



IN THE DISTRICT COURT OF NAURU
CRIMINAL JURISDICTION

Criminal Case No. 25 of 2021

THE REPUBLIC

-v-

AUGUSTINE DANIEL

Before: RM Penijamini R. Lomaloma
Republic: Mr. Shaif Shah
Defendants: Joshua Scotty/Dimenski Reweru/V. Clodumar
Date of Judgment: 17 September 2021
Submissions completed: 13 October 2021
Sentence: 15th October 2021

SENTENCE

Catchwords: *Sentence--Indecent Acts contrary to section 106(3)(a)(b)(c) ii & ii of the Crimes Act 2016; Masturbation into a CCTV camera in a shop knowing shopkeeper can see his act; Aggravating factors for a non-contact sexual offending.*

Introduction

1. You pleaded guilty to one count of Indecent Acts contrary to section 106(3)(a)(b)(c) ii & ii of the Crimes Act 2016. The offence as charged is not aggravated and so carries a maximum sentence of 10 years imprisonment.
2. After you plea of guilty, I ordered a Pre-sentence report which was compiled by the Acting Chief Probation Officer Jezza Agadio. I thank him and the submissions of both the prosecutor and defence counsel.

The Facts

3. At approximately 3: 52 pm on 18th of March 2021, one Ms. Chen, a young Chinese National and a storekeeper at VIM #2 shop in Denig District was managing the store when you entered the shop and asked for a pair of shorts in your size. Ms. Chen then directed you to the area where such shorts are kept. You then left the shop and returned. You then asked to try on the pants. She told you to try on the pants but she showed you the shop CCTV cameras inside the shop and the TV screen where the CCTV feed is displayed.
4. You then told Ms. Chen that you will try the shorts in the corner and asked her to inform you if another customer walked in. You then proceeded to the corner of the

store and started masturbating. Ms. Chen saw this on CCTV screen. You then walked to Ms. Chen and asked to take a photo together. While you were standing in front of Ms. Chen, your penis was sticking out around the elastic of your pants. You then walked back to the corner where you continued masturbating. Ms. Chen then reported the matter to police and you were interviewed under caution and charged.

5. You admitted these facts in Court on 17th September and I found you guilty as charged.
6. I then ordered a pre-sentence report and asked for sentencing submissions from the prosecutor and mitigation from your counsel.

Seriousness

7. A court is required to pass a sentence that is commensurate with the seriousness of the offence. The seriousness of an offence is determined by two main parameters—the culpability of the offender and the harm caused or risked being caused by the offence. The seriousness of the offence will determine: -
 - (a) which of the sentencing thresholds has been crossed;
 - (b) indicate whether a custodial, community or other sentence is the most appropriate; and
 - (c) be the key factor in deciding the length of a custodial sentence, the onerousness of requirements to be incorporated in a community sentence and the amount of any fine imposed.
8. Culpability starts with negligent acts at the lowest end of the scale then rises up through recklessness, knowledge with intentional acts at the top of the scale. The harm is the measure of the harm caused, intended or likely to be caused by your offending.
9. This was an intentional act and therefore highest on the culpability scale. The offending started where you exposed your genitalia. It continued when you masturbated. You then continued masturbating when you returned to where you originally started. It would have taken some time in which you should have known that what you are doing is wrong yet you did not stop. The offending was therefore sustained and raises your culpability.
10. The harm from any offending includes the harm caused, intended or likely to be caused by your act. In the pre-sentence report, the victim said she was afraid when the offence was taking place as you were alone in the shop with her. At one stage, you tried to put your hand around her to take a selfie and she was particularly afraid because of your proximity to her. She did not attend work for 2 days afterwards as she was scared because you told her you would be back. She was mocked by customers who came to know about the incident. This is the harm that she has suffered but it is not the total harm caused by this offence. From the assessment above, I would rate the seriousness of this offending at about the mid-point of this offence.

Aggravating Factors

11. The aggravating factors increase your culpability and the sentence. The act which is indecent is your initial masturbation. At that stage, your masturbation was a non-contact sexual offence. This was aggravated when you approached the victim with your penis sticking out of your trousers exposing your penis to her at short range. Attempting to put your hand around her for a “selfie” without her consent is another aggravating factor as this act moves the offence from a non-contact to a contact sexual offence. A contact sexual offence is always more serious because it increases the danger to the victim. The victim here said she became more afraid when you approached her.
12. This offending was premeditated. You went in first and came out and waited until she was alone at the shop before you went in and did your act. These matters clearly show that this was pre-meditated, in other words, you planned your offending.

