. The accused is married to the victim’s maternal grandmother, C. He is not the biological father of the victim’s mother, WG. The victim’s father is RM.
11. The accused lived at Meneng Terrace in a 2-bedroom house (Meneng Terrace) which belongs to C.
12. Between 2016 to October 2020 the victim lived with her parents and her 2 younger siblings in Meneng Terrace with the defendant and his wife, C.
13. In October 2020 the victim’s family moved to Nibok District to live with her mother’s cousin, Bethany.

TELEPHONE CALL TO NAURU POLICE STATION

14. On 18 January 2021 the accused contacted the Nauru Police Station by telephone at around midday and told the police officer that he spoke to, to escort him to the police station as he wanted to discuss some matters with them. He stated that he did not wish to discuss it over the phone. At about 1pm he was taken to the Nauru Police Station and according to the first information report he “reported himself to sexually assaulting another person”. He was then taken to the cell and the matter was handed to the Domestic Violence Unit for investigation.
15. As a result of the report by the defendant Senior Constable C Kitty Biang was appointed to be the investigating officer. On 18 January 2021 she and Sgt Lady Jane Hilo visited the victim in Nibok District and they informed her and her mother that the defendant had reported to the police station of committing indecent acts on the victim. She later brought them to the police station to allow her to take the victim’s statement.

VICTIM’S VERSION

16. In her statement to the police, she stated that the accused had touched her on her vaginal area on 2 different occasions; and that both incidents took place at night in the lounge area; and that at the time of the incidents she was about 10-11 years old.

FIRST INCIDENT

17. She stated that the first incident took place when she was sleeping on the couch and her grandmother was sleeping on a mattress on the floor. She stated that the defendant came home late at night and lifted her from the couch and laid her on the mattress and touched her on her thigh and vaginal area from outside her pants.

SECOND INCIDENT

18. She stated that the day the second incident took place her parents had an argument and her father walked out of the house and he went out of the house and sat on a trampoline; she was going to him when the defendant called her and made her lie next to him and touched her vaginal area from outside her pants.

RECORD OF INTERVIEW

19. After the victim’s statement was taken the defendant participated in a record of interview on 19 January 2021. Because the case was of a sexual nature and the suspect was a male SC Biang did not conduct the record of interview, and instead it was conducted by PC Bragga Namaduk whose role was only confined to taking of the record of interview. There is a conflict in how the questions and answers to the record of interview were formulated. PC Namaduk said that he was briefed by SC Biang and because it was a case of a sexual nature, he was not able to have access the victim’s statement; whilst, SC Biang in her evidence stated that she prepared the questions and gave it to PC Namduk to conduct the record of interview. She further stated in her evidence that the victim was unable to recall the time when the incidents took place so she estimated the time as to when the incidents took place.

20. Questions 26-29 of the record of interview were redacted by an order of Fatiaki CJ on 30 June 2021 as it contained material which was prejudicial to the defendant. The redacted version of the record of interview states as follows:

Question 8: I will now tell you what is alleged against you, do you understand?

Answer: I understand.

Question 9: It is alleged that on the unknown date between 1 January 2018 to 31 December 2019 you sexually assaulted a young female, namely, CG, do you understand the allegation?

Answer: I understand.

Question 10: Before I ask you further questions I must warn you that you are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence. Do you understand?

Answer: I understand.

Question 11: You have the right to seek legal representation; do you wish to exercise this right?

Answer: No.

Question 12: Lakena can you tell the record of interview what do you do for a living?

Answer: I am unemployed.

Question 13: Are you married?

Answer: Yes.

Question 14: How long have you been married?

Answer: 22 or 23 years now.

Question 15: Can you tell me what your partner's name?

Answer: C.

Question 16: How many children does your partner have?

Answer: 9 in total.

Question 17: Does she have any grandchildren?

Answer: She does have grandchildren.

Question 18: How many grandchildren does she have?

Answer: Just over 10.

