



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

Criminal Case No. 17 of 2024

BETWEEN: THE REPUBLIC PROSECUTION

AND: ESAU DE-GAGORO TEMAKI ACCUSED

BEFORE: Keteca J

Date of Hearing: 29th August 2025

Date of Judgment: 21st November 2025

Catchwords: Indecent Acts in Relation to a Child under 16 years old: Contrary to Section 117(3)(a) (b) and (c) of the Crimes Act 2016 (the Act).

Appearances:

Counsel for the Prosecution: **W. Deiye**

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

JUDGMENT

A. Background

1. The Accused is charged with two Counts of Indecent Acts in Relation to a Child under 16 Years old: Contrary to Section 117 (3) (a) (b) and (c) of the Act.
2. The prosecution called four witnesses. The accused submitted a written statement where he did not deny the allegations against him.

B. The Charge

The Counts are:

Count 1

Statement of Offence

Indecent Acts in Relation to a Child Under the Age of 16 years old: Contrary to Section 117(3) (a) (b) and (c) of the Act.

Particulars of Offence

Esau De- Gagoro Temaki, between the 1st day of January 2023 and 31st day of December 2023, at Yaren District in Nauru, did intentionally do an act to one JD, a child under 16 years old, and the act was indecent namely, by pulling the said JD to the bed in a room in their home, holding her against her will and kissing her with his lips on her lips; and was reckless about that fact.

Count 2

Statement of Offence

Indecent Acts in Relation to a Child Under the Age of 16 years old: Contrary to Section 117 (1) (a) (b) (c) of the Act.

Particulars of Offence

Esau De- Gagoro Temaki, on the 7th day of September 2024, at Yaren District in Nauru, did intentionally do an act to one JD, a child under 16 years old, and the act was indecent namely, by placing his hand below the belly button of the said JD and worked his hand up to her breasts and thereon felt her breasts through her t- shirt; and was reckless about the fact.

C. Elements of the Offence

3. The elements of Section 117 (3)(a) (b) (c) of the Act are:

(3) 'the defendant commits an offence, if:

- (a) The defendant intentionally does an act to another person;
- (b) The act is indecent AND the defendant is reckless about that fact; and
- (c) The other person is a child under 16 years old.

Penalty- Maximum term of 30 years imprisonment, of which imprisonment term at least one third to be served without parole or probation.

(4) Absolute liability applies to subsections (1) (c), (2) (c) and (3) (c). [The defence of mistake of fact under Section 45 is not available. Other defences under Section 127 apply to an offence under this Section]

(5) In this Section:

'touching' includes any of the following:

- (a) Touching with any part of the body;
- (b) Touching the person through clothing or other material; or
- (c) Using an object to touch a person.

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

D. The Prosecution Case

4. Counsel considered the evidence of the complainant in both Counts 1 & 2 and referred to the following cases;

i. *R v Hartman* [2020] NRSC 7, Criminal Case 16 of 2019 (04th March 2020) – *whether touching is indecent*

ii. *R v Court- indecent intention*

iii. *Excelerate Technology Ltd v Cumberbatch & Another* [2015]- *credibility of witnesses*

iv. *R v Doguape* [2021] NRSC 27; Criminal Case 13 of 2021 (27th July) – CJ Fatiaki – indecent nature of acts complained of.

v. *R v Harkin* (1989) 38 A Crim R 296 (NSW CCA) – *for indecent assault-necessary that the assault has a sexual connotation.*

vi. *R v Adeang* (Criminal Case no. 02/21)- Section 19(3) of the Act- *where recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that fault element of the offence*

5. ‘In this case the accused told PW1 to kiss him, and he showed her to kiss by demonstrating with his tongue, and then kissed PW1 on her lips, and **PW1 felt the accused’s tongue going inside her mouth.**’ Counsel submits that the conduct of the accused here is indecent and he is reckless about that fact and PW1 is under 16 years old.

