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

Criminal Case No. 02 of 2021

BETWEEN: THE REPUBLIC

PROSECUTION

JOSHUA SCOTTY

ACCUSED

BEFORE: Keteca J

Date of Hearing: **18th December 2024**

Date of Judgment: **10th April 2025**

Catchwords: Duplicity of charges, Representative charges, Abuse of process- Section 93(f) and (j) – Criminal Procedure Act 1972, Stay of Proceedings

Appearances:

Counsel for the Prosecution: **M. Suifa'asia**
Counsel for the Accused: **V. Clodumar**

RULING

BACKGROUND

1. With an Information filed on 25th January 2022, the accused is charged with three counts of Indecent Acts in relation to a child under 16 years of age and one count of Rape of a child under 16 years old contrary to Sections 117(1)(a)(b)(c) and 116(1)(a)(b) and (i) of the Crimes Act 2016.

THE CHARGE

2. The charges are as follows:

FIRST COUNT

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(1)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and 30th June 2020 at Boe District in Nauru, intentionally touched S.E., a child under the age for 16 years old, on her vagina, which was indecent and reckless about that fact.

SECOND COUNT

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(1)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and 30th June 2020 at Boe District in Nauru, intentionally licked S.E., a child under the age for 16 years old, on her breast, which was indecent and reckless about that fact.

THIRD COUNT

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(1)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and 30th June 2020 at Boe District in Nauru, intentionally kissed S.E., a child under the age for 16 years old, on her mouth, which was indecent and reckless about that fact.

FOURTH COUNT

Statement of Offence

RAPE OF A CHILD UNDER 16 YEARS OLD: Contrary to Section 116(1)(a)(b) and (i) of the Crimes Act 2016

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and the 30th of Hune 2020 at Boe District in Nauru, intentionally penetrated the mouth of S.E., a child under the age of 16 years old, with his penis.

3. On 14th November 2023, Counsel for the accused sought better particulars from the DPP to reflect the time of the alleged incidents. Counsel also sought details of who made the complaint and the persons who were present during the alleged offending.

4. On 22nd April 2022, Counsel for the accused filed a motion seeking the following orders:
   i. The charges filed by the prosecution are an abuse of process in regards to Section 93(f) & (j) of the Criminal Procedure Act 1972.
   ii. The proceedings be stayed permanently.

5. The DPP filed an Amended information dated 11 March 2024. The Amended Information reads:

COUNT 1

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(1)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and the 2nd day of July 2020, in the forenoon at Boe District in Nauru, intentionally touched S.E., a child under the age of 16 years old, while on the verandah of their home and the touching was indecent, herein being on her vagina; and reckless about that fact.

COUNT 2

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(1)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and the 2nd day of July 2020, in the forenoon at Boe District in Nauru, intentionally did an act toward S.E., a child under the age of 16 years old, and the act was indecent namely, by making her lie on his bed in his bedroom, take off her skirt and lick ger vagina; and was reckless about that fact.

COUNT 3

Statement of Offence

RAPE OF A CHILD UNDER 16 YEARS OLD: Contrary to Section 116(1)(a)(b) and (i) of the Crimes Act 2016

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and the 2nd day of July 2020, in the afternoon at Boe District in Nauru, intentionally engaged in sexual intercourse with S.E., namely, by putting his penis into her mouth while in the toilet of their home; and S.E is under 16 years old.

COUNT 4

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(3)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and the 2nd day of July 2020, in the forenoon at Boe District in Nauru, intentionally did an act toward S.E., a child under the age of 16 years old, and the act was indecent namely, by kissing her and putting his tongue in her mouth while in the toilet at their home; and was reckless about the fact.

COUNT 5

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER THE AGE OF 16 YEARS OLD: Contrary to Section 117(1)(a)(b)(c) and (i) of the Crimes Act 2016.

