



IN THE DISTRICT COURT OF NAURU

Criminal Jurisdiction

Criminal Case No. 40/2021

THE REPUBLIC OF NAURU

-v-

JACKSON PICKERING

*Before: RM. Neil Rupasinghe
Prosecutors: Ms Francis Pulewai
Defence: Mr Ravuanimasei Tagivakatini
Date of Judgment: 5th January 2023*

SENTENCE

Catchword: *Indecent acts contrary to Section 106(1)(a)(b)(c)(I) and (II) of the Crimes Act 2016 and Being found in certain places without lawful authority or excuse.*

1. After trial, the accused was convicted for one count of Indecent acts contrary to Section 106(1)(a)(b)(c)(I) and (II) of the Crimes Act 2016 and one count of Being found in certain places without lawful authority or excuse contrary to Section 164(a)(I) and (b) of the Crimes Act 2016. Both parties filed their sentencing submissions. Accordingly, this court acknowledges the same.

2. The summary of facts of count one suggested the accused, on 26th of September 2021 at Bauda District of Nauru, intentionally touched Marlicia Tsitsi's nipple, which is indecent. The accused is reckless about that fact, and Marlicia Tsitsi does not consent to touch, and the accused knows that fact.
3. The facts of the second count suggested the accused, on 26th of September 2021 at Bauda District of Nauru, entered a dwelling house, and the accused did not have the consent of the owner Omini Dabana to enter or remain in the place.

Tariff

4. The prescribed penalties for the relevant offences could be reproduced as follows; For the offence of **Indecent Acts**, If aggravating circumstances apply -20 years imprisonment and, In any other case, -10 years imprisonment. The offence of **Being found in certain places without lawful authority or excuse** carries a Penalty of 1-year imprisonment.
5. The sentencing or penalties for these offences always depends on the seriousness of the crime, and the bench must fix a starting point which depends on the facts of each case. For example, in ***Republic v Aroman*** [2020] NRDC 17; Criminal Case 28 of 2020 (6 November 2020), ACJ Khan stated as follows.

“The starting point for each sentence is to look at the seriousness of the offending, taking into account his culpability and the harm caused, intended or likely to be caused by the offending. Culpability or blameworthiness is the measure of the fault and starts with negligence, followed by recklessness, knowledge and with intentional acts at the top of the scale. The starting point for the sentence depends on the seriousness of the offending.”

6. To ascertain the seriousness of the offending, the court would consider the relationship between the parties (if any); the age gap between the victim and offender; the time and

place of the incident; the vulnerability of the victim; the mental status of both parties etc. Accordingly, penalties would be imposed.

7. Several case authorities have been mentioned in sentencing submissions. However, since there are more relevant case authorities, I will refrain from considering the cases of Indecent acts concerning children under 16 years old under Section 117 of The Crimes Act as it is another specific offence recognised by the parliament.
8. Therefore, I will consider *Republic v Aroman* [2020] NRDC 17; Criminal Case 28 of 2020 (6 November 2020) and *Republic of Nauru v Taumea* [2019] NRDC 3; Criminal Case 36 of 2018 (22 May 2019) for this sentencing. In the *Republic v Aroman*, the penalty was the imprisonment of 20 months and eight months consecutively for similar offences. In the case of *Republic v Taumea* was imposed \$ 500 was for a count of indecent acts, and \$ 300 was for being found in certain places without lawful authority. This confirms the wide range of sentencing with connections to relevant offences.
9. In *Republic v Aroman* the accused entered the rooms of 2 victims, who were 22 and 45 years of age, when they were sleeping, and squeezed breasts and rubbed the stomach and genital area. In the case of *Republic v Taumea* the accused went inside the victim's room, exposed his underwear, and asked for sex. She refused and was told to leave but asked to perform cunnilingus. Later, as in the current case, the defendant was beaten up by the victim's husband.

Submissions

10. In his mitigation, the accused stated that even though he pleaded not guilty, he accepted the verdict. He acknowledges that he is wrong, and he states that he is remorseful. The accused had apologised to the victims and was beaten up until losing consciousness by the complainants. But he did not retaliate. He was in remand for 14 months and is 22 years of age first offender. He had surrendered to the police and cooperated with investigations.

