



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

Criminal Case No. 08 of 2024

BETWEEN: THE REPUBLIC

PROSECUTION

TERINAN ARUNA ERI

ACCUSED

BEFORE: Keteca J

Date of Hearing: 28th April - 01st May 2025

Date of Judgment: 01st August 2025

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

Appearances:

Counsel for the Prosecution: **A. Driu**

Counsel for the Accused: **R. Tagivakatini**

JUDGMENT

BACKGROUND

1. The accused is charged with 2 counts of 'Rape of a child under 16 years old' contrary to Section 116(1)(a) & (b) of the Crimes Act 2016 ('the Act'). The child victims are JL, aged 5 years old and MK, aged 7 years old. The alleged crimes happened in 2023, at their grandmother's home.

2. The prosecution called the following witnesses:
 - PW1- Phoy Lucas
 - PW2- Joanne Lucas
 - PW3- Agnes ketner
 - PW4- JL
 - PW5- MK
 - PW6- Constable Joy Tokaibure
 - PW7- Senior Constable My- Girl Cecil
 - PW8- Dr Aisen Waike
 - PW9- Constable Rachel Notte.

3. The following documents were tendered as exhibits:
 - PEX-1 Birth Certificate of PW4
 - PEX-2 Birth Certificate of PW5
 - PEX-3 Record of Interview of the accused
 - PEX-4 Medical Report of PW4
 - PEX-5 Medical Report of PW5
 - PEX-6 Bundle of photographs (1-11)
 - PEX-7 Nauru Birth Certificate of the accused
 - PEX-8 Kiribati Birth Certificate of the accused
 - PEX-9 Passport Biodata page of the accused
 - PEX-10 (a)-(d) Police Statement Answer Charge forms.

RAPE of A Child Under 16 years Old

4. Section 116(1) (a) & (b) of the Act provides:
 - (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. The elements of the offence are”
 - i. The accused
 - ii. Intentionally engaged in sexual intercourse
 - iii. With JL and MK
 - iv. JL and MK are both children under 16 years old

6. Section 8 of the Act defines 'sexual intercourse' as:
 - (a) the penetration, to any extent, of or any part of a person's genitals with any part of the body of another person;
 - (b) the penetration, to any extent, of the anus of a person by any part of the body of another person;
 - (c) the penetration, to any extent, of or by any part of a person's genitals by an object, carried out by another person;
 - (d) the penetration, to any extent, of the anus of a person by an object, carried out by another person;
 - (e) oral sex; or
 - (f) the continuation of an activity covered by paragraphs (a) to (e).

7. section 17 of the Act defines 'intention' as:
 - (1) A person has 'intention' with respect to conduct, if the person means to engage in the conduct.
 - (2) A person has 'intention' with respect to a circumstance, if the person believes that it exists or will exist;
 - (3) A person has 'intention' with respect to a result, if the person means to bring it about or is aware that it will occur in the ordinary course of events.

BURDEN OF PROOF

8. Section 25 of the Act provides that the prosecution has the legal burden of proving each element of the offence. This burden of proof is to be discharged beyond reasonable doubt. What does beyond reasonable doubt mean? In *Keeley v Brooking* (1979) 143 CLR 162; 25 ALR 45 Barwick CJ said:
'To be satisfied beyond all reasonable doubt is, for the purposes of the law, to be certain.'

THE PROSECUTION CASE

9. **PW4 testified that she is 7 years old.** She's in class 1. The accused is her grandpa. She was lying on a bed in her grandma and grandpas' room. **She was in the room with the accused, her sister and her brother.** The door was closed. The accused locked the door.
Ques- Is it just you and grandpa in the room?
Ans- Mari and Benjamin too.
Ques- When he locked it, who was in the room?
Ans- Me and Terinan and my sister and brother
Ques- Who was inside the room when he took off your pants?
Ans Terinan and me.
 Ques- what did he do when he turned you downwards?
 Ans- I woke up. I opened my eyes, peeked and saw him take off his pants. He applied saliva on his penis. He was about to insert himself. I then started crying and he started tapping.
 Ques- Why did you cry?