Particulars of Offence

JOSHUA SCOTTY between the 1st day of January 2020 and the 2nd day of July 2020, in the forenoon at Boe District in Nauru, intentionally did an act toward S.E., a child under the age of 16 years old, and the act was indecent namely, by kissing her breasts while in the toilet of their home; and was reckless about that fact.

SUBMISSION BY COUNSEL FOR THE ACCUSED

6. Mr Clodumar still submits that the amended Information does not cure his objection. He relies on *R v Lakena Degia* (Criminal case No.2 of 2021) – paragraph [19]:

   ' *Nauru does not have provision for 'representative count' and its position is similar to Australia which I shall discuss later by reference to the case of Bannister v New Zealand.*

7. Counsel refers para [23] of the Degia case which mentions- S v The Queen (1989) 168 CLR 266. At paragraph [11] Dawson J said:

   ' The Australian Position

   In S the applicant for leave to appeal was charged with three counts of incest. The first count was said to have occurred between 1 January 1980 and 31 December 1980; the second, between 1 January 1981 and 31 December 1981; and the third, between 8 November 1981 and 8 November 1982. Further particulars of the charges were sought but refused. In her evidence the complainant disclosed numerous acts of intercourse. She said that the first occurred in about 1979 or 1980 when she was fourteen years of age. She was born on 8 November 1965, so that act may or may not have occurred during the first period particularized. She said that other acts of intercourse occurred over the next two years until she left home at the age of seventeen years. The only acts of which she was able to give specific details were the first incident to which we have already referred and another incident during which the accused wore some of his wife's clothing. There was no way of attributing this incident to any one of the three periods specified in the indictment. At p 274-61 Dawson J said:-

"As I have said, the three counts in the indictment were framed in a permissible way. Each charged only one offence and gave rise to no duplicity. Had the evidence revealed only one offence in each of the years in question, there could have been no complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this there was what has been called a 'latent ambiguity' in each of the counts ... . That ambiguity required correction if the applicant was to have a fair trial.

The material before us does not reveal whether the ambiguity was apparent by reference to the depositions at the time that the applicant made application for particulars. If it was, it may have been appropriate for the trial judge to have ordered that particulars be given identifying the offences charged, if not by reference to time, by reference to other distinguishing features. If at that stage such a course was inappropriate and it was necessary for the prosecution to call its evidence for the precise nature of the defect in the proceedings to emerge, the prosecution ought to have been required as soon as the defect became apparent to elect by indicating which of the offences revealed by the evidence were the offences charged. In some cases (although not, it would seem, the present one) the ambiguity may be removed by an amendment of the indictment splitting a count into several counts or by adding further counts so as to distinguish the separate occasions alleged. Such an amendment may only be allowed if it does not cause injustice or prejudice to the accused and that generally means that it cannot be made during the course of a trial

There was, I think, obvious embarrassment to the applicant in having to defend himself in relation to an indeterminate number of occasions, unspecified in all but two instances, any one of which might, if it occurred in one of the relevant years, constitute one of the offences charged. There was the additional embarrassment that the years in the second and third counts overlapped so that if an occasion fell within the overlapping period it was not possible to determine whether it was an offence charged by count two or by count three.

The occasions upon which the offences alleged took place were unidentified and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specific and, therefore, more effective defences, such as the defence of alibi. Because the occasions on which he was alleged to have committed the offences charged were unspecified, he was unable to know how he might have answered them had they been specified. It is not to the point that the prosecution may have found it difficult or even impossible to make an election because of the generally unsatisfactory evidence of the complainant. An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness.