6. PW2 confirmed the age of PW1 through her birth certificate- PEX3.

7. Counsel refers to *R Gucake* [2025] NRSC 34; Criminal Case 16 of 2024 (18th July 2025) where the accused denied the allegation. **(I note that the accused in the present case did not deny the allegations against him)**

E. The Defence Case

8. Counsel submits that the accused ‘denies the allegations against him and believes that PW1 was influenced by her aunt PW3.’ At paragraph [12] of his submissions, Counsel contends that there was no intention on the accused’s part i.e. the absence of the fault element.

9. For Count 2, Counsel contends full denial by the accused based on mistaken identity of PW1 by the accused who thought that the person on the bed was his partner, PW2. In this regard, Counsel contends that the prosecution has not proven the element of ‘intention.’

F. Consideration

The Evidence

10. PW1, aged 13 years, testified that she used to live in Yaren with her mother. On 07th Sept 24, her mother left her and her younger brother at home while she went to drink kava. She slept on the upper bed while her brother slept on the lower bed. A person got onto the upper bed with her. The person touched her stomach and held her breast. She woke up. The person saw her and said- ‘*Sorry, I thought you were your Mom.*’ That person was the accused. When the accused said that he was sorry, he was still holding onto her stomach. She slapped his hand and she went outside the house. She later went back inside and slept next to his brothers. The accused was sleeping on the upper bed. The next day, she told her mother about what the accused did. Her mother said nothing. (I noted the sad look in PW1’s eyes as she said this.)

She relayed the same tale to her aunty, PW3. The police were called and they all went to the police station. She told Constable Darg about the accused touching her breast.

11. PW1 testified about another incident in 2023. The accused was living with them at Yaren at that time. After picking clothes from Meneng, they went home. Her Mom told her to get a speaker from her Mom's house. The accused was there; at the lower bed. He said-“Come here, I want to hold you.’ She refused. The accused grabbed her hand and pulled her towards him. He grabbed her waist and held her. He said-“I want to kiss you.’ He was showing her how to kiss with his lips. The accused then kissed her on her lips. **‘He was trying to put his tongue in my mouth.’** She was scared. A nephew called from outside. The accused released her. She went to her aunty and told her that the accused kissed her. Her aunty told her Mom. (PW1 was crying at this stage). PW1 relayed the same account in paragraph 6 of her police statement recorded on 27th September 24. She was scared and that caused the delay in her report.

Cross- Examination

12. On the night the accused touched her, her mother was not at home. She was facing the wall. The accused came behind her. She did not smell alcohol on him. The lights were off. The accused said-“**Sorry, I thought you were your Mom.**’ When the accused apologized, he did not turn away. He was still holding onto her stomach. Her mother did not do anything when she told her of what the accused did to her.

Q- Did your mother take you seriously when you told her of the kava night incident?

Ans- No.

13. On the music box(speaker) incident in 2023, she did not tell her Mom or PW3. She told Constable Darg of this incident.

Q- Kissing incident never happened?

Ans- **Incorrect**

Q- The kissing incident, your aunt forced you to complain?

Ans- **That's a lie**

Re- Examination

14. She did not tell her mother about the kissing incident. When she was being interviewed by Const Darg about the ‘breast touching’ incident, she then told him about the kissing incident in 2023.

Record of Interview

15. When asked on his whereabouts on 07th September 24, the accused admitted that he was drinking in ‘black arrow.’ In answer to Question 26, he admitted going to PW2's residence later that evening. In answer to Question 29, he admitted that when he entered PW2's residence someone was present.

Q 30- Esau, was Rosehilda (PW2) in the room?

Ans- I think there was someone but I just came and fell asleep on the bed.

Q 33- Esau, it is alleged that you saw JD sleeping on the bed that Rosehilda uses when she sleeps – what can you say?

Ans- **Yes**, I went on our bed.

From then on, the accused's other answers to the ROI were mostly 'no comment.'

I will Consider Count 2 first- The 'indecent touching' Incident

16. In his unsworn written statement, the accused does not deny any of the allegations in Counts 1 & 2. On Count 2- in the ROI, the accused admits that he did go to PW2's home at Yaren on the night of 07th September 2024. He had been drinking. He admits seeing JD sleeping on the bed that he and PW2 used to sleep on.