Ans- **He took off my underwear and he ‘pump me.’** It was painful.

Ques- where did he pump you? Is this where you poo?

Ans- **Yes, where I poo.**

Ques- What did he do?

Ans- He pump me. **I slept and he slept as well.**

Ques- Where was Mari?

Ans- Outside, at the door. My grandpa said- door is locked so nobody will distract us when we’re watching movies. It was after school. She did not tell anybody.

Ques- Where was your grandmother Surere that day?

Ans- She’s going to work

Ques- Your aunty Agnes?

Ans- She’s in the room

Ques- Did Mari come into the room after?

Ans- I come out and and I see Mari outside

Ques- What did you two speak about?

Ans- I speak about why Terinan lock the door and she said, because he pumped you

Ques- How did your mummy come to know?

Ans- Mari told her mum about the accused and Mari’s mum called my mum.

CROSS- EXAMINATION OF PW4

10. Ques- You were facing down on the bed?

Ans- Yes, I was facing down on the bed

Ques- Did you feel pain when you went to use the toilet?

Ans- Inaudible response

Ques- **Why didn’t you tell your mum that you had pain?**

Ans- **I didn’t tell my mum because Terinan will hit me. He told me not to tell my mum.**

Ques- What does ‘pump’ mean?

Ans- He laid me down, took off his pants and pump me.

Ques- What does ‘pump’ mean?

Ans- I don’t know where I heard it from

Ques- What exactly did he do?

Ans- He took off his pants and ‘pump’ me

Ques- Terinan did not pump you that day?

Ans- I disagree

Ques- He did not lock the door?

Ans- He locked it

Ques- When you were watching movies, Jane and Benjamin were also in the room?

Ans- **It was Mari and Benjamin.** Jane was in Denig

RE-EXAMINATION

11. Ques- when you say he pumped you, he pumped you with what?

Ans- Panty. He applied saliva on his penis

Ques-Then what did he do?

Ans- He was about to insert himself, I faced downwards

Ques- what he insert?

Ans- **His penis. I feel it through my panty, yes.**

Ques- **You feel his penis in your panty, in your anus?**

Ans- **Yes**

Ques- Is that what you call pump?

Ans- Yes

12. **PW5- MK is now 9 years old.** She is in Grade 3. Surere is her grandmother. The accused is her grandpa. She calls him Terinan. PW4 is her sister. She remembered telling police a story.

Ques- What was that story about?

Ans- When I was tired, my grandfather came behind me, he took off his pants, he took off my pants and then he 'pump me.'

Ques- where in the did this happen?

Ans- In the lounge, at night.

Ques- Was anyone else in the house when he did this to you?

Ans- Yes- my mom, my brother and my sisters and families.

Ques- Was your mom in the living room or in the bedroom?

Ans- She was in the lounge.

Ques- She was sleeping next to you?

Ans- Yes, on the bed in the lounge. She was on her bed. I was on one bed.

Ques- Who else was sleeping in the lounge room?

Ans- Shurere, my mom, my brother, my sisters and Benjamin.

Ques- How did you know it was Terinan?

Ans- Because her shirt is a number, white and red

Ques- What did you notice about his face?

Ans- I just see her rat tail

Ques- Was the light on?

Ans- My dad's light was on.

Ques- Where's your Dad's light?

Ans- The room straight.

Ques- How were you lying on the bed? Face up or face down?

Ans- face down.

Ques- What were doing at the time? Were you awake?

Ans- I'm phone

Ques- What were doing on the phone?

Ans- Watching cartoon.

Ques- Was your mom awake?

Ans- She was sleeping.

Ques- Did Terinan have anything on him?

Ans- Only shirt and white sheet.

Ques- White sheet? How was the white sheet, what was the white sheet?

Ans- Color? White

Ques- The sheet was color white? Who was holding the sheet?

Ans- Her, Terinan

Ques- So he came with the white sheet and what did he do?

Ans- He pulled off her pants and he put it on my pants and he pumps me.

