



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

**Criminal Case No. 11 of 2023**

**BETWEEN:** THE REPUBLIC  
**PROSECUTION**

**AND:** VISION BIDINIMI ENGAR  
**ACCUSED**

**BEFORE:** Keteca J

**Date of Hearing:** 30<sup>th</sup>, 31<sup>st</sup>, July, 02<sup>nd</sup>, 3<sup>rd</sup> August 2024

**Date of Submissions:** 16<sup>th</sup> August 2024

**Date of Judgment:** 23<sup>rd</sup> August 2024

**Case may be cited as:** Republic v Vision Bidinimi Engar

**Catchwords:** Rape of Child under 16 years old: contrary to Section 116(1)(a)(b) of the Crimes Act 2016

**Appearances:**

Counsel for the Prosecution: **M.Suifa'asia**

Counsel for the Accused: **S. Hazelman**

**JUDGMENT**

**BACKGROUND**

1. The accused is charged with with two counts of Rape of a Child under 16 years old: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.

2. The Information reads:

**COUNT 1**

*Statement of Offence*

RAPE OF CHILD UNDER 16 YEARS: contrary to Section 116(a)(b) of the Crimes Act 2016.

*Particulars of Offence*

VISION ENGAR on the 7<sup>th</sup> of May 2023 at Aiwo District in Nauru, intentionally engaged in sexual intercourse with SD by licking her vagina and SD is a child under 16 years old.

**COUNT 2**

*Statement of Offence*

RAPE OF CHILD UNDER 16 YEARS: contrary to Section 116(a)(b) of the Crimes Act 2016.

*Particulars of Offence*

VISION ENGAR on the 7<sup>th</sup> of May 2023 at Aiwo District in Nauru, intentionally engaged in sexual intercourse with SD by penetrating her vagina and SD is a child under 16 years old.

3. The amended Information was put to the accused and he maintained his not guilty plea.

**THE LAW**

4. Rape of a child under 16 years old: Section 116(1)(a)(b) and (i) of the Crimes Act 2016 states:

*(1) A person commits an offence, if:*

*(a) the person intentionally engages in sexual intercourse with another person; and*

*(b) the other person is a child under 16 years old.*

*Penalty: life imprisonment, of which imprisonment term at least 15 years to be served without any parole or probation.*

5. Definitions- Crimes Act 2016

Section 8- *Oral Sex* means:

*The bringing into contact of any part of the genitals or anus of a person with any part of the mouth (including the lips or tongue) of another person*

*Sexual intercourse means:*

*(a) ... (d) ...*

*(e) oral sex or*

*(f) the continuation of an activity covered by paragraphs (a) to (e).*

**THE PROSECUTION CASE**

6. The prosecution called nine witnesses.

**PW1-** Sgt Luke Agege

On 07<sup>th</sup> May 23, he received a report from a Ima that the accused, sexually assaulted his daughter. He was manning the front desk. Accused brought to station- taken to watch house. Read the accused his rights. Earlier report on the accused being assaulted was withdrawn.

**PW2-** Sgt Jamieson took photos of the scene where the incident happened. Took 8 photos:

- Photo 1- tent outside the dwelling
- Photo 2- Main entrance to the house
- " 3- Door to complainant's room

- '4- Victim's room and couch
- '5- couch and bed
- '6 Room of victim's cousin
- ''7- same as 6
- '8- back entrance to the house

Photos 1-8- Prosecution Ex-1

**PW3-** Police Reserve- Vicka Dageago- with other police officers picked up the accused from Aiwo and took him to RON hospital.

**PW4-** Constable Chrisman Gioura- part of the police officers that took the accused to RON hospital. He was then taken to the station.

**PW5-** Constable Joshua Batiku- Part of the team that picked up the accused. Identified the accused as " Imie."

**PW6-** SD – the complainant was born on 16<sup>th</sup> Feb 2008- she's 16years old now. *(She was distressed and crying a lot- whilst struggling to give evidence)* On 07<sup>th</sup> May 2023, she returned from her grandma's place. She went to her room and slept. She felt 'cold' on her vagina. She woke up, looked down and saw Imie between her legs. She was shocked to see Imie between her legs. Imie was licking her vagina. He stood up, went to the door, turned and said- "Not to tell anyone as what will happen next will be worse.'

He went out and shut the door. She fell asleep again.

She felt cold on her vagina again. Imie was on top of her. He held her mouth shut. He inserted his dick in her vagina. It felt like a needle poking her. He then pulled his dick out and sat on the couch. She was afraid. He put on his pants, sat next to the victim, held her shoulders and said that "it's good that I don't tell anyone about it.'

He asked if she'd tell anyone. She said no. He left the room and shut the door.

She got her phone and called her cousin- Freedom who was in the adjacent room. She went to Freedom's room, she was crying and told him that Imie ' took off my pants.'

Imie is her cousin. Their mothers are sisters. Freedom is younger than Imie.

### **CROSS EXAMINATION**

Grandmother runs a 'kava' business. PW6 usually serves kava there at 7pm till 6am the next morning. Immediate reaction after feeling something cold was open her eyes and look down.' Saw his head between my legs.'

'He was licking my vagina'. She tried to see who it was.:

'When he opened the door to walk out- I saw his face- Imie's face.'

### *On the Second Incident*

Didn't notice her pants being removed. Imie came on top of her and closed her mouth. She was trying to push him away.

