

IN THE DISTRICT COURT OF NAURU
(Criminal Jurisdiction)

CRIMINAL CASE NO. 13 of 2016

BETWEEN:

THE REPUBLIC OF NAURU
Complainant

AND:

MU
Defendant

Mr. Livai Sovau for the Republic
Mr. Ravunimase Tangivakatini for the defendant

Date of hearing: 11th October 2016

Date of Ruling: 21st October 2016

Ruling

INTRODUCTION

1. The defendant is charged with 1 count of indecent assault contrary to section 216 of the Criminal Code 1899. The complainant at the time of the alleged offence was 6 years 3 months and 28 days old. She is now seven years and 3 months old.
2. The following recommendation were made to the court by Geoff Fox (Psychologist) IHMS, Nauru; Lauren Hart Social Worker CAF Team, Nauru and Dr. Sam Jolayemi FRANZCP Consultant Child and Adolescent Psychiatrist IHMS, Nauru

"7. M is was a six year old girl who had been exposed to adverse life events such as parental separation, migration, prolonged detention, and alleged

sexual abuse. As a consequence M now presents with emotional and behavioral disturbances such as anxiety, night terrors and social isolation.

8. It is our professional opinion that M should not be required to present evidence in court. A court appearance is highly likely to adversely affect her overall presentation, increasing her subjective stress and trauma. The emotional vulnerability of a child should always be taken into consideration when subject to court appearance. It is the writers expert opinion that evidence for M's testimony should be gathered through more appropriate means, such as; written statements or audio recordings outside the court room or other adverse environment.¹"

3. Following receipt of the medical report, the prosecution now applies to the court for:
 - i) the court to be closed to the public during the trial of this matter.
 - ii) the statement of the complainant to be tendered to the court without requiring the witness to be cross-examined by the defendant through his counsel.

WHETHER OR NOT THERE SHOULD BE A CLOSED COURT

4. Mr. Tangivakatini representing the defendant informed the court that there is no objection to the application by the prosecution for the court to be closed to the public during the trial of this matter.
5. Article 10(10) of the Constitution of the Republic of Nauru read:

*"Except with the agreement of the parties thereto; proceedings of a court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority including the announcement of the decision of the court or other authority, shall be held in Public..."*²
6. Article 10(10) of the Constitution is clear authority that the court has the power to order a closed court when the circumstances of the case and the interest of administering justice require that such an order be made. With the concession from the defendant, I order that should the complainant be

¹ Paragraph 7 and 8 Medical Report dated 14th September 2016

² Article 10(10) of the Constitution

required to give evidence then her evidence will be given in a closed court where only the lawyers and other persons whose presence is required for the conduct of the hearing to take place will be present.

WHETHER OR NOT THE STATEMENT OF THE COMPLAINANT SHOULD BE ADMITTED AS PART OF THE EVIDENCE OF THE PROSECUTION AT TRIAL WITHOUT REQUIRING THE COMPLAINANT TO GIVE EVIDENCE IN COURT OR BE CROSS-EXAMINED BY THE DEFENCE

7. The prosecution has made an application to have the statement of the complainant tendered and form part of the evidence of the prosecution case and that the complainant not be cross-examined. The reason for this application by the prosecution is based on the recommendation by the Doctors as referred to in paragraph two of this judgment.
8. Mr. Sovau has referred to section 5 of the Cyber Crimes Act 2015, Section 24 of the Child Protection and Welfare Act 2016 and the International Convention on the Rights of the Child (ICRC) in support of this application.

9. Section 24 of the Child Protection and Welfare Act 2016 read:

"1. The Director may apply to a Magistrate for a child protection order for a child.

2. The application must

- (a) State the grounds on which it is made; and*
- (b) State the nature of the order sought; and*
- (c) Comply with applicable rules of Court; and*
- (d) Be filed in Court.*

3. When an application is filed, the Registry must immediately fix the time and place for hearing the application having regard to the principle that it is in the best interest of the child for the application to be heard as soon as possible.

4. Subject to subsection (5), as soon as practicable after the application is filed, the Director must:

(a) arrange for a copy of the application to be served on each of the child's parents; and

(b) ensure that the child is told about the application

5. If it is not practicable to serve the copy personally, a copy of the application may be served on a parent by leaving it at the last known residential address of the parent.

