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

Criminal Case No. 04 of 2023

BETWEEN: THE REPUBLIC

PROSECUTION

AND: GREGORY RIBAUW

ACCUSED

BEFORE: Keteca J

Date of Submissions: 14th March 25

Date of Judgment: 24th June 2025

Case may be cited as: Republic v Gregory Ribauw

Catchwords: Application to quash Information for abuse of process under section 190A Criminal Procedure Act 1972

Appearances:

Counsel for the Prosecution: **A. Driu**
Counsel for the Accused: **V. Clodumar**

RULING

BACKGROUND

1. The accused is charged with 3 counts of 'Rape' contrary to Sections 347 and 348 of the Criminal Code 1899 and 2 counts of 'Indecent Assault' contrary to Sections 350 of the same Code.

2. On 13th March 2023, Mr Clodumar filed a Motion and Affidavit seeking the charges be dismissed for abuse of process. He seeks costs on an indemnity basis.

3. The grounds for the application are:
   i. The Amended Information is bad for duplicity and latent ambiguity;
   ii. The prosecution on the Amended Information as per counts 1, 2, and 3 is unfair and unlawful; and the prosecution on the Amended Information as per counts 4 and 5 is unfair and unlawful.
   iii. The application is made under Section 190A of the Criminal Procedure Act 1972.

SUBMISSIONS FOR THE ACCUSED

4. The Application is made under Section 190A of the Criminal Procedure Act 1972- in that 'the Information is calculated to prejudice or embarrass him or her in his or her defence to the charge or that it is formally defective.'

5. Counsel quotes Section 192- 'Where any information does not state, and cannot by any alteration authorised by the Section 191A be made to state any offence, it shall be quashed and the accused shall be discharged.' Mr Clodumar submits the following:
   i. The prosecution, in 'electing to charge the defendant under the general application of section 380 of the Code instead of the specific sections for minors- namely sections 212 and 215- this is calculated to prejudice or embarrass the defence;
   ii. Since the victim was under 17 years old, the charges for indecent assault should have been laid under section 216 of the Code and not section 350. There is room to amend these as there is no time limit in section 216 offences;
   iii. The complainant was born on 13th September 1986. Section 3 of 'The Child Protection and Welfare Act 2016 defines child or children to mean any person below the age of 18 years. Under the Crimes Act 2016- it is 16 years. **(Counsel is mistaken here as the Crimes Act 2016 also states that a 'child' means an individual who is under 18 years old)**
   iv. The delay in reporting the incident 'was 24 years from the first alleged occurrence.' This may infringe the right of the accused under Article 10 of the Nauru Constitution;
   v. The issue before the court is whether the DPP can charge an accused **'under whatever law she elects or preferred."** Generally, the DPP has the power to charge or withdraw charges *but this case' dictates that the DPP is obligated to charge the accused under the proper sections.*
   vi. Counsel refers to ***Bridges v The King*** [1943] Courts of Criminal Appeal, a Queensland 1943 case and submits-

      a. The DPP is obligated to charge the accused under Sections 212 and 215 of the Code. This argument is supported by ***Saraswati v The Queen*** (1991) 172 CLR where the majority in the High Court of Australia (JJ Toohey, Gaudron and McHugh) held:

         'Parliament did not intend that the power to prosecute under that section could be used to circumvent the specific time limitation which s. 78 placed

*on s. 61F(1) and 71 and (3) upon the general ground that when a statute deals specifically with a matter and makes it a subject of limitation, it excludes the right to use a general provision in the same statute to avoid that condition of limitation.' [*Counsel extracted the above quote from **R v Jones** [2002] EWA Crim 2983]

b. Counsel refers ***to R v Blight*** 22 NZLR 837 where Williams J said:

' In the present instance, I think effect can be given to the language of the proviso by holding that where the deposition or evidence shows a transaction every incident and every step in which is an offence under section 196, any prosecution in respect of any such transaction, or in respect of any step, or act or incident in such transaction, is in fact, by whatever name it may be called, a prosecution for offence under section 196, and it would be the duty of every Magistrate to commit, every Crown Prosecutor to indict, under the section. If, accordingly, it appears that any such step, act or incident had occurred more than a month before such prosecution was commenced, it would be the duty of the Magistrate to refuse to commit, or the Judge to direct an acquittal... '

Williams J concluded-

'I think therefore the prosecution was instituted out of time. If the above construction be not adopted the result is that no effect could be given to section 196, and that section would be practically expunged from the Act, and the protection given by a time limit would be illusory. The prosecution would always be commenced under section 188 which has no time limit.. '

c. Counsel submits that s. 188 of the New Zealand Criminal Code 1893 is analogous to s. 216 of the Criminal Code of Nauru 1899 and s. 196 is analogous to s. 215 of the Code 1899. They are not exact but the elements of the crime are similar.

Section 188 of the NZ Criminal Code reads:

'Everyone is liable to seven years imprisonment with hard labour , and according to his age, to be flogged or whipped once, twice or thrice, who-

(1) Indecently assaults a female;

(2) Does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as; to the nature and quality of the act.