Not only was the applicant embarrassed in putting his defence, but as the prosecution was not put to its election, the trial proceeded in a manner which made it impossible to deal with questions of the admissibility of similar fact evidence ... . True it is that evidence of acts of intercourse other than those charged may have been admissible as similar facts of sufficient probative force to warrant their admission in evidence. I attempted to explain in Harriman v The Queen [(1989) 167 CLR 590] that when such evidence is admitted in a case of this kind its relevance is said to lie in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance as to justify its admission .... Obviously that high degree of relevance can only occur where the evidence of propensity is related to a specific offence upon an identified occasion. If no occasion is identified, the necessary relationship cannot exist. In this case, where there was a failure to identify the occasions upon which the offences charged took place, the whole of the evidence was, in effect, evidence of propensity which could not be related to the offences charged because of the lack of identification of those offences. In other words, the prosecution case sought to go no further than to establish that an incestuous relationship existed between the applicant and his daughter – which is to do no more than establish a particular kind of propensity – and to assert the guilt of the applicant upon three unspecified occasions during the existence of, and upon the basis of, that relationship. Far from establishing the necessary high degree of relevance, to proceed in this way was to obtain the conviction of the applicant upon evidence of propensity unrelated to a specific offence upon an identified occasion. Such a course was clearly objectionable.

The case having proceeded as it did, it is theoretically possible that individual jurors identified different occasions as constituting the relevant offences so that there was no unanimity in relation to their verdict. That, of course, would be unacceptable, but it is more likely that the jury reached their verdict without identifying any particular occasions. Indeed, that is virtually inevitable because no means were afforded the jury whereby they could identify specific occasions. As I have indicated, such a result is tantamount to their having convicted the applicant, not in relation to identifiable offences, but only upon the basis of a general disposition on his part to commit offences of the kind charged.

Moreover, the law requires that there be certainty as to the particular offence of which an accused is charged, if for no other reason than that he should, if charged with the same offence a second time, be able to plead autrefois convict or autrefois acquit. ..."

8. Mr Clodumar submits that in the Degia case, Khan J relied on the Dawson J's observation above and found that the charges complied with Section 93(f) of the Criminal Procedure Act 1972 because one offence was committed 'in the specified period in 2018 and one offence in the specified period in 2019.'

9. Counsel adds:

i. That the amendment of the Information submitted by the DPP in March 2024 was adding the word 'forenoon' on all counts.

ii. The offences were committed at an unspecified time and date thus the accused cannot use the defence of alibi under Section 148 of the Criminal Procedure Act 1972.

iii. It will be impossible for the accused to account for his whereabouts between 12am and 12pm for the period 01 January to 02nd July 2020.

iv. The accused will not get a fair trial as 'he will not be able to mount a proper defence.'

v. Did he rape the child first or did he perform the 3 indecent acts at some time before noon on an unknown day?

vi. This case is distinguishable from the Degia case and the ' Information was framed in a way that clearly falls within the definition of 'representative count.' There is no provision for representative counts in Nauru's Criminal Procedure Act 1972 and thus 'the framing of the information submitted by the DPP was unlawful.'

vii. This court has the power to stay proceedings permanently. The *Republic v Batisua and Ors* case- Criminal Appeal No. 2/2018 (unreported) the Nauru Court of Appeal said at paragraph [89]-*' It is not uncommon for Courts to grant an interim or conditional stay for a variety of reasons. The grant of a permanent stay is however quite exceptional, an 'extreme step' which should not be taken unless the Court is satisfied that continuation of the prosecution is oppressive, vexation and inconsistent with the recognised purposes of the administration of criminal justice and therefore constitutes an abuse of process of the Court (see DPP v Humphrys [1977] AC146, Moevau v Department of Labour [1980] 1NZLR 464). Mere delay is not, on its own, will not ground a permanent stay (Jago v District Court (NSW) (1989) 168 CLR23).*

viii. This case *' falls within the exception in that the continuation of the prosecution will be oppressive, vexatious and inconsistent with the recognised purposes of the administration of criminal justice and therefore constitutes and abuse of process of the Court.'*

