



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

**Criminal Case No. 24 of 2021**

**BETWEEN:** THE REPUBLIC  
**PROSECUTION**

**AND:** XAVIER NAMADUK  
**ACCUSED**

**BEFORE:** Keteca J

**Date of Submissions:** 28<sup>th</sup> June, 03<sup>rd</sup> July & 01<sup>st</sup> August 2024

**Date of Ruling:** 02<sup>nd</sup> August 2024

**Case may be cited as:** Republic v Xavier Namaduk

**Catchwords:** Indecent Act in relation to child under 16: contrary to Section 117(1)(a)(b)(c) of the Crimes Act 2016

**Appearances:**  
Counsel for the Prosecution: **M. Suifa'asia**  
Counsel for the Accused: **R. Tom**

**RULING**

**A. BACKGROUND**

1. The accused is charged with two counts of 'Indecent Act in relation to a child.' He is also charged with one count of 'Being found in a certain place without lawful authority or excuse.'
2. The prosecution called four witnesses. Counsel for the accused submitted that he would make a no case to answer submission. Both Counsels filed written submissions.

## B. THE CHARGE

### 3. The Information reads:

#### *Count 1*

##### Statement of Offence

**INDECENT ACTS IN RELATION TO A CHILD UNDER 16:** contrary to Section 117 (1)(a)(b)(c) of the Crimes Act 2016.

##### Particulars of Offence

**XAVIER NAMADUK** on the 17<sup>th</sup> of December 2021 at Yaren District Nauru, intentionally touched VA's breasts outside VA's house and the touching was indecent and **XAVIER NAMADUK** was reckless about that fact and VA does not consent to the touching and **XAVIER NAMADUK** knows that fact.

#### *Count 2*

##### Statement of Offence

**INDECENT ACTS IN RELATION TO A CHILD UNDER 16:** contrary to Section 117 (1)(a)(b)(c) of the Crimes Act 2016.

##### Particulars of Offence

**XAVIER NAMADUK** on the 17<sup>th</sup> of December 2021 at Yaren District Nauru, intentionally touched VA's breasts and her genitals inside VA's bedroom and the touching was indecent and **XAVIER NAMADUK** was reckless about that fact and VA does not consent to the touching and **XAVIER NAMADUK** knows that fact.

#### *Count 3*

##### Statement of Offence

**BEING FOUND IN A CERTAIN PLACE WITHOUT LAWFUL AUTHORITY OR EXCUSE:** contrary to Section 164(a)(i) and (b) of the Crimes Act 2016.

##### Particulars of Offence

**XAVIER NAMADUK** on the 17<sup>th</sup> of December 2021 at Yaren District in Nauru, entered a dwelling house and **XAVIER NAMADUK** did not have the consent of the owner, Joannah Akubor to enter or remain in the place.

## C. THE LAW- NO CASE TO ANSWER

### 4. The relevant provision under the Criminal Procedure Act 1972 is Section 201.

*In Republic v Jeremiah [2016] NRSC 42, (applied in R v Obadiah Dabwido, SC Criminal Case No. 13 of 2019; R v Foreman Roland, SC Criminal case No. 4 of 2022) Crulci J issued guidelines on a submission of no case to answer at [4], [5] and [22] as follows:*

*[4] In Nauru the statutory provision for the consideration of a submission of no case to answer is found in the Criminal Procedure Act 1972:*

*“201. Where the evidence of the witnesses for the prosecution has been concluded and any written statements and depositions properly tendered in support of the prosecution case have been admitted, and the evidence or statement, if any, of the*

*accused taken in preliminary enquiry has, if the prosecutor wishes to tender it, been tendered in evidence, the Court-*

*(a) If it considers that, after hearing, if necessary, any arguments which the prosecutor or the barrister and solicitor or pleader conducting the prosecution and the accused, or his barrister and solicitor or pleader if any, may wish to submit, that a case is not made out against the accused, or any one of several accused, sufficiently to require him to make a defence in respect of the whole of the information or any count thereof, shall dismiss the case in respect of, and acquit the accused as to the whole of the information or that count, as the case may be;..'*

*[5] Section 201 is applicable to both the Supreme and District Courts as provided for by section 158 of the Criminal Procedure Act 1972.*

*[22] The following are guidelines when a submission of no case to answer is made:*

*(1) If there is no evidence to prove an element of the offence alleged to have been committed, the defendant has no case to answer.*

*(2) If the evidence before the court has been so manifestly discredited through cross-examination that no reasonable tribunal could convict upon it, the defendant has no case to answer.*

*(3) If the evidence before the court could be viewed as inherently weak, vague or inconsistent depending on an assessment of the witness's reliability, the matter should proceed to the next stage of the trial and the submission dismissed.*

#### **D. SUBMISSION BY COUNSEL FOR THE ACCUSED**

5. Mr Tom refers to the guidelines outlined in *R v Jeremiah* case above. He then summarises the evidence of the complainant.