- Question 19: Do you know a person goes by the name of CG?
- Answer: I know her.
- Question 20: Who is CG?
- Answer: Our granddaughter, C and I.
- Question 21: How do you know C?
- Answer: She lived with us, we raised her.
- Question 22: Do you know how old is C?
- Answer: Twelve.
- Question 23: Do you know what school she is attending?
- Answer: She is not attending school.
- Question 24: Do you know C's parents?
- Answer: I know her parents W and RG
- Question 25: Are you related to C's parents?
- Answer: No, W is my wife's (C) daughter.
- Question 30: It is alleged that she was sleeping in the lounge and you lifted her and laid her on the mattress and sexually assaulted her? Do you agree or what can you say?
- Answer: I agree.
- Question 31: What do you mean I agree with question 30?
- Answer: It happened too.
- Question 32: What was she doing when you sexually assaulted her?
- Answer: She was sleeping in the lounge, no one was there at the time, only me and her.
- Question 33: It is alleged that she was sleeping when you lifted her and sexually assaulted her? Do you agree or what can you say?
- Answer: I agree.
- Question 34: How many times have you sexually assaulted C?

Answer: The incident at the lounge. I feel guilty from doing it.

CROSS EXAMINATION

21. The victim was extensively cross examined on when and how the incidents took place and her cross examination was as follows:

After my grandfather made me lie on the mattress – he was touching me outside and not inside my pants.

Question: You said that happened when you were – how old?

Answer: 10 or 11 years old.

Question: Do you know what year you turned 10?

Answer: No.

Question: Do you know when you turned 11?

Answer: No. I am in year 13. I am in form 2 and in form 1 I would be 11.

Question: How old were you in 2021?

Answer: 12 years.

Question: 2020 how old?

Answer: 11 years.

Question: In 2019?

Answer: 10 years. In 2019 I was in grade 5.

Question: Do you know when the first day of the year is?

Answer: No.

Question: 1 January is the first day of the year.

Answer: Yes.

Question: How many months in a year?

Answer: I don't know.

Question: Do you know when first term starts?

Answer: No.

Question: Do you agree that first term starts in January?

Answer: I don't know.

Question: Would the incident have happened in 2018 January?

Answer: I don't know. I know Nauru Independence Day is in January.

Question: Did it happen after January or February, do you know Valentine's Day?

Answer: I don't know of Valentine's Day.

Question: Did it happen in February?

Answer: I don't know.

Question: Do you know that the Woman's Day in March?

Answer: No.

Question: Did it happen any time in March

Answer: I don't know.

Question: Do you know that Easter is in April?

Answer: Yes.

Question: Did it happen in April after Easter time?

Answer: No.

Question: Do you know when is Constitution Day in Nauru?

Answer: No.

Question: Do you know that Constitution Day is in May?

Answer: No.

Question: Did it happen in May?

Answer: I can't remember the month that it happened.

Question: I put it to you that it did not happen in May?

Answer: I don't know.

Question: The allegation did not happen in January and February, March and April and I am putting that to you?

Answer: Correct it was in 2019 and not 2018.

Question: So, I just confirm that nothing happened in 2018?

Answer: Yes.

Question: When did the trampoline incident happen?

Answer: In 2018 or 2020.

Question: You said one time your mum and dad had a fight and I went outside and sat on the trampoline?

Answer: Yes.

Question: That is when your grandfather called you?

Answer: Yes.

Question: Your grandfather was in the living area?

Answer: Yes.

Question: You said he said don't tell anyone?

Answer: Yes.

Question: You told the Court that he put his hand inside your pants?

Answer: Yes.

Question: When did this incident happen – in 2019 or 2020?

Answer: I can't remember.

Question: You said he put his hand inside the pants?

Answer: Yes.

Question: Can you see your statement to police?

Answer: Yes.

Question: Can you see question 10 in Nauruan version?

Answer: I can't read Nauruan.

Question: Can you read the translated version – question 9 and 10?

Answer: Reads out question 9 and 10.

Question: You said it was outside your pants, is that correct?

Answer: Yes.

Question: You did not say inside your pants is that correct?

Answer: Yes.

Question: Look at question no. 21 read it out.

Answer: She reads out.

Question: So, this is what you told police?

Answer: Yes

Question: So, you never mentioned to police that your grandfather never put his hand inside your pants and I am putting to you?

Answer: I didn't tell them.

Question: So, you told the police that when you went to look for your father he only touched you from outside is that the truth?

Answer: No, it was inside my pants – but outside my underwear.

Question: I am putting to you what you told the police and what you told the Court is true regarding the trampoline incident?

