



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

CRIMINAL CASE No. 18 of 2020

BETWEEN

REPUBLIC

AND

(1) MICKEY TSIODE  
(2) VENOS TSIODE  
(3) VENDO TOM  
(4) T.T ( a Child)  
(5) DOMICKY TOM

Defendants

Before: Fatiaki CJ.  
Date of Hearing: 4 March 2021  
Date of Ruling: 4 March 2021

Case may be cited as : *Republic v Tsiode and others (No. 3)*

CATCHWORDS: Joinder of offences ; joinder of offenders ; severance ss. 91 & 92 Criminal Procedure Act 1972; “*offences of a similar character*” ; “*...form or are part of a series of offences*” ; “*..committed in the course of the same transaction*” ; child offender ; presumption of “*carnal knowledge*”. s. 29 Criminal Code 1899; s. 41 Crimes Act 2016; criminal responsibility of child between 10 and 14 years.

APPEARANCES:

Counsel for the Prosecution:	R. Talasasa (DPP)
Counsel for the First, Third and Fifth Defendants:	V Clodumar (absent)
Counsel for the Second Defendant:	E Soriano
Counsel for the Fourth Defendant:	R Tagivakatini(PLD)

## REASONS FOR RULING

1. On 3 September 2020 the five (5) defendants were referred to the Supreme Court for trial on a single charge that charged them jointly with Rape of a Child under 16 years of age contrary to section 116(1) of the Crimes Act 2016. The offence is alleged to have occurred over a period of 7 years beginning in 2013 until August 2020.
2. On 17 September 2020 the DPP filed an Information charging the 5 defendants in 7 separate counts of Rape variously under sections 347 & 348 of the Criminal Code 1899 and under section 116 of the Crimes Act 2016 as follows:
  - Two against Mickey Tsiode (Counts 1&2) ;
  - Two against Venos Tsiode (Counts 3&4) ;
  - One under the Criminal Code 1899 against Vendo Tom (Count 5) ;
  - One under the Criminal Code 1899 against (TT) a child born on 7 August 2004 who would have been 12 years of age on the date charged in the alleged offence (Count 6) ;
  - One under the Crimes Act 2016 against Domicky Tom (Count 7).
3. On 23 October 2020, the DPP filed an amended Information in almost identical terms to the earlier Information. What amendments were made are not entirely clear nor is it known why the amendments were needed. Nevertheless the following features are plain:
  - The amended Information charges offences of Rape under Sections 347 & 348 of the Criminal Code 1899 and under Section 116(1)(a) of the Crimes Act 2016 ;
  - The offences are alleged to have occurred in two (2) different locations : “*Yaren District*” and “*Anibare District*”.
  - The offences are alleged to have occurred during 5 different date ranges as follows :
    - (a) “*between 1<sup>st</sup> January 2013 and 31<sup>st</sup> December 2013*” ;
    - (b) “*between 1<sup>st</sup> January 2015 and 31<sup>st</sup> December 2015*” ;
    - (c) “*between 1<sup>st</sup> January 2016 and 31<sup>st</sup> December 2016*” ;
    - (d) “*between 1<sup>st</sup> January 2020 and 31<sup>st</sup> August 2020*” ; and
    - (e) “*between 1<sup>st</sup> January 2020 and 31<sup>st</sup> December 2020*”.
  - The identical particulars of all of the offences reads:

*“...intentionally engaged in sexual intercourse with T.R. a child under the age of 16 years.”*
4. On 15 February 2021 during the course of a general “*call-over*” the DPP was asked about defence counsel’s request for severance of the charges and after lengthy discussions with

the Court, the DPP was directed to justify the joinder of the defendants as well as the joinder of the counts.