6. Counsel then refers to *R v Galbraith* [1981] 2 All ER 1060 where Lord Lane CJ observed:

*'(1) that the judge should stop the case if, in his view, it would be unsafe (alternatively or unsatisfactory) for the jury to convict;*

*(2) that he should do so only if there is no evidence on which a jury properly directed could properly convict.'*

7. Mr Tom submits-

*'Lord Lane CJ in Galbraith set out the process for a judge to follow when dealing with a submission of 'no case to answer':*

*(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion*

*that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.'*

**8. Mr Tom highlights the following:**

- i. PW1 admits to being 'a constant user of sniffing gas.'
- ii. The prosecution did not provide any evidence on the 'mental status of PW1
- iii. This goes to the credibility of PW1
- iv. PW1 'had a troublesome childhood.'
- v. PW2 and PW1 went to the gym later in the day of the incident- 'highly unusual for a victim of a sexual crime at a very young age.'
- vi. The prosecution did not tender the birth certificate of the complainant.
- vii. The prosecution did not adduce any specialist evidence 'to support the notion that the victim's mind was not affected by the sniffing of gas...'
- viii. 'it would be unsafe for this court to provide a conviction and therefore should stop the case.'
- ix. 'The evidence adduced in the prosecution's case is manifestly discredited through cross- examination that no reasonable tribunal could convict upon it, and accordingly not sufficient to require the defendant to make a defence.'

**E. SUBMISSION BY THE PROSECUTOR**

**9. Ms Suifa'asia refers to the guideline in *R v Jeremiah* case above. She also refers to the following:**

- i. The definition of 'intention' under Section 17 of the Crimes Act 2016
- ii. The definition of 'recklessness' under Section 19 and 'consent' under Section 9.
- iii. Counsel then examines the evidence of PW1, PW2 and PW3
- iv. 'VA demonstrated in court that the defendant came from behind her, had his arms around her and his hands, grasped her breasts.'
- v. VA told PW2, whilst crying that the accused touched her. He went into her bedroom and touched her again.
- vi. 'PW1 went to her room and lay face up. The accused came into her room, climbed over her and told her to open her eyes. The accused had his hands VA's breasts and kept telling her that he'll report her to her father. She started crying. The accused's hand moved from her breasts to her groin or private part. She pushed his hand away.'

- vii. When asked how she felt when the accused touched her breasts and her private part area- she replied- 'That's when I know that he was there for a different intention, I did not feel safe.'
- viii. For Count 2- PW4 saw the accused go into the PW1's house on the date in question.
- ix. PW3 did not ask the accused to check on PW1 on the day in question. The accused, as a friend of her husband, would call from outside the house and her husband would go to see him outside.
- x. Counsel concludes that there is 'evidence to prove each elements of Counts 1, 2 & 3 on the Information.
- xi. 'The evidence before the court has not been manifestly discredited through cross- examination that the defendant has no case to answer.'

## F. DISCUSSION

### 10. Mr Tom submits that:

- i. The prosecution did not tender the birth certificate of PW1 to prove her age.
- ii. The prosecution failed to adduce specialist evidence on the effect of sniffing gas on PW1' mind.
- iii. 'it would be unsafe for this court to provide a conviction and therefore should stop the case.'
- iv. 'The evidence adduced in the prosecution's case is manifestly discredited through cross- examination that no reasonable tribunal could convict upon it, and accordingly not sufficient to require the defendant to make a defence.'

11. PW1's mother stated that PW1 was born on 22/12/ 2008. PW1 said that she was born on 27/12/2008. On the date of the incident, 13<sup>th</sup> Dec 21, PW1 was 13 years old.

12. On the specialist evidence on the effect of sniffing gas on PW1's mind, the prosecution did not have to provide this. PW1 was clear in giving her evidence in chief and she was steadfast whilst being cross- examined. As reflected in para [13] below-

**Q- You started shaking in your room? Rice was burning?**

**Ans- No. I noticed the smelling when the accused was fondling me.**

13. I further note that Mr Tom did not refer specifically to how the evidence has been discredited through cross- examination. His cross- examination focussed on the complainant's history of sniffing gas, suspension from school, stealing from the accused. The following line of cross examination are noteworthy:

*Q- When you sniff gas, describe your feeling?*

*Ans- dizziness*

*Q- You see things?*

*Ans- No*

*Q-Talk to imaginary friends?*

*Ans- No*

*Q- Xavier caught you sniffing gas, your state of mind at that time?*

*Ans- I only started, five seconds later, I felt someone behind me*

*Q- You blacked out whilst sniffing? Slouched over?*

*Ans- No*

*Q- Accused picked you up, helped you to your room, because you were slouched over?*

*Ans- Incorrect*

*Q- You started shaking in your room? Rice was burning?*

*Ans- No. I noticed rice smelling when the accused was fondling me*

*Q- you became aware, you started laughing?*

*Ans- No*

*Q- You're a problem child- lying, stealing, sniffing gas?*

*Ans- Yes*

*Q- When accused indicated that he had video footage of you, you made all this up to save yourself?*

*Ans- No, incorrect*

*Q- the allegations, touching you- you were not in correct state of mind?*

*Ans- No, I knew/ clear mind*

*Q- Effect of gas still affected you and you alleged all these against the accused?*

*Ans- No, incorrect*

14. The above clearly show that the complainant stood by her evidence in chief. Her evidence was not manifestly discredited through cross examination.
15. Considering the submissions by counsels and applying the guidelines in *R v Jeremiah* to the evidence adduced so far, I agree with Ms Suifa'asiva that - there is 'evidence to prove each elements of Counts 1, 2 & 3 on the Information; and 'The evidence before the court **has not been manifestly** discredited through cross- examination that the defendant has no case to answer.'

#### **G. CONCLUSION**

14. The application of 'no case to answer' by the defendant is dismissed.
15. The matter will proceed to the next stage of the trial.
16. Explain the options available under Section 201(b).

**DATED** this 02<sup>nd</sup> day of August 2024.



**Kiniviliame T. Keteca**

**Judge**