Ques- Now, this is very important because we have to understand what do you mean by pump Ok? So you tell us what did he do when he pumped you?

Ans- He came in the back and he pumps me.

Que- He came in the back of who?

Ans- Me

Ques- While you were lying down or sitting?

Ans- Lying down

Ques- You said he came on you and he pumped you, he pumped you with what?

Ans- In the bum

Ques- So when you say he pumped you in the bum, is this where you poo?

Ans- poo

Ques- And what did he use to pump you in the bum?

Ans- His penis

Ques- You said he took off your pants, were you wearing panty that night?

Ans- Yes

Ques- Did he take off your panty when he pumped you or did he pump you with your panty on?

Ans- My panty on.

Ques- Your panty still on but you could still feel him pumped you through your anus?

Ans- Yes

Ques- Did it hurt?

Ans- Yes

Ques- When it hurt, what did you do?

Ans- I said 'ai.'

Ques- When you said 'ai' what did he do?

Ans- He ran in the room.

Ques- Did your mother wake up?

Ans-Sleeping

Ques- When you said 'ai', did anyone hear you?

Ans- No

Ques- Did you tell your mother that day what happened to you?

Ans- No

Ques- Did you tell your grandmother what happened to you?

Ans- No, by the way, I'm 8, I told my auntie, and my auntie called my mom.

Ques- Why did you choose to tell your mom then?

Ans-Because me and my sister PW4 were fighting.

Ques- What were you fighting about?

Ans- Candie

Ques- You were fighting, what did you say to JL?

Ans- I said, **I'm gonna tell auntie what Terinan did to you, something bad.**

Ques- To you meaning JL?

Ans- Something bad.

Ques- What was something bad?

Ans- JL is sleeping and Terinan said MK, go outside. I go outside when JL is sleeping and Terinan came on her back and put it in her pants and he pumps JL.

Ques- **And how do you know this? How do you know that Terinan pumped JL? How do you know?**

Ans- Because the brick is cracked.

Ques- The crack in what?

Ans- in the room, in Ijuw

Ques- Did you see through this crack?

Ans- Yes

Ques- **Why didn't you just go through the door?**

Ans- **Because I know Terinan is gonna pump JL**

Ques- Sorry?

Ans- I know Terinan is gonna pump JL

Ques- **How do you know that?**

Ans- **Because he already make me**

Ques- **He already pump you?**

Ans- Yes

Ques- **So when Terinan pump you, did that happen before he pumped JL?**

Ans- **Me first**

Ques- Did this happen in the living room? In the lounge room?

Ans- In the living room.

Ques- I'm talking about JL, did it happen in the lounge room or in one of the bedrooms?

Ans- One room, it has a white door.

Ques- Could you go through the door when you saw Terinan and JL?

Ans- Yes

Ques- Why didn't you go through the door?

Ans- Because I know (inaudible) I said Terinan open the door- he said no, I just watch TV.

Ques- Was JL with him at that time?

Ans- Yes

Ques- What did you see Terinan do in the room with JL?

Ans- He put it on her pants

Ques- **He pulled down her pants**

Ans- And he put it on JL's pants

Ques- Sorry- **He pulled down his pants and he pulled down JL's pants ad then? Where was JL?**

Ans- **Sleeping on the bed and Terinan pumped her**

Ques- And what do you mean by pump, because we want to know what do you mean by 'pump'?

Ans- **He applied saliva to his penis**

Ques- **You saw this through the crack?**

Ans- Yes and he pumped JL

Ques- How did he pump JL?

Ans- He applied saliva to his penis. He then inserted his penis into her anus

Ques- You saw all this through the crack in the bricks?

Ans- Yes

Ques- Were you able to see what JL did when he did this to her?

Ans- JL cried and he closed her mouth

Ques- After seeing JL crying, what else did you see? Did you remain there to look through the bricks or did you go away?

Ans- I went to the crack. Terinan opened the door. JL woke up. I asked JL what Terinan did to you. She said- he pumped me.