Answer: No, I am telling the truth.

Question: You said you went to look for your father?

Answer: I was just about to step out when Lakena called me back.

Question: Is it true that after the fight your mother was in the room with you?

Answer: Yes.

Question: That your grandfather was also in the house?

Answer: No.

Question: After the incident why didn't you go to look for your father?

Answer: Because my father came back in.

Question: So, when did your father come back inside?

Answer: After the incident. I stood up and I walked away but he called me back – I said no but my father came back inside the house. When my father walked in my grandfather was lying on the mattress.

Question: Why didn't you tell your father what your grandfather did?
Answer: I was scared.

Question: The reason you didn't tell was because it never happened.
Answer: It did happen and Lakena told me not to tell anyone.

Question: So, you could have told your father?
Answer: Yes

Question: But you did not?
Answer: Yes.

Question: When were you 11 years old?
Answer: Yes.

Question: What year would you be 11 years old.
Answer: In 2020 or something.

Question: When did the incident about the trampoline occur when you were 11 in 2020, 12 in 2021 or 10 in 2019?
Answer: I think it was in 2020.

Question: My question is when did it happen in 2019 when you were 10 years old or in 2019 when you were 11 years old when you told Luna?
Answer: The incident happened in 2020.

Question: I am going to ask you one last time did the incident occur in 2020?
Answer: Yes.

Question: Not in 2019?
Answer: Yes.

Question: Nothing happened in 2019 is that correct?
Answer: Yes.

Question: Nothing happened in 2018 is that correct?
Answer: Yes.

22. Upon completion of the prosecution case the accused chose to remain silent and that is his right and no adverse inferences can be drawn from that.

SUBMISSIONS

FAILURE TO CAUTION – UNDER JUDGE’S RULES

23. Mr Lee submitted that he had already informed the court that the admissibility of the admissions in the record of interview will not be challenged by way of voir dire, however, notwithstanding that the defence reserved its right to make submissions on the issue of admissibility of the admissions.
24. Mr Lee submitted that after the defendant had waived his right to seek legal advice or legal representations, he was not cautioned under the Judges’ Rule to the effect that whatever he said in the record of interview would be recorded and given in evidence; and the failure to do so renders all the admissions at questions 30 – 34 to be inadmissible for being in breach of the Judges’ Rule.

ISSUE OF TIME OF INCIDENT

25. Mr Lee submitted that the complainant had accepted in her cross examination that no incident took place either in 2018 or in 2019, and that she accepted that the incident took place in 2020; and that the incident in respect of counts one and two stated that an incident took place between 1 January 2018 to 31 December 2018 and 1 January 2019 to 31 December 2019 respectively. He submitted that the issues about the charges was addressed previously and, in a ruling, delivered on 19 November 2021¹ in which it was stated as follows at [21] and [23]:

[21] “...**This form of pleading is quite proper where the date is not an essential part of the alleged offence and, of itself, does not render a count bad for insufficiency of particulars.**” (Emphasis added)

[23] Whereas in cases like this one where only one incident is alleged in 2018 one in 2019 poses no problem as long as there is evidence of only one act as stated in counts one and two. However, if the evidence reveals more than one act then it creates problems...”

26. Mr Lee conceded that if only one incident had occurred separately in count one and two respectively then the dates would not have been an “essential” part of the offence, however, because the complainant has stated that no incident took place in 2018 or 2019 and that the incidents took place in 2020 it has become an “essential” part of the offence. He further submitted that the complainant has stated that the incident took place when she was 10 or 11 years old and it was not agreed that the complainant was either 10 or 11 in 2018 or 2019.
27. He also submitted that the complainant’s acceptance that no incident took place in 2018 or 2019 meant that the defendant did not put his hand outside her pants in 2018 and 2019 respectively.

¹ Degia v R [2021] NRSC 48; Criminal Case No. 2 of 2021 (19 November 2021) Khan J

28. On the issue of the Judges' Rule and failure to caution the defendant the DPP's response is that the accused was cautioned at the beginning of the record of interview and the accused knew the allegation against him having reported the matter to the police himself and then made the admission. On the issue of the time of the incidents the DPP submitted having cited Archibald 2021 Edition pages 69 to 71 that "*Despite the old authorities to the effect that the date of the offence must be shown in the indictment it never seems to have been necessary for the date shown to be proved by evidence unless time is of an essence of the offence*". He also submitted that the age of the victim is clear, in that, she was under 16 years of age at the time of the incident.