Personal Circumstances and Mitigation

13. You are 20 years old and the second youngest in a family of 12. You lived in Aiwo District with your mother and youngest brother. You were unemployed and had just been offered a job when this offence took place. The Acting President of the Aiwo Committee, Alkali Thoma wrote a reference on your behalf. The Acting Chief Probation officer recommended a non-custodial sentence and your counsel recommended this.
14. You were found guilty and sentenced to 3 months imprisonment in May 2020 for being found in certain places without consent. This happened in a residence occupied by a couple in the early morning while it was still dark. You have not learnt from the leniency of the court in that case and re-offended 10 months later.
15. You told the Probation Officer that you deeply regret what you did and you are full of remorse. You seek forgiveness for what you did. You are a young offender. You pleaded guilty at the first opportunity.

Similar offences in other jurisdictions

16. There are not enough cases for this offence in Nauru to have an accepted lower and upper level of sentences since the Crimes Act was introduced only in 2016. The maximum sentence was increased from 6 years to 10 years imprisonment on 23 October 2020 and this is the first charge since then.
17. The prosecutor has referred me to UK cases on the equivalent offence which is exposure. This offence prohibits one from intentionally exposing their genitalia publicly to anyone. The maximum sentence is 2 years imprisonment.
18. In *R v Ketteridge*¹, the appellant was driving past a bus when he took out his penis and masturbated in view of the school children aged 16 -17 on a school trip in the bus. He was sentenced to 9 months imprisonment and his appeal against sentence was dismissed by the Court of Appeal.
19. In *R v Smith*², the appellant was charged with two offences of committing an act of outraging public decency by behavior in an indecent manner contrary to the common law. The offence carries an unlimited maximum sentence. The first involved

¹ [2014] EWCA Crim 196

² [2018] EWCA Crim 151

him masturbating in front of a community centre where mostly adults of both sexes in their sixties could see him. In the second offence, he was masturbating inside a cathedral during a wedding and stopped when someone spoke to him. He then moved on from one place to another continuing to masturbate. He was told to leave but continued to masturbate in the car park. He was sentenced to 12 and 21 months respectively for a consecutive total of 33 months. The Court of Appeal reduced the sentence to 10 months for the first count 13 months for the second count. Both were reduced to 8 months and 13 months respectively after taking into account the totality principle.

20. In *R v Birch*³ the accused was caught masturbating on a CCTV camera at a bus stop when a woman walked past. He followed her to town and tried to avoid being discovered by her. At one stage, he pulled his penis out as he was following her. The police were called and he was arrested. He was charged with indecent exposure contrary to s 66 of the Sexual Offences Act 2003 (SOA 2003) but he pleaded guilty to the alternative charge of an act of outraging public decency by behavior in an indecent manner contrary to the common law which carried an unlimited sentence. He was sentenced to 3 years in the Crown Court but this was reduced to 18 months by the Court of Appeal in part because the appellant's sentence had to be consecutive to another sentence.
21. The UK sentences reflect the dangerousness of this offence as it is often a stepping stone to contact sexual offences. You planned this offending and made sure the victim was alone before you carried it out. You need a deterrence sentence to stop you from this kind of offending.
22. The maximum sentence for indecent act in Nauru is 10 years whereas it is 2 years for indecent exposure in the UK and an unlimited maximum for the common law offence. The starting point for your sentence should reflect the relative maximums here and in the UK and to reflect the maximum sentence which I can pass, which is 5 years imprisonment pursuant to section 7(a)(ii) of the Criminal Procedure Act 1972.

Sentence

23. From the seriousness of the offending, I consider that a custodial sentence is necessary to punish and deter you from this kind of behavior. You re-offended 8 months after this court sentenced you for your first offence. It is obvious that you have not learnt from the court's leniency.
24. I would pick a starting point of 24 months imprisonment. For the aggravating factors, I would add 3 months taking the sentence to 27 months. For the mitigating factors, I would subtract 3 months leaving a sentence of 24 months. For your early plea of guilty, I would subtract 6 months leaving a sentence of 18 months imprisonment. This discount is given to encourage defendants to plead guilty and save the time for a trial and particularly in sexual offences like this one, to save the victim from having to relieve her ordeal.
25. You spent 69 days in remand and this is to be subtracted from your sentence.

³ [2007] EWCA Crim 1008

Orders

26. For the offence of Indecent Act contrary to section 106(3)(a)(b)(c)(ii) & (ii), I convict you and sentence you to 18 months imprisonment less 75 days spent in remand.
27. 14 days to appeal.


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Penijamini R Lomaloma
Resident Magistrate

The seal of the District Court of Nauru is circular. It features a central emblem with a shield and a crown on top. The text "DISTRICT COURT OF NAURU" is written around the perimeter of the seal. There are two stars on either side of the central emblem. The seal is stamped in blue ink.