The Witness is shown PEX-6- Bundles of Photographs

Referring to photograph No. 2-

Ques- What's that white thing on the wall here, the thing that's coming down?

Ans- It's a light- in the lounge room.

Ques- Was that light on when he pumped you?

Ans- No

Ques- The room with the white door, that's the room that Terinan pumped JL?

Ans- Yes

Ques- (referring to photograph No. 10) is that the cracks in the bricks you were talking about?

Ans- Yes. When Terinan was staying with them, he would sleep in that room too.

Ques- Did anyone force you to tell this story about Terinan?

Ans- No

CROSS EXAMINATION OF PW5

Ques- In the lounge, there were other people awake? You agree?

Ans- No- it was just me.

Ques- I put it to you, Terinana did not pump you? **Are you making this up?**

Ans- No, not making it up.

Ques- Surere forced you to make allegations against Terinan?

Ans- No

Ques- After Terinan pumped you, did you have difficulty using the toilet?

Ans- Yes I was hurting, yes, felt pain.

Ques- Why didn't you tell your mom about the pain?

Ans- Because he would smack me.

Ques- You're making this up that you felt pain when you use the toilet?

Ans- It's the truth

SUBMISSIONS BY THE DPP

13. The DPP submitted as follows:

- The identity of the accused is proven beyond reasonable doubt. The ages of the victims being 5 and 7 are not in dispute.
- The only issue is whether the accused 'engaged in sexual intercourse with PW4 and PW5.
- How did the allegation come to light? Through the innocent outburst of PW5 to PW4- **'I'm going to tell aunty what Terinan did to you.'** This was spontaneous, unplanned and impromptu. It was heard by their grandfather, (PW1) and PW2.
- Was there any motive for PW1 to make up such a story? PW1 was forthright. His demeanour shows a doting grandfather who is concerned for the welfare of his grandchildren.
- The defence 'did not challenge to any degree his story concerning the outburst of PW5.'
- PW1 did not call Surere about the allegations as PW2 and PW3 had already been informed by PW4 and PW5.
- **On recent complaint-** PW2 took the victims into a bedroom asked them about PW5's outburst. She was consistent in her testimony.
- PW3 wanted the truth to come out. In her emotional testimony- "I was in Ijuw. I went to Location same time. I spoke to my father- what happened- he said to go speak to the children. She relayed what PW5 told her. She was in shock and angry. She denied the suggestion by the defence that her mother Surere instructed her to bring the complaint against the accused. In her words- "No I

don't agree. How would my mum tell me what to say when I don't wish to be involved in their relationship?'

- On the sexual acts on PW4 and PW5- Both victims were clear in their evidence. They did not 'fold' under cross examination. They disagreed when it was suggested that they were forced to come up with their stories. Both victims said they felt pain when going to the toilet. They did not tell anyone immediately about what happened to them because the accused might hit them.
- The eyewitness testimony of PW5 supports PW4's claim of sexual intercourse with the accused. This is unchallenged.
- The medical reports- PEX-4 and PEX-5 – findings- No remarkable findings. PW-8 Dr Waike admitted that one finger of an adult cannot go into the anus of a 5 – year old child. If penetration were to occur, 'there is usually a tear of the vagina and rectum as well.' It depends on the force used. Victims were examined almost a year after the incidents- healing would have happened already. The medical report and the evidence do not rule out P4 and PW5 being sexually assaulted. The case of *R v Depaune* [2023] NRSC 7, Criminal Case No. 6 of 2022 is distinguishable as the victim there was examined a few hours after the alleged incident.
- On Motive- It's not an element of the offence of rape. As argued by the defence, the timing of the complaint is around the time the accused left Surere for another woman. This is farfetched. PW4 and PW5 did not disclose what happened to them to their grandmother. Surere was not told of the allegations before it was reported to the police and she was not an 'active player in the prosecution story.' The accused himself did not blame Surere (**the supposed jilted lover**) for the allegations against him.
- **ALTERNATIVE VERDICTS - Section 273 of the Act** - Counsel submits that should I find the accused not guilty of a Section 116 (Rape of a child under 16 years old) offence, then I should consider the alternative offence under Section 117- Indecent Acts in relation to a child under 16 years old.

