



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

Criminal Case No. 23 of 2019

BETWEEN: THE REPUBLIC

PROSECUTION

ELKO-JOE AGIR

ACCUSED

BEFORE: Keteca J

Date of Hearing: 17th May 2025

Date of Sentence: 29th May 2025

Catchwords: Intentionally Causing Serious Harm: Contrary to Section 71(a)(b)(c)(ii) of the Crimes Act 2016.

Appearances:

Counsel for the Prosecution: **S. Shah**

Counsel for the Accused: **R. Tom**

SENTENCE

BACKGROUND

1. On 17th April 2025, the accused was found guilty of one count of Intentionally Causing Serious Harm. He caused serious harm to a Jecain Menke by striking him with a knife, contrary to s.71(a)(b)(c)(ii) of the Crimes Act 2016.

SUBMISSION BY THE PROSECUTION

2. Mr Shah for the prosecutions submits as follows:
 - a) The accused is a first offender.
 - b) As aggravating factors, the victim was unarmed and had to receive stitches to for the injury to his shoulder.
 - c) The court should send a clear, stern message that those who intentionally harm others will receive custodial sentences. It should be a deterrent to others.
 - d) Counsel refers to the following cases;
 - i. R v Kepae [2022] NRSC 4; Criminal Case 1 of 2020 (21 January 2022)- the accused was sentenced to 30 months imprisonment for assaulting a victim that caused him a fractured jaw and broken wisdom tooth.
 - ii. R v Daniel [2025] NRSC; Criminal case 13 of 2024 (18th March 2025)- the accused stabbed a lady shopkeeper with a knife. Considering the impaired mental state of the accused, the court sentenced him to 2 years imprisonment. This was suspended for 2 years.
 - iii. R v Atsiwebwada [2023] NRSC 27; Criminal Case 10 of 2022 (22 Nov 2023)- the accused pleaded guilty to a charge of intentionally causing serious harm to a minor by punching and stabbing her in the neck. The accused was sentenced to 60 months imprisonment. He had to serve 24 months in prison.

SUBMISSION BY THE DEFENCE.

3. Mr Tom submits as follows:
 - a) Counsel refers to the following provisions of the Crimes Act 2016:
 - i. S. 278 – purposes of sentencing.
 - ii. S. 279- sentencing considerations.
 - iii. S. 280- sentencing considerations- imprisonment.
 - b) R v Waidabu [2020] NRSC 24- both the accused and the victim were under the influence of liquor. The accused assaulted the victim who had to be hospitalised for several weeks. The court sentenced him to –

‘The defendant is convicted and placed on probation for two years on the following conditions;

 - i. He will live, reside, and work at places as approved by the probation service.
 - ii. He will report to the Chief Probation officer within 24 hours from now.
 - iii. He will attend to any anger management, programme or similar one as directed by the Probation Service.
 - iv. He will continue to attend the church outreach and open-air activities during his probationary term.
 - v. He shall refrain from consuming alcohol during his term of probation.’

ANTECEDENTS and MITIGATION

4. Counsel submits as follows:
 - a) The accused is 43 years old and has been separated from his wife for 6 years. He has 5 children aged- 23, 21, 17, 15 and 8. The children all live with the accused. He has a 10 months old granddaughter.
 - b) He has been in the employ of the Nauru Marine Fisheries Resource Authority for 23 years. He was recently promoted to Senior Coastal Fisheries Officer.
 - c) The accused is an Aiwo community figure. He organises events for the community including functions for the elderly.
 - d) He is the secretary for the Nauru Darts League, men's and women's teams.
 - e) He has reconciled with the victim. They are good friends now.
 - f) Since the incident, the accused attends church regularly now.
 - g) He is the sole breadwinner for the family.
 - h) He has no violent tendencies and a gentle and kind fellow.
5. Counsel seeks a non- custodial sentence and refers to some letters and affidavits in support of the accused.

LETTERS/ AFFIDAVITS OF SUPPORT

6. Jovick Adeang deposes as follows:
 - He has been the community leader of Uaboe District for 5 years. To him, the accused is a well-respected member of the community.
 - At paragraph 9 of the affidavit, he refers to the offences of indecent acts and a Namaduk who is clearly not the accused!!
7. Tigerlilly Agir deposes as follows:
 - She is 21 years old and the oldest daughter of the accused. She is a single mother to a 10months old child.
 - Her father, the accused, is the sole provider in their household.
 - She seeks the courts leniency in sentencing her father. It will be a heavy burden to the family if the accused is imprisoned.
8. Jecain Menke, the victim in this case deposes as follows:
 - He is the complainant in this case. He intended to withdraw his complaint against the accused.
 - He seeks a lenient sentence for the accused who has now become his friend. The accused struggles to support his family.