CONSIDERATION

29. The breach of the Judge's rule does not in itself render all admissions to be inadmissible. See Carter's Criminal Law of Queensland (Lexus Nexus, Butterworths) page 824 where it is stated:

"The Judges' Rules however, as has been frequently pointed out, are not rules of law but only rules of guidance of the police and so evidence obtained in contravention of the Judge's Rules is not necessarily admissible in law. See *R v Wattam (1952)* 36 Cr App R 72. It is a matter for the trial judge, in the exercise of his discretion in the circumstances of each case, whether he will refuse to admit a statement which is voluntary, on the ground that there has been a breach of the Judges' Rules.

30. In *Reg v Nichols, Johnson and Aitcheson*² the Court of Criminal Appeal stated at pages 208 and 209 as follows:

"As has frequently been pointed out, Judges' Rules are not rules of law, and it is not every breach of one or more of them which will require the rejection of evidence obtained as a result of such breach. The rules have been formulated as a guide to investigating officers so that if they do not wish to run the risk of having evidence rejected they should see that they abide by those rules. If, however, they do not follow them, the trial judge may in the exercise of his discretion exclude any evidence which he considers has been obtained in breach of them. In exercising such discretion however, it is proper and relevant to ascertain whether in obtaining of the evidence in breach of the rules there is anything which could be said to be improper or unfair to the prisoner to the extent that it is in the interests of justice that the evidence should be excluded. Such a discretion also exists in cases where there has been no infringement of the Judges' Rules.

It has not been suggested nor could it be suggested that any of the evidence is untrue or that any of the facts contained therein are incorrect. Nor has it been suggested that there was any unfairness to the prisoner. The appellants rely upon the fact that the rules were infringed and contend that for that reason the evidence should be excluded.

After a careful and close scrutiny of the whole of the trial script, I have come to the conclusion that, although the learned trial judge held that Johnson was not in custody within the meaning of Rule 3, there is no sufficient grounds for rejecting the evidence which has been objected to." (Emphasis added)

² (1957) 200 QD.R 200

31. This is a very unusual case in that no formal complaint was ever made to the police about the complainant having been sexually abused by anyone; and only after the defendant contacted and later spoke to the police that the investigation process commenced; after he told the police that he had sexually assaulted the complainant. There is no evidence before me as to what prompted him to do so. It is correct that the investigating officer did not caution the defendant when he waived his rights to seek legal advice and his counsel now invites me to exercise my discretion in his favour and rule that the admission is not admissible
32. The test for exercising the discretion is set out in *R v Nichols and Others* above where it is stated at [31] as follows:
- “... In exercising such a discretion however, it is proper and relevant to ascertain whether in obtaining the evidence in breach of the rules there is anything which could be said to be improper or unfair to the prisoner to the extent that it is in the interest of justice that evidence should be excluded.”***
33. The defendant of his own volition admitted to sexually assaulting the victim when he first met and spoke to the police. Nobody knew about the sexual assault except him and the victim and apart from that the only person was Luna, the victim’s friend. The admission is consistent with the version given by the victim and therefore it cannot be suggested that there is any unfairness to the defendant and in the circumstances, I am unable to exercise the discretion in his favour and rule that the admissions made by him in the record of interview is admissible.

TIME OF INCIDENT

34. The allegation put to the defendant in the record of interview was that he had sexually assaulted the victim between 1 January 2018 to 31 December 2019 by lifting her from the couch and putting her on the mattress (first incident), and he admitted by saying: “I agree”; and when asked to explain it to what did he mean by saying that “I agree”, his response was that: “It happened”. Notwithstanding these admissions by the defendant and the defence having made a conscious decision not to make an application for a voir dire to challenge the admissibility, it was suggested to the victim in cross examination that no incident ever took place in either 2018 or 2019. That line of cross examination was unfair and improper.
35. It is correct that the victim had difficulties with dates, months and years and she was not able to say as to when the school term would begin or end and she was unable to remember special events like Independence Day, Valentine’s Day etc but she was very adamant that the two incidents took place which she described in detail.
36. The defendant in his record of interview stated that he knew that the victim was 12 years old (as at 19 January 2021 – her date of birth being 10 November 2008) and according to the victim both the incidents took place when she was living at Meneng Terrace with her family with the accused and his wife (grandmother). They left Meneng Terrace in October 2020. On the basis of this it would be correct to say the both incidents took place before she was 11 years old.