17. I remind myself of the elements of Section 117 (3)(a) (b) (c) of the Act. They are:

'The accused

Intentionally touched PW1

The touch is indecent

The accused is reckless about that fact

PW1 is a child under 16 years old

18. **Did the accused touch PW1's breast and stomach on the evening in question?** The accused admits seeing JD sleeping on the bed. He lay on the same bed. As in paragraph [16] above, the accused does not deny touching PW1.

The accused pleaded not guilty to both Counts here. On the significance of a not guilty plea, I refer to *Griffiths v The Queen* (1994) 69 ALJR 77; 76 A Crim R 164; 125 ALR 545 (HC) Brennan, Dawson and Gaudron JJ said at (79; 547-548;167):

'A plea of not guilty puts all elements of the offence charged in issue.'

From the above case, the plea of not guilty by the accused means that he denies all the elements of the offence. In his written statement however, the accused does not deny touching or kissing PW1 as in Counts 1 & 2.

19. PW1 testified that the accused touched her breast and stomach. Counsel for the accused argues that it was a case of mistaken identity. As PW1 testified- the accused said- *'Sorry, I thought you were your Mom.'* This is not a case where I have to decide on whose version of the events I am to accept. There is only one side of the story here. It is from the complainant, PW1. Should I accept PW1's accounts of the two incidents in totality?

20. 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)

21. 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?***

He added:

*'Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. **And motive is one aspect of probability.** All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they*

are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part."

With reference to the above cases, I pose the same questions here.

Firstly, is PW1 a truthful or untruthful person? PW1 was consistent in her testimony and her general demeanor was steady. Whilst being cross-examined, suggestions were put to her that the kissing incident did not happen and that her aunt forced her to complain. She was firm in that the suggestions by Counsel were incorrect and a lie. When relating how her mother, PW2 did not take her complaints seriously, PW1 appeared sad. She was actually crying on the witness stand. I find PW1 to be a truthful witness.

Secondly, are PW1's accounts of the 'touching and kissing incidents' altered by some unconscious bias or wishful thinking or by over much discussion of it with others? I do not find any of those issues altering PW1's recollections of what happened to her on both incidents.

22. I considered a similar issue of uncontested evidence in *Republic v Kam* [2024] NRSC 36; Criminal Case 5 of 2024 (29 November 2024). At paragraph [22] of my judgment, I said:

[22] The allegations of PW1 against the accused are unchallenged. In *RPS v R* [2000] HCA 3 Gaudron ACJ, Gummow, Kirby and Hayne JJ observed:

'In a civil trial there will very often be a reasonable expectation that a party would give or call relevant evidence. It will, therefore, be open in such a case to conclude that the failure of a party (or someone in that party's camp) to give evidence leads rationally to the inference that the evidence of that party or witness would not help the party's case (*Jones v Dunkel* (1959) 101 CLR 298 at 321 per Windeyer L) and that:

'where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference.'

At [27] they added-

'By contrast, however, it will seldom, if ever, be reasonable to conclude that an accused in a criminal trial would be expected to give evidence. The most that can be said in criminal matters is that there are some cases in which evidence (or an explanation) contradicting and apparently damning inference to be drawn from proven facts could come only from the accused. In the absence or explanation, the jury may more readily draw the conclusion which the prosecution seeks. As was said in Weissenteiner v R (1993) CLR 217 at 227-8 :

'In a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when the evidence, if it exists at all, must be within the knowledge of the accused.'

23. In the present case, any evidence to the contrary of what PW1 has said 'must be within the knowledge of the accused.' The accused did not remain silent here. He opted to give a written statement. In that statement, the accused did not deny the allegations of PW1. I am persuaded to 'draw the conclusion that the prosecution seeks' in that the accused lay on the

bed that PW1 was lying on. The accused put his hands on PW1's belly button and worked his hands up to her breasts. Although the accused said- 'Sorry, I thought it was your mother,' I find that this does not absolve the accused under Section 44 of the Act as he admitted in the ROI that he knew that it was JD that was lying on the bed. Further, when the accused gave that rather lame apology, he did not remove his hand from PW1's stomach. I therefore accept PW1's evidence that on 07th day of September 2024, the accused did touch her stomach and breast as per her evidence.