5. On 1 March 2021, the DPP advised the Court that he intended to file an amended Information however he needed to speak with the victim ('VV') first. The DPP was granted leave to file an amended Information which addressed the joinder concerns that had been earlier raised during discussions at the "call-over".
6. On 4 March 2021, the DPP filed a second amended Information. This time there was an additional count against the child defendant (TT) which split the earlier single Count that charged an entire year namely, "...between 1<sup>st</sup> January 2016 and 31<sup>st</sup> December 2016", into two (2) separate Counts. The first, charged an offence of Rape under the Criminal Code 1899, "...between 1<sup>st</sup> January 2016 and 11<sup>th</sup> May 2016" and the second, Rape of a Child under the Crimes Act 2016 "between 12<sup>th</sup> May 2016 and 31<sup>st</sup> December 2016". Other than that amendment which increased the number of Counts, the 2<sup>nd</sup> amended Information was identical in almost all other respects to the earlier amended Information.
7. It is unfortunate that the DPP did not address the Court's earlier expressed joinder concerns in this latest amended Information which continued the joinder of the offences and offenders.
8. Be that as it may, on 4 March 2021 the Court heard the DPP on the unaltered joinder of offences and offenders in the latest amended Information filed. Defence counsels also made submissions seeking severance of their respective clients as well as severance of their joined charges.
9. Furthermore although not cited or referred to the Court the leading English case of R V Assim [1966] 2 QB 249 lends some support for the DPP's submissions where Sachs LJ in delivering the judgment of the Court of Criminal Appeal made the following observation on the question of joinder of offenders and offences (at pp 258 and 259) :  

*"The first point .....is that questions of joinder be they of offences or of offenders are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice.....; Secondly, it is also clear that joinder of counts being a matter of practice, any error in the application of relevant rules would normally amount to an irregularity and would not result in the trial court having no jurisdiction ..... in relation to such matters a essential issue to be considered is whether any real injustice has been done to the applicant.....; Thirdly, this Court considers that there never has been a clear, settled and general practice based on principle as to the occasions when joinder of offenders is in practice correct.....;"*. (my emphasis)
10. I interpose here to mention that the position in Nauru is governed by relevant statutory provisions namely, Sections 91 and 92 of the Criminal Procedure Act 1972 (see: paras 19 & 20 post).

11. For completeness, I set out Sachs LJ's conclusion in the following oft-quoted extract taken from p 261 where he says :

*“As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that had nothing to do with each other where, however, the matter which constitute the individual offences of the several offenders are upon the available evidence, so related, whether in time or by other factors that the interest of justice are best served by them being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule of course includes cases where there is evidence that several offenders acted in concert but is not limited to such cases.”*

And at p 262 :

*“The Court ...desires to repeat, that it is the interest of justice as a whole that must be the governing factor and that amongst those interests are those of the accused. It is essentially a matter for the discretion of the court whether several offenders can properly be tried together at the same time and it is necessary for the trial judges to scrutinize matter closely with the same degree of care that is applied in dealing with the question whether a single person can be charged with several offences before the same jury.”*

12. Whatsoever where a child is involved the Court is additionally required to consider and apply the provisions of the Child Protection and Welfare Act 2016 and the relevant Articles of the UN Convention on the Right of the Child ( *see* : ss. 3(3) ; 6(1) and 54)
13. The DPP sought to justify the joinder of offences under the second limb in Section 91(1) of the Criminal Procedure Act 1972 on the basis that the joined offences “...*form or are part of a series of offences of the same or similar character*”.
14. As for the joinder of offenders, the DPP relied on Section 92(1)(a)(b)(c) and (d) of the Criminal Procedure Act 1972. He argued forcefully that the defendants were properly joined in the one Information because they are “...*accused of the same offence committed in the course of the same transaction*” [para (a)] or the defendants are “...*accused of different offences committed in the course of the same transaction*” [para (d)].
15. Defence counsels disagreed and submitted that while the offences charged may be similar they are not “*the same*” as required by the section, nor can it be said that the offending occurred “...*in the course of same transaction*”. In this latter regard, defence counsels point to the different range of dates in each count spanning 6, 8 and 12 months and the different years 2013, 2015, 2016 and 2020 and different venues in the charges, as clearly showing that all 5 offenders did not commit the offences during “*the same transaction*”.
16. After carefully listening to and considering the submissions, I was satisfied that in the interest of justice, there should be severance of both the offences as well as the offenders jointly charged in the latest amended Information and the court so ordered.