SUBMISSION BY THE PROSECUTION

10. "Representative Counts" in relation to the amended Information – filed on 11th March 2024. Ms Suifa'asia submits as follows:

i. The issue for determination is- Whether the four charges on the Amended Information filed on 11th March 2024 remains to be duplicitous or are representative counts given the time of the **offence(s) is (are) between tbe 1st day of January 2020 and the 2nd day of July 2020?** Counsel submits that 'the charges have been further and better particularised – it renders each count 1 to 4 capable to inform the accused of the nature of the charge."

ii. With reference to the case of *Degia v Republic [2021] NRSC 48; Criminal Case 2 of 2021 (19 November 2021)*, at paragraph [22] the court looked at 'R v Accused [1993] 1NZLR 385 where in a conduct alleged occurred more than once, the prosecution must show at least one criminal action described of the alleged offence during the period.'

iii. *Counsel has also referred to paragraph [23] quoted by the Defence counsel above. In particular, Dawson J's comments at [274-61]-*

' "As I have said, the three counts in the indictment were framed in a permissible way. Each charged only one offence and gave rise to no duplicity. Had the evidence revealed only one offence in each of the years in question, there could have been no complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this there was what has been called a 'latent ambiguity' in each of the counts ... . That ambiguity required correction if the applicant was to have a fair trial.

> *The material before us does not reveal whether the ambiguity was apparent by reference to the depositions at the time that the applicant made application for particulars. If it was, it may have been appropriate for the trial judge to have ordered that particulars be given identifying the offences charged, if not by reference to time, **by reference to other distinguishing features**. If at that stage such a course was inappropriate and it was necessary for the prosecution to call its evidence for the precise nature of the defect in the proceedings to emerge, the prosecution ought to have been required as soon as the defect became apparent to elect by indicating which of the offences revealed by the evidence were the offences charged. **In some cases (although not, it would seem, the present one) the ambiguity may be removed by an amendment of the indictment splitting a count into several counts or by adding further counts so as to distinguish the separate occasions alleged.***

iv. Counsel adds- ' the Court in Degia, further referred to [13] in Bannister where it explains that the objection in instances of indictment that has 'latent ambiguity', it leaves the accused with uncertainty of the charges he has to answer to. Reference was made to Dixon J, in Johnson v Miller [1973] 59 CLR 467, where Honor said-

> *' The question is whether the prosecutor should not be required to identify one of a number of sets of facts, each amounting to the commission of the same offences that on which the charge is based. In my opinion he clearly should be required as soon as it appears that his complaint in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence ith which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. '*

v. Counsel submits that the DPP has corrected the ambiguity in the four counts on the Amended Information filed on 11th March 2024- they have 'defined each count distinguished in the matter alleged in the particulars to better describe the nature of the offences on the four occasions. These 'took place within the period of an unknown date between 1st January 2020 to 02nd July 2020.'

vi. In conclusion, Counsel submits- there is no duplicity and the exception to the 'representative charge' as contended in this instance, is that'... the ambiguity may be removed by an amendment of the indictment splitting a count into several counts or by adding further counts so as to distinguish the separate occasions alleged.'

DISCUSSION

11. The Amended Information filed by the DPP on 11th March 2024 may be summarised as follows:

Count	Date	Offence- Section of Crimes Act 2016	Physical Element of Offence	Where the Offence Took Place
1	Between 01st day of Jan 2020 and 02nd day of July 2020	Indecent act- child under 16 years old- Section 117(1) (a) (b) (c) (i)	Touching S.E's vagina	Veranda of their home
2	Between 01st day of Jan 2020 and 02nd day of July 2020	Indecent act- child under 16 years old- Section 117(1) (a) (b) (c) (i)	Lay S.E on his bed, take off her skirt and lick her vagina	Accused's bedroom
3	Between 01st day of Jan 2020 and 02nd day of July 2020	Rape of child under 16 years old- Section 116(1)(a)(b)	Putting his penis into S.E's mouth	Toilet of their home
4	Between 01st day of Jan 2020 and 02nd day of July 2020	Indecent act- child under 16 years old- Section 117(3) (a) (b) (c) (i)	Kissing S.E and putting his tongue in her mouth	Toilet of their home
5	Between 01st day of Jan 2020 and 02nd day of July 2020	Indecent act- child under 16 years old- Section 117(3) (a) (b) (c) (i)	Kissing S.E's breasts	Toilet of their home