SUBMISSIONS BY THE DEFENCE

14. The accused opted to give sworn evidence. He denied the allegations by PW4 and PW5 that were put to him. On the allegation by PW4, he said that he would have been at work. On the allegation by PW5, he said that about 8 people would sleep in the lounge.
15. On the credibility of witnesses, Counsel referred to *R v Olsson* [2024] NRSC 34; Criminal Case 6 of 2024 (19th November 2024) and *R v Taumea* [2019] NRDC 3 Criminal case 36 of 2018 (22 May 2019) that discussed **Excelerate Technology Ltd v Cumberbatch & Anor [2015]**

16. In paragraph [14] of his submissions, Counsel submits that the ‘evidence of the Prosecution witnesses supports the claim that the Accused intentionally inserted his penis into the anuses of PW4 and PW5 respectively in 2023. There is also evidence of ‘recent complaint’ from PW1, PW2 and PW3 in July 2024.’
17. There is no evidence in the medical report of penetration of the anuses of the complainants in this case.
18. On the motive of a witness, Counsel refers to *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 (at 431) and *Armagass Ltd v Mundgas S.A (The Ocean Frost)* [1968] AC 717 and argues that the timing of the complaint is relevant here. The complaint came to light after the accused left the house of the complainant’s grandmother (Surere) for another woman. According to Counsel, this timing ‘seems highly peculiar and should raise suspicion against the grandmother.’ I note that this Surere was not called as a witness.
19. Counsel concludes that in the absence of Surere’s evidence, there is a reasonable doubt raised here and that the accused be acquitted on both counts.

DISCUSSION

20. Both Counsels filed helpful submissions. I am left with the question- Am I to believe the young complainants or the accused? On the testimonies of both PW4 and PW5, 7 and 9 years old now, they were both clear and forthright. At the end of PW4’s evidence, my file notes record- **‘Very clear testimony. Speaks good English too.’** The same can be said for PW5. In fact, they spoke better English than their mothers.
21. In *Republic v Olsson* [2024] NRSC 34; Criminal Case 6 of 2024 (19 November 2024), I noted:
‘In *R v Bill*, [2024] NRSC 25; Criminal Case 1 of 2023 (24th September 2024), I said:
At common law, the credibility of a witness generally depends on the following factors:
Knowledge of the facts on which the witness gives evidence;
Impartiality;
Integrity; and
Truthfulness.”

22. In the present case, the issue of the truthfulness of the complainants, PW4 , PW5 and the accused are to be assessed. In the *Olsson* case above I referred to:

‘In *THE STATE OF WESTERN AUSTRALIA -v- COATES* [2007] WASC 307, BLAXELL J at [54] said this-

‘The determination of a witness’ credibility on the basis of demeanour does not require the exercise of any legal skill, and is not something which can be the subject of reasoned analysis. It is largely a semi-intuitive process, and most ordinary members of the community have the life experiences which equip them to make such an assessment.’

At [57], he said:

‘Obviously, the assessment of each witness’ credibility will be a matter of critical importance in arriving at my findings of fact. It may be that I accept the whole of a witness’ evidence or that I reject it all. It may also be that I accept part of what a witness has had to say but reject the rest. The fundamental question in relation to each witness, and in relation to each matter the subject of his or her testimony, is whether or not I believe the evidence. The answer to this question will turn on my evaluation of a number of factors, including the truthfulness of the witness, the reliability of the observations made by him or her at the material time, and the accuracy of his or her recollections’

At [58] Justice Blaxell said:

‘Matters to be taken into account in this evaluation include the witness’ general demeanour whilst testifying, the consistency of the evidence (both within itself and with other evidence in the trial), personal characteristics such as powers of expression and apparent levels of intellect, the possible impact of alcohol or drugs, and the emotional state of the witness at the material time. In the end, I should carefully assess all relevant matters and decide whether or not I can accept the witness’ evidence on a particular issue as being truthful and correct.’