17. Under Section 92(2) the 2<sup>nd</sup> defendant (Venos Tsiode) and the 4<sup>th</sup> child defendant (TT) were severed from the 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> defendants who are all represented by the same defence counsel. Additionally, the child defendant (TT) was ordered severed from the 2<sup>nd</sup> adult defendant (Venos Tsiode).

18. Furthermore, under Section 91(3), the two counts faced by Venos Tsiode namely Counts 3 & 4 which are separated by 7 years were ordered to be severed and tried separately at the DPP's choosing. Finally, the DPP was directed to file further amended Informations in compliance with the Courts severance orders. The Court also indicated that it would provide fuller reasons for its severance orders.

19. **Section 91 Joinder of counts in a charge or information**

*(1) Any offences may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or a similar character.*

*(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.*

*(3) Where, before trial, the Court is of opinion that an accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the Court may order a separate trial of any count or counts of that charge or information.*

20. **Section 92 Joinder of two or more accused in one charge or information**

*(1) The following persons may be joined in one charge or information and may be tried together, namely:*

*(a) persons accused of the same offence committed in the course of the same transaction;*

*(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence ;*

*(c) persons accused of more offences than one of the same kind, that is to say, offences punishable with the same amount of punishment under the same section of the Criminal Code 1899 or of any other written law, committed by them jointly within a period of twelve months;*

*(d) persons accused of different offences committed in the course of the same transaction;*

*(e) persons accused of any offence under Chapters XXXVI to XLIV, inclusive, of the Criminal Code 1899, and persons accused of receiving or retaining property possession of which alleged to have been transferred by any such*

*offence committed by the first-named persons, or of abetment or of attempting to commit either of such offences.*

(2) *Where, before trial, the Court is of opinion that the interests of justice require that one or more of several accused who are included in the one charge or information be tried separately from the others, it may so order and separate trials shall thereupon be held as ordered.*

21. **Section 93 Mode in which offences are to be charged:**

(i) *a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;*

(ii) *.....(inapplicable);*

(iii) *after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary;*

(iv) *.....(inapplicable);*

(v) *where a charge or information contains more than one count, the counts shall be numbered consecutively;*

22. Section 91(1) which deals with the joinder of offences in a charge or Information permits joinder in two (2) instances as follows :

(a) *“if the offences charged are founded on the same (not similar) facts ....” or*

(b) *...“form or are part of, a series of offences of the same or a similar character”.*

The second limb (b) may be further broken down into its component parts namely :

(i) offences of *“...the same or similar character”* ; and

(ii) such offences must *“...form or are a part of a series of offences...”*.

23. The DPP sought to justify the joinder of offences in the latest amended Information on the basis of (b) above, in that the offences joined together are described either as Rape or Rape of a Child under 16 years old with the common descriptor being *“Rape”* and both offences are of *“...the same or similar character”* insofar as they are both offences which involves sexual intercourse with a common victim.

24. Rape under the Criminal Code 1899 is defined in Section 347 in the following relevant terms :

*“any person who has carnal knowledge of a woman, [or girl] without her consent....is guilty of a crime, which is called rape.”*

And Section 6 defines *“carnal knowledge”* as *“complete upon penetration”*.

The ingredients of the offence are :

(a) The defendant had penile intercourse with *“VV”* ;

(b) *“VV”* is a woman (girl) ;