6. The copy of the application served under this must state:

- (a) When and where the application is to be heard; and*
- (b) That the application is to be heard and decided even though the parent does not appear in court*

7. The child's parents are respondents to the application"³

³ Section 24 Child Protection and Welfare Act 2015

10. Section 24 of the Child Protection and Welfare Act 2016 in my view is of no relevance to the situation as is present in this case. Section 24 of the Child Protection and Welfare Act 2016, does not in way make provisions for how the court is to receive evidence from children who are vulnerable.

11. Section 5 of the Cyber Crime Act 2015 read:

*"In proceedings for an offence against a law of Nauru, the fact that evidence has been generated from an electronic system does not prevent that evidence from being admissible"*⁴

12. How the statement of the complainant has been taken in this case has not been explained to the court. Was the statement typed or written? Section 5 of the Cyber Crime Act 2015, provides for the admissibility of evidence obtained by electronic means. It does not even by implication allow for the tendering of a witnesses' statement without the consent of the defendant and without allowing the defendant to cross-examine the complainant.

13. Article 10 (3) (f) of the Constitution of Nauru read:

"Any person charged with an offence-
(a)...
(b)...
(c)...
(d)...
(e)...
*(f) shall be afforded facilities to examine in person or by his legal representative the witnesses called before the court by the prosecution, and to obtain the attendance and carry out the examination of witnesses and to testify before the court on his own behalf, on the same conditions as those applying to witnesses called by the prosecution."*⁵

14. It is my view that the right to cross-examination though not absolute, is a right guaranteed under Article 10(3) (f) of the Constitution of Nauru. Sir Albert Palmer CJ in *Gittoa v Regina*⁶ said:

*"There is no separate right to cross examination other than when it arises after examination in chief."*⁷

⁴ Section 5 Cyber Crime Act 2015

⁵ Article 10(3)(f) Constitution of Nauru

⁶ *Gittoa v Regina* [2011] SBHC 111;HCSI-CRAC 46 of 2011 (8 August 2011) at page 2 paragraph 2

⁷ *Gittoa v Regina* [2011] SBHC 111;HCSI-CRAC 46 of 2011 (8 August 2011) at page 2 paragraph 2

There are circumstances where a witnesses statement can be tendered and due weight be given to it by the court taking into consideration the fact the defence has not been able to cross-examine the witness or complainant. I am however of the view that the circumstances of this case before me is not one of those situations where a document could be tendered instead of the complainant giving evidence and not subjected to cross-examination.

15. In Republic v Karl⁸, the prosecution was not able to produce the complainant. The defense submitted to the court that the defendant should be discharged on the grounds that the defendant will not have the opportunity of cross-examining the complainant. Also the court would not be able to see her and assess the value of her complaint. The reason for not being able to produce the witness was because she had left the country and it would have been at great expense and inconvenience to have her brought back to give evidence. The court ruled against the defence submission in this case because there was a confession and other independent evidence to corroborate the evidence that the complainant was raped. The defendant in this case was convicted.

16. The case of the Republic v Karl⁹ in my view could be distinguished from the application by the prosecution in this case. That is to have the complainant's statement tendered through the officers who have obtained the statement instead of calling the complainant to give evidence and be subjected to cross-examination.

17. My reading of the recommendation provided in the report is that her evidence could still be taken by the court but in a less stressful and less imposing environment outside of the court room or in an alternative less imposing environment. It has already been the practice of the Court that when children are giving evidence before the Court, the Court as far as it can possibly be able to within the confines of the law ensure a child friendly environment is ensured to hear evidence from the children who give evidence. For instance it should now be clear to counsels that when children give evidence, the court sits in a more informal and less imposing environment where the lawyers and magistrate do not wear business suits or jackets and everyone sits in a round table setting for the taking of the evidence of children with persons (adults) present to provide support to the child or children by sitting next to them.

⁸ [1985] NRSC 1; [1986] LRC (Crim) 158 (20 November 1985)

⁹ [1985] NRSC 1; [1986] LRC (Crim) 158 (20 November 1985)

18. I must refuse the application by the prosecution to have the statement of the complainant in this case admitted as part of the evidence in the case against the defendant and deny the defendant the opportunity to cross-examine her.

Dated this 21 day of October 2016