Q- you mistook Imie for someone else?

Ans- It was Imie

### **RE- EXAMINATION**

‘When he opened the door, I clearly see him.’

**PW7-** Dr Angeline Makutu - Examined the complainant PW6 on 07<sup>th</sup> May 23. PW6 relayed that she had been sexually assaulted by the accused. Vagina- no bleeding, lacerations or discharge. On D-16 of medical report- evidence of ‘sexual penetration before she presented to the emergency.’

On D-15- ‘spermatozoa seen on HVS test

Evidence of sperm- deposit of sperm in the vagina- sexual intercourse did take place. Sperm can be alive for 03 days.

**PW8-** Freedom Engar- 20 years old. Younger brother of the accused. On 07<sup>th</sup> May 2023, whilst in his room, PW6 called her. She was crying. She went to his room (in the same house) – she was crying and shivering. He asked her what happened. She said ‘Imie pulled down her pants.’

He went looking for his brother. His Uncle Jese beat his brother up. When he got back home- PW6 was still crying and the whole family was comforting her.

**PW9-** Hope Dowedia- PW6 is her second daughter. She was born on 16<sup>th</sup> Feb 2008.

7. That concluded the prosecution case.
8. The Defence did not apply for a no case to answer. The accused chose to remain silent.
9. Both counsels filed written submissions.

### **SUBMISSION BY DEFENCE COUNSEL**

10. The gist of Ms Hazelman’s submissions is that PW6 did not properly identify the accused as the person who raped her on both occasions. She raises the following:
  - i. Duration of observation- initial observation was brief and made while PW6 was not fully awake.
  - ii. Although the accused was close to her, the poor lighting ‘limited her ability to make a reliable identification.
  - iii. Lighting conditions- the room was dark –‘with minimal light filtering through the curtains.
  - iv. Impediment to observation- PW6 was drowsy. With poor lighting, it impeded her ability to observe and identify the person accurately.
  - v. Familiarity with the accused- PW6 was not close to the accused. She did not feel comfortable with him. The lack of familiarity casts doubt ‘on her ability to identify him accurately.’
  - vi. Timing of identification- the identification occurred ‘during a traumatic and stressful event- memory and perception are often distorted.’
  - vii. Discrepancies in the testimony of SD.

11. Ms Suifa'asia submits the following:

- i. 'PW6 is a very credible witness. Her demeanor in court cannot be flawed. She was so emotional with the trauma of having to relive the events of the day. She was raped twice. The accused was no stranger. He was known to PW6 as her first cousin.'
- ii. The evidence of PW1 was consistent and unshaken by cross-examination. She was in distress when she immediately 'reported to PW8 who was the accused's younger brother.'
- iii. There is evidence beyond reasonable doubt to find the accused guilty of the two counts of rape of SD.

#### **ELEMENTS OF THE OFFENCE**

12. The elements of Section 116(1)(a)(b) are:

"The accused  
Intentionally  
Engages in sexual intercourse  
With SD  
And SD is under 16 years old"

#### **DISCUSSION**

13. Identity of the Accused- On the first incident, PW6 said- 'He was licking my vagina'. She tried to see who it was.

'When he opened the door to walk out- I saw his face- Imie's face.'

On the second incident she said- Imie came on top of her and closed her mouth. She was trying to push him away.

Q- you mistook Imie for someone else?

Ans- It was Imie

On Re- Examination- 'When he opened the door, I clearly see him.'

The evidence is clear that PW6 identified the accused as the one that licked her vagina on the first incident and the one that inserted his penis in her vagina on the second incident.

14. Did the accused have the requisite 'intention to do the above on PW6? Intention is defined in Section 17 of the Crimes Act 2016 as:

'(1) A person has 'intention' with respect to conduct, if the person means to engage in the conduct.

**On the first incident,** PW6 was sleeping. She felt the cold. She woke up to see the accused between her legs, licking her vagina. After doing that- "He stood up, went to the door, turned and said- "Not to tell anyone as what will happen next will be worse.'

**On the second incident-** She also felt the cold. The accused was on top of her. He covered her mouth. He inserted his penis into her vagina.

He put on his pants, sat next to the victim, held her shoulders and said that "it's good that I don't tell anyone about it.'

The medical report showed that there was recent intercourse. There were sperm deposits in her vagina when she was medically examined on the same day.

The removal of PW6's pants, the licking of her vagina, the covering of PW6's mouth, the insertion of the accused's penis in her vagina, and the accused's remarks that PW6 not tell anyone, show a clear intention that the accused 'meant to engage 'in the conduct.

15. Do the licking of the vagina and insertion of the accused's penis in PW6's vagina amount to sexual intercourse? With reference to [5] both conduct amount to 'sexual intercourse.
16. At the time of the incident, was PW6 below the age of 16 years? On the evidence of PW6 herself and her mother, PW9- SD was born on 16<sup>th</sup> Feb 2008. At the time of the incident, PW6 was 15 years old.
17. Considering all the above, and the burden of proof under Section 25 of the Crimes Act 2016, I am satisfied that the prosecution has proved beyond reasonable doubt that the accused, Vision Engar committed the offences of rape as charged.

### CONCLUSION

18. I make the following findings against Vision Engar:

- i. Count 1- Guilty
- ii. Count 2- Guilty

DATED this 23<sup>rd</sup> of August 2024

  
**Kinivillame T. Keteca**  
Acting Chief Justice