Count 1

24. Did the accused kiss PW1 as alleged in her evidence? I have already considered the credibility of PW1 and I accept her evidence in toto. My conclusion is supported by my discussions in paragraph [22] above. Similarly, I readily draw the conclusion that the prosecution seeks in that on a day between 01st January 2023 and 31st day of December 2023, the accused did pull JD onto a bed, held her against her will and kissed her lips.

25. I now ask the question- did the accused have the requisite intention to engage in such conduct on both incidents? I note the meaning of 'intention' in Section 17 of the Act. For Count 1- the accused did three things in the lead up to the kiss. Firstly, he pulled JD onto the bed where he was. Secondly, he held her by the waist against her will. Thirdly, he then kissed her on the lips and inserted his tongue into her mouth. From this, the evidence is clear that the accused meant to engage in the conduct of kissing PW1 on the lips.

26. For Count 2, did the accused have the same intention when he touched PW1's stomach and moved his hand up to her breast? On this incident, the accused did four things leading up to the 'touch.' Firstly, he opened a door that had been locked by PW1's Mom when she went to drink kava. Secondly, the accused entered the house. He saw JD lying on the top bed. Thirdly, he climbed onto the bed. He touched JD's stomach and her breast. When apologising saying that he thought PW1 was PW2, his hand remained on JD's stomach. From this evidence, it is also clear that the accused meant to engage in the conduct of touching JD's stomach and her breast.

Is the touching by the accused of PW1's stomach and breast (in Count 1) and kissing of her lips against her will (in Count 2) 'indecent?'

27. Section 117(6) of the Act provides:

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

In my judgment in **Republic v Gucake** [2025] NRSC 34; Criminal Case 16 of 2024 (18 July 2025), I considered the following-

[28] 'In **Republic v Doguape** [2021] NRSC 27; Criminal Case 13 of 2021 (27 July 2021), Fatiaki CJ observed:

29.. 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**".

30. 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.

31. 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?....**”*

[32] At [43] Fatiaki CJ said”

‘33. 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.”*

[34] In *Republic v Ignazio-Iyongo Aubiati*, Criminal Case 15 of 2023, I referred to *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...’*

[35] *From the above, 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.’*

[36.] For Count 1- On a 'kiss' as an example of indecent assault- *R v Pahuja (No 2)* [1989] SASC 1434; (1989) 50 SASR 551; 40 A Crim R 252 (CCA) is informative. White J said at (553; 254)

'Whatever might be the situation where a young girl misinterprets the manner or the reason for massaging her chest in the breast area, there could not be any like immature misinterpretation of a kiss and / or the insertion of the tongue into her mouth. If either or both these two latter things happened they would necessarily constitute indecent assaults.'

28. In the present case, the touching of PW1's stomach and breast and the kissing of her lips by the accused both have sexual connotations. I remind myself *that the 'gravamen of the offence of indecent assault is the element of indecency.'* In the present case, I find that the conduct of the accused in intentionally touching PW1's stomach and breast and kissing her lips will be considered by right thinking people (in Nauru's case, the ordinary person') as an affront to the sexual modesty of a woman.

I conclude that in the present case, the conduct of the accused on Counts 1 and 2 constitute indecent assaults.

29. I remind myself that the burden of proof under Section 25 of the Act rests with the prosecution. Am I satisfied beyond reasonable doubt that the accused committed the offences as charged? What does the term 'beyond reasonable doubt mean? In *Keeley v Brooking* [1918] ArgusLawRp 125; 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.'

CONCLUSION

30. Having considered the totality of the evidence in this case, I am certain that the accused committed the offences as charged in Counts 1 & 2.

31. My findings are:

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

Dated this 21st day of November 2025.


Kiniviliame T. Keteca
Judge