(My emphasis)

In *Excelerate Technology Ltd v Cumberbatch & Another* [2015] Lexis Citation 6, Queens’s Bench Division, at paragraph [9], Justice Simon Brown QC said this:

‘ . The most compendious judicial statement on this is to be found in the dissenting speech of Lord Pearce in the House of Lords in *Onassis v Vergottis* [1968] 2 Lloyd’s Rep 403 at p 431: ‘Credibility’ involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. **First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others?**

23. The *Excellerate case* above dealt with fraud. The questions raised therein are apt to be asked in this case.
24. Is PW4 a truthful or untruthful person? As in paragraph [20] above, I found the 7-year-old PW4 to be forthright in her testimony. She was clear. She remained calm; even under cross-examination. Although the DPP asked several leading questions without any objections from the Defence counsel, PW4 was still clear that she was alone with the accused in the room. She saw the accused apply saliva to his penis. The accused tried to insert his penis in her anus. She still had her panty on. She cried out in pain. The accused tapped her to sleep. PW4's testimony is supported by PW5 as she peeped through the cracks in the bricks as shown on Photo No. 10 in PEX-6. I find that PW4 was a truthful witness.
25. Is PW5 a truthful person? PW5 was equally clear in her testimony. She was awake and was on her phone. There were about 6 other people sleeping in the lounge on the night in question. She identified the accused by the colour of the shirt he wore and that he had a 'rat tail.' The light (shown on Photo No. 02 in PEX-6) in the lounge was off. Her Dad's light was on in his room. The accused took off her pants. She had her panty on. The accused pumped her- where she poo with his penis. It hurt her. She said 'ai.' The accused ran back to his room. Her testimony, as she peeped through the crack on the wall, supporting the evidence of PW4, was also clear and unmoved under cross examination. I find that PW5 was a truthful witness.
26. Is the accused a truthful witness? The accused looked bemused and callous throughout the trial. When asked about the allegation of PW4, he responded- he doesn't know why he is accused of that. When asked about the allegation of PW5, he responded- 'Doesn't know why he was accused of that.'
27. When asked whether he recalled anything happening in Suwere's house about the allegations. He said that he **doesn't recall anything about it,**
Ques- You took off your pants and took off PW4's pants?
Ans- Not true
Ques- You inserted your penis in her anus?
Ans- Not true
He denied the allegations put to him. He was unconvincing in his denials. I find the accused was less than truthful when he denied the allegations put against him.
28. **Were PW4's and PW5's recollection of the events altered by unconscious bias?**
With the tender ages of the complainants, and without expert evidence on this question, I will not attempt to answer this question

29. Were PW4's and PW5's recollection of the events altered by **over much discussion of the allegations with others**? It was suggested to both PW4 and PW5 during cross examination that it was their grandmother Surere who forced them to make these allegations against the accused. They were both adamant when they said- No. I also find that though both PW4 and PW5 had recounted the allegations to their mothers and the police, this did not alter their recollections on what the accused did to them.
30. Did the accused intentionally engage in sexual intercourse with PW4 and PW5? For sexual intercourse under Section 8 of the Act, there has to be 'penetration' of PW4's and PW5's genitals, or anus with any part of the accused's body, or an object carried out by the accused. It also includes oral sex.
31. From the evidence, there is inconclusive evidence that the accused's penis or any part of his body penetrated PW4's and PW5's anuses.
32. There is conclusive evidence that the accused intended to engage in the conduct of trying to insert his penis into the anuses of PW4 and PW5.
33. Since there is no penetration here, the element of intentionally having sexual intercourse under Section 116 of the Act is not met.

ALTERNATIVE OFFENCE

34. The alternative offence here is Section 117 of the Act- Indecent Acts in relation to a child under 16 years old. The elements of the offence are:
'the accused intentionally
touched PW4 and PW5
the touching is indecent
and PW4 and PW5 are children under 16 years old.'
35. Section 117(6) of the Act defines 'touching' as including any of 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

Section 117(6) of the Act 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.'