- (c) “VV” did not consent to the act of intercourse ; and
- (d) The defendant intended to have sexual intercourse with VV regardless or was reckless as to whether or not VV consented to the act.
25. The above, may be contrasted with, the offence of Rape of a Child under 16 years old under Section 116 of the Crimes Act 2016 where the ingredients of the offence are :
- (a) The defendant had sexual intercourse with VV ;
- (b) The sexual intercourse was intentional ;
- (c) VV was under 16 years of age at the time of the act.
- Section 126 expressly provides that consent is not a defence to an offence under section 116 of the Crimes Act 2016.
26. It is clear that the ingredients of the Rape offences charged in the latest amended Information are not identical, nevertheless, they may be broadly characterised as being of a similar nature within limb (b) of Section 91(1) but, do the offences constitute a “*series*”? The answer to the question is neither obvious or simple. Nor is it clear whether or not the “*series of offences*” has to be committed by the same person in order for them to be joined in the one Information. The DPP submits that the joinder of similar offences is sufficient for the purposes of Section 91 irrespective of whether or not they are committed by more than one offender. With respect I disagree.
27. Section 91 is not concerned with the joinder of offenders. That is the exclusive concern of section 92 and such joinder is guided by quite different considerations.
28. For instances, the Court’s power to order severance of offences under Section 91(3) is predicated on whether the accused will be “*embarrassed in his defence*” or the joinder is oppressive or unfair and it is desirable to sever the offences. On the other hand, under section 92(2) severance of offenders may be ordered if the “*...interest of justice require*” which includes both the interests of the prosecution and of the accused, as well as the Court’s interest in ensuring the most efficient and economical use of its limited resources as the justice of the case permits or requires.
29. The Paperback Oxford English Dictionary (7<sup>th</sup> edn.) defines a “*series*” as : “ *a number of similar or related things coming one after another.*” It is clear that the word is concerned with a number of similar events or offences that occur one after the other and are closely related in both time and space so as to form a continuous connected nexus without a lengthy break or pause between events or offences
30. In the amended Information the offences and events are undoubtedly similar but, they did not occur at the same place or at the same time. Indeed there is a break of a year ie. 2014 between the earliest offendings in 2013 and 2015. Likewise there is a three year break ie. 2017, 2018 and 2019 between the latest offendings which occurred in 2016 and 2020.

31. In the circumstances and given that the offences were committed by different offenders it is difficult to accept that the offences joined in the amended Information in the words of the second limb to Section 91(1) : “...*form or are part of a series of offences.*”
32. I am fortified by the provisions of subsection(3) which clearly assumes that the “...*series of offences*” are committed by a single offender who “.. *may be embarrassed in his defence by reason of being charged with more than one offence in the same Information.*” I also receive some support from the fifth footnote to Section 347 of the Criminal Code 1899 which reads :
- “*Acts of rape separated by an interval of 2 days cannot be regarded as one continuous offence.*”
33. Section 92(1) permits the joinder of different offenders in the same Information under 5 enumerated circumstances namely paras (a) to (e). The DPP sought to rely on paras (a)(b)(c) and (d), to justify the joinder of the 5 offenders in the one Information. After considering his submissions I was not satisfied that paras (b) and (c) had any application to the present case.
34. Para (b) states “***persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence***” and para (c) deals with the situation where “*persons accused of more offences than one of the same kind, that is to say, offences punishable with the same amount of punishment under the same section of the Criminal Code 1899 or of any other written law, committed by them jointly within a period of twelve months*”. This leaves only paras (a) and (d) as possible justifications for the joinder of the 5 offenders (my emphasis).
35. Both paras (a) and (d) contains a common phrase namely that the joined offenders committed their offences “...*in the course of the same transaction*”. For the sake of argument I accept that the defendants may be described as persons who have been accused of the same or different offences but whatever the correct description, the common denominator is that the offences were “...*committed in the course of the same transaction*”.
36. The DPP submits the offences charged fulfills that requirement because they are similar and were committed against the same victim. In particular, he submits that the joinder of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants is fully justified because their offences were committed within the same time range namely “*between 1<sup>st</sup> January 2020 and 20<sup>th</sup> August 2020*”. Although the period is 8 months nevertheless, he submits that their offending occurred “...*in the course of the same transaction.*” I disagree.
37. In my view under no circumstances can it be said that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> defendants are “...*accused of the same offence.*” The mere fact that the Statement of Offence and Particulars of Offence are identical in Counts 2,4 and 8 does not make them “...*the same offence.*”