9. Hon. Delvin O'Neal Thoma, MP submits:

- The accused's 5 children are unemployed. They depend on the accused for their livelihood.
- The accused was reckless in the past. This led to this case.
- The accused is remorseful and has made amends with the complainant.
- He submits that a sentence of community service will be appropriate here so the accused can continue to look after his children.

10. Pastor Ruth Garabwan, Buada Congregational Church submits:

- The accused is a member of her church and is truly remorseful.
- He is a supportive father to his children and engages in community work.
- He has repented of this crime.
- He pleads that the accused be supported and restored rather than being condemned.

11. Monte Depaune, Deputy CEO, Nauru Fisheries and Marine Resources Authority (NFMRA) submits:

- He has known the accused, as an employee of the NFMRA since 2002. The accused demonstrated strong work ethics and teamwork.
- The accused is well respected within the NFMRA and a good role model to his peers.
- The accused recently got promoted to Senior Coastal Fisheries Officer – 'due to his experience and leadership qualities.'

THE LAW

12. The penalty of this offence is:

- i. If aggravating circumstances apply- 20 years imprisonment; or
- ii. In any other case- 15 years imprisonment.

13. I have taken the following provisions of the Crimes Act 2016 into account:

- i. S. 277- kinds of sentences- after a finding of guilty,
 - the court may record a conviction and order that the offender serve a term of imprisonment;
 - With or without recording a conviction, order the offender to pay a fine;
 - Record a conviction and order the discharge of the offender;
 - Without recording a conviction, order the dismissal of the charge for the offence; or
 - Impose any other sentence or make any order that is authorised by this or any other written law of Nauru.
- ii. S. 278- Purposes of sentencing
- iii. S. 279- General sentencing considerations
- iv. S. 280- Sentencing considerations- imprisonment
- v. S. 282- Power to reduce penalties

14. This is a very serious offence. The complainant suffered an injury which was described in the medical report as:

- i. D[14]- Injury extent- severe
- ii. D[16]- Clinically stable

15. **Should I record a conviction against the accused here?** To answer this question, I take another look at the circumstances surrounding the offending. On 29 November 2019, the accused was drinking with a friend at his place at Uaboe. He was celebrating having completed a regional fisheries training course in Fiji. He and his friend went on to drink at Nibok. The complainant joined them. The complainant started arguing with the accused. The complainant stood up and challenged the accused to a fight. Others in the group stopped the complainant. The accused left Nibok and went to his place at Uaboe. The complainant arrived uninvited and challenged him to a fight for the second time. The accused went towards his house as he did not want to fight. When the complainant approached him, that is when he grabbed the knife and chopped the complainant.

16. It is clear from the circumstances of the offending that it was not premeditated. In his evidence, the accused, though much bigger than the complainant, testified how he was scared of the victim. That is why he walked away. As he said in court- *'I wasn't going for a weapon. I was going to go in and lock the door. I heard his footsteps behind me. I was scared. I grabbed whatever I could to defend myself. That's when I grabbed the knife, turned around and struck him. I struck him once on his shoulder.'*

17. From the above facts, the accused tried to avoid any confrontation with the complainant; not once, but twice. On the second occasion, he struck the complainant with a cane knife because he was scared.

18. Here is a senior public servant who has been recently promoted. He is the sole breadwinner to his five children including a 10 months old grandchild. He has a bright future in the government-controlled enterprise he is employed in. He has another 17 years before the retirement age of 60. Notably, is his attempt to seek reconciliation with the complainant and his parents. The complainant has forgiven him. In his affidavit filed for the sentencing hearing, the complainant deposes that they are good friends now. The accused confirms this friendship. The complainant's parents have forgiven him too. In the accused's testimony, when he went to seek forgiveness from the complainant's parents, this transpired:

Accused- "I have come today to ask for forgiveness from the bottom of my heart. I know your feelings as a parent as I am a parent too."

In response, the complainant's father said- "There is no forgiveness required here. We already forgave you."

19. I refer to all the letters and affidavits in support of the accused. It includes the affidavit of the complainant. The complainant states:

[7] I wish this court to provide a lenient sentence for Elko Joe Agir. We have become close friends after the incident and I know he is a family man struggling to support his family.

[8] This incident was caused in a drinking binge and we have moved on from that in our lives.

[9] I humbly seek this court to withdraw my complaint against Elko Joe Agir and give him a second chance in life because sending him to prison will not solve this matter as it has been already solved through a manly approach.' (*I think the complainant meant- customary approach*).