11. Contrary to the above mitigation, the prosecution suggested a harsh penalty than penalties imposed on the existing case authorities as the statutory law changed on 23/10/2020 subsequently but before the alleged incident of this matter. The legislature's intention was reflected by the Parliamentary speech of Hon Maverick Eio, the Minister of Justice.

"...This action is necessary on the part of the legislature to ensure that the judiciary is equipped with the necessary jurisdiction and power to impose sentences which will serve as a deterrence. the new sentences in this bill are very severe for this reason..... Our woman and children must enjoy their freedom and their liberty given to them not only by the constitution but as we have always enjoyed as a society." (Emphasis added)

12. The prosecution further questioned the genuineness of remorsefulness of the defendant since he continued to contest. When a person is defending himself before a court, they are exercising their right to defend themselves at a trial, which can not be questioned or stopped as it is a right guaranteed by the constitution. However, it gives an implication that the defendant was behaving naturally and attempting to avoid the sentencing but nothing else.

13. Referring to the victim impact report, the prosecution suggested applying the high end of the scale of punishments as the level of harm is severe. According to the victim impact report, the victim is still worried about her experience and trying to relieve her mind. I would not consider entering the victim's house without consent, touching the nipple, or both parties being neighbours as aggravating facts as they are either elements of the offences or don't have a logical connection to the offences but mere evidential facts.

14. I agree with the prosecution's suggestion that the defendant should not be given any discount for his period at the remand centre as specifically prescribed by the legislature under part- 7 (Sexual Offences) of the Crimes Act 2016.

" Sec: 282A Pre-trial detention not to be taken in to account in certain offences for sentencing purposes

In dertermining the final term of imprisonment, the court shall not make provision to discount any period served in remand pending or prior to a trial for offences under part 7.”

15. Further, I would comment that the assault of the defendant by the victim's husband is not entertained by the court, as any individual must not punish other than the prescribed way by law, no matter what. He lost his hearing ability in the right ear due to assault by PW-2. However, I would not consider it a mitigatory fact as it would amount to legal recognition of an illegal act by the victims and create a bad precedent.
16. The court system, prosecution and law enforcement have been introduced to formalise the punishment and prevent the public from taking punishment into their hand. In that sense, the defendant has been punished earlier by the victim's husband. What is appropriate is that police should have filed a cross-charge against the victim's husband for assaulting the defendant, but he has not been charged for it.
17. The abovementioned scenario must not be confused with the right of retaliating or self-defence, as this attack occurred when the defendant apologised after the incident. In *Republic v Taumea* the accused was beaten by the victim's husband and, finally convicted, imposed a non-custodial sentence. In that sense, the defendant deserved similar lenient punishment. However, due to the amendment of related law, I would refrain from following the current tariff but conclude that the defendant deserves a higher custodial sentence.
18. In the *R V Ball* (1951) 35 Cr App R 164, Hilbery J Delivering the judgment of the Court of Appeal, commented on pages 165-166 as follows;

“ In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. Criminal law is publicly enforced, not only with the object of punishing crime but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempt to try crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice, the punishment is

negligible. Such a sentence may also deter the particular criminal from committing a crime again or induce him to turn from a criminal to an honest life."

19. The discretion of the magistrate's sentencing is broad under Nauruan Law. It has been prescribed in section 277 of The Crimes Act 2016 and which provides as follows;

"Kind of Sentences

Sec: 277.

Where a court finds a person guilty of an offence, it may, subject to any particular provision relating to the offence and subject to this act, do any of the followings;

- (a) record a conviction and order that the offender serve a term of imprisonment;*
- (b) with or without recording a conviction, order the offender to pay a fine;*
- (c) record a conviction and order the discharge of the offender;*
- (d) without recording a conviction, order the dismissal of the charge for the offence; or*
- (e) imposed any other sentence or make any order that is authorised by this or any other written law of Nauru"*

Sentence

20. After considering the sentencing submissions, relevant law and principles of the sentencing, I imposed the defendant subject to the following sentence;

[1] For count One of the indecent act, FourtyTwo months imprisonment, and

Twelve months out of the same will be suspended for three years.

[2] For the Second of Being found in certain places without lawful authority

Six months imprisonment.

[3] Both imprisonments will run concurrently.

[4] The defendant must pay \$ 750 compensation to the victim; in default, subject to 12 months imprisonment in addition to the imprisonment mentioned at [1], and it will run consecutively.

21. Defendant has 21 days to appeal this decision.