12. It is noteworthy that there is no **(i)** in Section 117 of the Crimes Act 2016.

13. In tabulating the 5 Counts, it becomes clearer that the **physical elements** for Indecent Act under Counts 1, 2, 4 and 5 involve different alleged conduct on the part of the accused at 3 different places. These are:

Count 1 - Touching S.E's vagina- **veranda of their home;**

Count 2 - laying S.E on his bed, removing her skirt and licking her vagina- **accused's bedroom;**

Count 4 - Kissing S.E and putting his tongue in her mouth- **Toilet of their home;** and

Count 5 - Kissing S.E's breasts- Toilet of their home.

Count 3 is rape and it is alleged that this also happened in the Toilet of their home.

14. It is apparent therefrom that though there are 4 Counts of 'indecent acts' the alleged **physical elements are different** and *so are the places where the alleged offence took place.* Both counsels have referred to **S v The Queen (1989) 168 CLR 266.** At page At p 274-61 Dawson J said:-

> '. But the evidence disclosed a number of offences during each of those years, any one of which *fell within the description of the relevant count.* Because of this there was what has been called a 'latent ambiguity' in each of the counts … . That ambiguity required correction if the applicant was to have a fair trial.
> His Honour added:
> ' . In some cases (although not, it would seem, the present one) the ambiguity may be removed by an amendment of the indictment splitting a count into several counts or by adding further counts so as to *distinguish the* ***separate occasions alleged.***
>
> His Honour also observed-
> '*There was, I think, obvious embarrassment to the applicant in having to defend himself in* ***relation to an indeterminate number of occasions****, unspecified in all but two instances, any one of which might, if it occurred in one of the relevant years, constitute one of the offences charged. There was the additional embarrassment that the years in the second and third counts overlapped so that if an occasion fell within the overlapping period it was not possible to determine whether it was an offence charged by count two or by count three.*
>
> His Honour added:
> *' **The occasions upon which the offences alleged took place were unidentified** and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specific and, therefore, more effective defences, such as the defence of alibi. Because **the occasions on which he was alleged to have committed the offences charged were unspecified,** he was unable to know how he might have answered them had they been specified. It is not to the point that the prosecution may have found it difficult or even impossible to make an election because of the generally unsatisfactory evidence of the complainant. An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness.*

15. Considering the comments by Dawson J above, I find that there is no ambiguity in the different counts here. The offences in each count are sufficiently particularised. This is done by distinguishing the **different physical elements**- from touching S. E's vagina, licking it, kissing her breasts and the allegation that the accused put his penis in S. E's mouth. The particulars of the offences go further. They clearly distinguish where the accused allegedly committed the offences- at *their veranda*, the *accused's bedroom*, and the *toilet of their home*. These particulars sufficiently identify the number and different ***occasions*** where the alleged offences took place.

16. I find that the Information filed by the DPP on 11th March 2024 complies with Section 93(f) of the Criminal Procedure Act 1972 in that- the descriptions of the offences are sufficient in particularising the place, time, and physical act of the accused. These are described in ordinary language. In this regard I find that the counts as described in the information indicate with reasonable clarity for the accused to know and understand what are being alleged against him and the ***different occasions*** when these offences were allegedly committed by him.

17. I further find that there is no abuse of process and the continuation of the prosecution in this case will not amount to an unfair trial against the accused.

CONCLUSION

18. The application for a permanent stay of this proceedings is dismissed.

DATED this 10th day of April 2025.

Kiniviliame T. Keteca

Judge