38. The fact that the date of the offending is “*unknown*” in all 3 counts albeit within the same 8 months, is sufficient in my view to distinguish each count and renders the offences not “*the same*”. The offences are also not “*the same offence*” because the defendants are not jointly charged in the same Court, in other words, they are not co-offenders or accomplices who were present together and committed the offence in each offender’s presence ie. they are not “*particeps criminis.*” That in my view, is the meaning to be given to the phrase: “ *...accused of the same offence*”.
39. Accordingly, para (a) has no application and cannot justify the joinder of the defendants in the latest amended Information.
40. I turn next to the only other possible justification for the joinder and that is para (d) which allows for the joinder in one Information of “*person accused of different offences committed in the course of the same transaction.*” In light of the Court’s construction of para (a) above I accept that the defendants are individually charged with “*different offences*”. That satisfies the first limb of the para (d) but, were the offences “*committed in the course of the same transaction?*”
41. Halsbury’s Laws of England (2015 edn.) Vol 28 para 326 describes the modern approach to joinder of two or more defendants as follows:
- “Where two or more persons join in the commission of an offence, all (or any number) of them may be indicted for that offence jointly in one indictment.***
- As a general rule, it is not proper to try several defendants together on charges of committing individual offences that have nothing to do with each other;.....in complicated cases where an indictment contains numerous counts concerning different persons the prosecution should endeavour to divide the trial into convenient parts in order to .....render the duties of the Court easier. Indictments should be kept as short as possible and no more defendants should be tried together on one indictment than is necessary for presentation of the case ..... Necessity, not convenience, is the guiding factor.***” (my highlighting)
42. Before attempting an analysis of the expression it may assist to set out the parameters of the amended Information which includes the following :
- The defendants comprise 4 adults and 1 child (T.T) ;
  - The defendants are not jointly charged together in any count ;
  - The offences occurred at 2 different locations ;
  - The offences occurred over a period of 7 years between 2013 and 2020 ;
  - There was no alleged offending in 2014, 2017, 2018 and 2019 ;
43. Despite DPP’s contrary submissions I am not persuaded that multiple unrelated Rapes committed by 5 different perpetrators albeit against the same victim, and, occurring over the span of 7 years can be classified under any circumstances as constituting “*one transaction*” sufficient to justify the joinder of the perpetrators in one and the same

Information. Much less can it be said that the offences were : “...committed in the course of the same transaction”. Such an expression in my view suggests that the joined offenders committed the offences whilst engaged in an agreed or common activity performed at the same time and place or in close proximity and succession and before the activity is concluded or ends.

44. Finally, concerning the child defendant (TT), it is common ground that at the dates of the offences alleged against him in 2016, he was 13 years in Count 6 and had turned 14 years in Count 7. In respect of Count 6 which is charged under the Criminal Code 1899, Section 29 relevantly provides inter alia :

*“a person under 14 years of age is presumed to be incapable of having carnal knowledge”*

45. I accept that the “Section 29” presumption is rebuttable by the prosecution and that the evidence of the complainant /victim (“VV”) may be relied on to rebut the presumption.

46. A similar provision may be found in the Crimes Act 2016 under which the charge in Count 7 is drawn up. In particular, Section 41 provides :

*“a child between 10 and 14 years is criminally responsible only if the prosecution proves that the child knows that his/her conduct is wrong”.*

47. In similar vein, the child defendant’s “criminal responsibility” for the offence charged under the Crimes Act 2016 is dependant on the prosecution establishing that he knows that having sexual intercourse with the victim (“VV”) “is wrong”. Again the victim’s evidence could establish this.

48. Both legislative presumptions exist for the protection of child offenders under 14 years of age and presumes both sexual incapacity and lack of moral discernment unless and until the prosecution rebuts both presumptions.

49. The above are the Court’s fuller reasons for its severance orders.

DATED this 19<sup>th</sup> day of March 2021.

**D.V. Fatiaki**  
**Chief Justice**