20. What weight, if any, should I give to the forgiveness by the complainant and the pleas for leniency by his daughter the community and church elders and his representative in parliament? In *R v Miyatatawuy* (1996) 6 NTLR 44; 135 FLR 173, an Aboriginal woman stabbed her husband. It punctured his lung. The stab breached a bond for an earlier serious assault on the husband. Both were drunk. The victim, her husband, forgave her. The community did not want her imprisoned. She was sentenced to a bond. Martin CJ said:

'I am not satisfied that the wishes of a victim of an offence in relation to the sentencing of the offender can usually be relevant. The criminal law is related to public wrongs, not issues which can be settled privately. But here, it was not so much the wishes of the victim that were placed before the court, but the wishes of the relevant community of which the victim also happened to be a leading member and on behalf of which he spoke. Those wishes may not be permitted to override the discharge of the judge's duty, but have been taken into account as a mitigatory factor.'

21. In *H v The Queen* (1995) 15 WAR 264; 81 A Crim R R 88 (WA CCA), the appellant pleaded guilty to three counts of sexual assault. The victim was his wife. He was sentenced to 3 years imprisonment. At [98] Malcom CJ said:

'It has been recognised that full regard should be paid to the prospects of rehabilitation and the maintenance of the family unit where that is possible. This has sometimes been called a 'welfare approach.'

At [104] Malcom CJ added:

'It seems that the complainant made a quick recovery from her injuries. Within 4 days she had accepted his apology and forgiven him. The two of them had resolved to solve the problem. The applicant had committed himself to abstain from alcohol and had succeeded in doing so between May 1994 and February 1995, when he was sentenced. She appears to have accepted that the offences were committed while the applicant was heavily under the influence of alcohol and in a jealous fit of blind rage under circumstances which he could barely remember, but which he was readily prepared to admit. In my opinion, the result of the imposition of a prison sentence in the present case has been to inflict a significant punishment upon the victim by depriving her of her breadwinner as well as depriving her of the support and assistance she needs from him as the mother of young children. In my view, of all the cases which have so far come before this Court, this one does fall within the exceptional circumstances in which a non- custodial disposition was justified.'

The applicant was admitted to probation in that case.

22. Noting the above cases, I consider the forgiveness by the complainant and the pleas for leniency by his eldest daughter, the community and church elders, and his representative in parliament as relevant mitigating factors in this case.

23. I also consider the case of *R v B.R.* [2024] NRSC 4 (26th April 24), a case involving a juvenile offender, I said this-

[38.] I refer to *R v DBU* [2021] QCA 51 [CA 124/2020] where the Queensland Court of Appeal considered the statutory presumption of not recording a conviction under the provisions of the Youth Justice Act 1992. The court considered that *"there can be no doubt that employment and rehabilitation are pivotal in reducing the risk of future offending."*

[39.] On the impact of recording a conviction, the court observed- *"Clearly there is a connection between his chances of finding or retaining employment and his chances of rehabilitation."*

24. In the present case, the accused is not a juvenile. If a conviction is recorded against him, it will remain in the Register of Records of Criminal Convictions for 15 years. Section 98(5) of the Criminal Procedure Act 1972 provides for this.

25. A conviction will also give rise to the question of whether he retains his employment. As a public service employee, Section 82A of the Public Service Act 2016 makes it mandatory that he will be summarily terminated on being convicted for a criminal offence. You will have difficulty obtaining visas to go abroad for other work or training purposes. You will be destined to remain within the shores and pinnacles of Nauru. Your 5 children and granddaughter will lose their breadwinner and source of livelihood. This, in my view will be too harsh a penalty and indeed not fair nor just, considering in totality the circumstances surrounding the offending. I have also considered your good character and the fact that you have no previous convictions.
26. I note that the *H v The Queen* case in [21] above involved a husband and wife case. Although the present case does not involve similar parties, I take the same '*welfare approach*' and I believe that an imprisonment term '*will inflict a significant punishment*' on the 5 children and the grandchild '*by depriving them of their breadwinner and the support and assistance they need*' from a father.
27. Considering all the above I find that this case falls within the exceptional circumstance where a conviction should not be recorded and a non- custodial sentence is justified.
28. What then, would be the appropriate sentence? Section 279 (1) provides that – 'a court shall impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.'
29. Without recording a conviction, and considering Section 281 of the Crimes Act 2016, I find that a fine would be a more appropriate sentence in this case.

CONCLUSION

30. Elko Joe Agir, you are to pay a fine of \$500 within 21 days.

Dated this 29th Day of May 2025

Kiniviliame T. Keteca

Judge