37. The defence contends that the victim's agreeing to the fact that no incident took place either in 2018 or 2019 which is the subject of the two counts respectively make the information "bad for insufficiency". That is not the only criteria to determine as to whether the information is bad for insufficiency. What is important is whether the charges are clear and distinct from each other. This issue was addressed in *R v KP; ex parte A-G (Old)*³ where children aged 11 and 12 were victims and William JA stated as follows at [2] and [3]:

[2] One point taken by the appellant, who appeared in person, was that there was insufficient particularity with respect to the numerous charges against him. Courts are now being called upon to adjudicate upon conduct which occurred many years prior to trial, and in most of those cases it is not possible for the complainant to give a precise time and date for the conduct constituting each of the numerous offences which are almost invariably involved. *The inability to provide a precise time and date does not mean that each charge is insufficiently particularised so that the accused is deprived of a fair opportunity of mounting a defence to it. What is important is that the evidence in relation to each charge is clear and distinct, and readily distinguishable from the other charges levelled against the accused.*

[3] As the reasons of Holmes JA demonstrate, the evidence here satisfied that test. Though no precise date was ascribed to each charge, each charge was the subject of detailed evidence distinguishing it from the other charges. *The timeframe within which each of the offences was alleged to have occurred was established by the evidence. In consequence I have come to the conclusion that there was no substance in the appellant's complaint as to the want of particulars with respect to the various charges he faced at trial.* (Emphasis added by me)

38. Holmes JA stated in *R v KP* at [46], [47] and [48] as follows:

[46] *The appellant complained of a lack of particularity in the charges. He said that A could not give time of day, date or time of the year for particular events. That course, is not fatal.* But his counsel had applied for a pre-trial ruling as to the adequacy of particulars on specific counts, on the basis that the evidence (at that stage as it appeared in the appellant's statements) was insufficient to distinguish those events from others by reference to anything objective. The learned judge on the pre-trial application ruled against that submission, except in respect of one count (count 9) which was then the subject of a nolle prosequi.

[47] The application was renewed at trial, in the form of a submission that counts 1- 4, 6, 8, 12-14, 17, 20-22, and 27-29 were insufficiently particularised and ought not to be left to the jury. The complaint was that A had given evidence of the events without reference to any objective circumstances and in respect of a number had referred to them as the first occasion of a particular type of offending. (That submission seems to have been made with, in mind, this Court's criticism in *R v F* of particulars of an indecent dealing count: "Its designation as 'the first occasion' did not enable it to be identified by referring to any objective external fact or event and did nothing to diminish the difficulties apprehended by their Honours in similar circumstances in *S v The Queen*".) The learned trial judge expressed the view that

³ [2006] QCA 3001

the evidence had not differed significantly from that placed before the judge considering the matter pre-trial and considered therefore that there was no basis for revisiting the ruling.


[48] The difficulties of inadequate particularisation identified in *S v The Queen*, primarily by Dawson, Gaudron and McHugh JJ, were: the risk of latent ambiguity, that is, that any one of a number of offences might fall within the description of the relevant count; the difficulty of answering charges of unspecified occasions; the problem of determining admissibility of similar fact evidence when it could not be related to a specific offence on an identified occasion; the possibility that jurors would identify different occasions as constituting the relevant offences, so that the verdict was not unanimous, with the related risk of conviction on the basis of a general disposition to commit offences of the kind; and the problems inherent in pleading *autrefois convict* or *autrefois acquit* where there was uncertainty as to the offence of which an accused had been charged.

39. The evidence in relation to the two incidents is distinct and clear, and of course the first incident was admitted by the defendant in the record of interview.

CONCLUSION

40. In the circumstances I am satisfied that the prosecution has proved all the elements of the offence in the two counts beyond all reasonable doubt and I find the defendant guilty of the two counts as charged.

DATED this 17 day of June 2022


Mohammed Shafiullah Khan
Acting Chief Justice