36. I have found that the accused intentionally tried to insert his penis into the anuses of PW4 and PW5. They still had their panties on. There was no penetration. Does the conduct of the accused amount to touching? Clearly, they do.
37. Is the touching of PW4's and PW5's anuses by the accused's penis 'indecent? In *R Joji Gucake*, criminal Case 16 of 2024 I referred to-
In *Republic v Doguape* [2021] NRSC 27; Criminal Case 13 of 2021 (27 July 2021), Fatiaki CJ observed:

40. *In R v Stanley [1965] 2 QB 327 Lord Parker CJ ruled that to be “indecent” the publication in that case would need to be highly offensive against the recognised standards of common propriety. In Nauru, however the standard is that “...of an ordinary person”.*
41. *In most cases the indecent nature of the act(s) complained about presents no difficulty. Most often, the act is of a sexual nature involving the victim’s breasts and/or genitalia or it may be an act of intimacy that offends the modesty of the victim such as uninvited caressing or kissing or it may even include exposure of the male genitalia and/or masturbation as occurred in Republic v Hartman [2020] NRSC 7.*
42. *In this regard the House of Lords in R v Court (1988) 2 ALL ER 221 explained:*
*“To decide whether or not a right-minded person might think that the assault was indecent, the following factors were clearly relevant: **the relationships of the accused to his victim (were they relatives, friends or virtually complete stranger?) how had the accused come to embark on this conduct and why was he behaving in this way?....”***

38. At [43] Fatiaki CJ said”

‘43. Of greater relevance however, to the circumstances of the present case, are the observations of Lord Griffiths where he said *ibid* (at p 223):

*“The **gravamen** of the offence of indecent assault is the element of indecency. It is this element...that distinguishes the offence from common assault ...*

...By indecency is meant conduct that right-thinking people will consider an affront to the sexual modesty of a woman.

*Although the offence of indecent assault may vary greatly in its gravity.....there is agreement that the **offence cannot be committed accidentally.....** Once this concession is made it is apparent that some extra mental element is required than that necessary for common assault..... this mental element should be that which constitutes the essence of the offence, **namely an intent to do something indecent to a woman in the sense of an affront to her sexual modesty.....** Indecent assault is after all a sexual offence appearing in (Our PART 7 - SEXUAL OFFENCES) and one should on general principle look for a sexual element as an ingredient of the offence.”*

39. In Republic v Ignazio-Iyongo Aubiati, Criminal Case 15 of 2023, I referred to -

“In R v Harkin (1989) 38 A Crim R 296 (NSW CCA) Lee J said:

‘[I]f there be indecent assault it is necessary that the assault have a sexual connotation. That sexual connotation may derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are relevant areas...’

40. As I said in the Joji Gucake case, I note that the offence of indecent assault cannot be committed accidentally. For touching to be indecent- (a) It has to be of a sexual nature or have a sexual connotation OR (b) It must have the intent to do something indecent to a woman OR (c) *The area of the body of the perpetrator and the victim- involved in the touching, are relevant. The genitals and anus of both male and female and the breast of the female are relevant areas... 'OR (d) conduct or touching that right-thinking people (in Nauru- it's the ordinary person') will consider an affront to the sexual modesty of a woman.'*
41. Considering the above cases and having found in paragraph [36] that the conduct of the accused against PW4 and PW5 amount to touching, I find that the element of 'indecent' which is the **gravamen of the offence of indecent assault**, is satisfied here.
42. I remind myself of the burden of proof discussed in paragraph [8] above and I am certain that the accused committed the offence under Section 117 of the Act in that he intentionally touched PW4 and PW5, the touching were indecent, the accused was reckless about that fact and PW4 and PW5 are children under 16 years old.

CONCLUSION

43. I make the following findings:
- i. Count 1- Guilty on the alternative offence of indecent act in relation to a child under 16 years old- Section 117 of the Act.
 - ii. Count 2- Guilty on the alternative offence of indecent act in relation to a child under 16 years old- Section 117 of the Act.

DATED this 01st Day of August 2025


Kiniviliam T. Keteca
Judge