It shall be no defence to an indictment for an indecent assault on a female under the age of fourteen that she consented to the act of indecency: Provided however, that it shall be sufficient defence to any charge under this section if it shall be made to appear to the jury whom the charge shall be brought that the person so charged had reasonable cause to believe that the female was of or above the age of fourteen years. '

d. Section 196 of the NZ Criminal Code reads:

'Everyone is liable to five years imprisonment with hard labour who unlawfully carnally knows or attempts to unlawfully carnally know any girl being of or above the age of twelve years and under the age of fourteen years.

It shall be defence to an indictment for an offence under this section committed upon a girl under the age of fourteen years that she consented to such offence:

Provided, however, that it shall be sufficient defence to any charge under this section if it shall be made to appear to the jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of fourteen years.

No prosecution for an offence under this section shall be commenced more than one month after the commission of the offence.'

e. Counsel adds that the NZ Criminal Code 1893 and the Nauru Criminal Code 1899 were enacted in the same era. Offences against minors were to be quickly reported, investigated and prosecuted to prevent 'the continuation of the perpetration of the assault so that the offender is quickly arrested and brought to trial.' He refers to the decisions of the Court of Appeal of England and Wales (Criminal Division) Powell [2006] Cr App 5R 468 and Malicki [2009] CA Crim 265. In Malicki, at [22] the Court of Appeal said:

'What has happened in this case underlines the importance of what was said in ***Powell*** *and the crucial need for all concerned to pay full attention to it. We have concentrated on the effect that the delay had on the ability of the appellant to defend himself. But it is of equal concern that the young complainant had to wait so long before the matter came to trial, then had to come to court and be cross examined, only for the conviction to be quashed because of the delay. As was said in Powell, cases involving young complainants must be fast tracked. The proper administration of justice requires it. It is the responsibility of all concerned- prosecution and defence- to bring the need for expedition to the attention of the court (and we refer to both the magistrates' court and to the Crown court because expedition is needed at all stages of the procedure), and it is the responsibility of the court to ensure that such expedition is provided.'*

f. Referring to [41] in Jones:

'Nothing we have said should be taken as an encouragement to prosecutors to bring defendants to court on charges of indecent assault in cases where, were the time limit not applicable, the charge would have been under s. 6. While the decision to do so will depend on the circumstances of the case, it seems to us that the decision to prosecute should depend, not simply upon the fact that the offence or offences have not come to light till after the expiry of the 12 months, but upon the presence of some unusual or aggravating nature sufficient to justify the avoidance of the limitation period under s. 6. Finally, nothing we have said should detract from the now settled practice of this court in treating 2 years imprisonment as the maximum sentence appropriate to a charge of indecent assault brought in circumstances where, but for the expiry of the 12-month time limit, the charge would appropriately have been laid under s. 6.'

g. Mr Clodumar concludes:

- From Saraswati- 'when a statute deals specifically with a matter and makes it a subject of limitation, *it excludes the right to use a general provision in the same statute to avoid that condition of limitation.*'
- The DPP has charged the defendant under s. 348 of the Code (being a general provision for rape) because the prosecution was out of time to sections 212 and 215.
- The **Seniloli** case is not relevant here. It dealt with the offence of treason and not sexual offence against minors. The Court said at [12] *'clearly the cases of Blight, Hibbered and the High Court decision in Saraswati are distinguishable.'*
- The DPP has the option to amend the information and file 5 counts of indecent assault against the defendant.
- Electing to proceed with 3 counts of rape under s. 348 of the Code, invites the consideration of Denniston J's observation in Blight that- ' ... *If, accordingly, it appears that any such step, act or incident had occurred more than a month before such prosecution was commenced, it would be the duty of the Magistrate to refuse to commit, or of the judge to direct a acquittal..'*
- In applying a general provision to charge the defendant, it is an abuse of the process of the Court.
- Pursuant to Section 191A of the CPA 1972, the court may order the prosecution to amend the charges for Counts 1,2, and 3- to charge the defendant under Sections 212 and 215 of the Code and not Section 348. The amended information will be time -barred and the defendant should be acquitted.
- For Counts 4 & 5, relying on Section 191A of the CPA 1972, the Court can direct the DPP to amend the charges from Section 350 to Section 216 under the Code. There is no time limit for Section 216 and the trial can proceed on these two counts.

SUBMISSIONS FOR THE PROSECUTION

6. Madam DPP submits as follows:
   - The main issue before the court is whether the accused can be charged with an offence created by Sections 347 and 348 of the Criminal Code of Queensland 1899 (CCQ).
   - The Defence submit that the decision to prefer the charge under section 347 was to avoid the time limitation under Sections 212 and 215 of the CCQ and is an abuse of process.
   - The case of ***Bridges v The King*** [1943] Court of Criminal Appeal, which the Defence relies on, is one where the prosecution chose to charge the accused under Section 215 for sexual relations with a girl aged 12 years. The time limit for prosecution of this offence under Section 215 was 6 months. As the child was below 12 years, the accused should have been charged under Section 212 which had a time limit of one month.
   - The Defence relies on ***R v Blight*** (1903)2022 NZLR 837, ***R v Hibberd*** [2001] 2 NZLR 211 and ***Saraswati v R*** (1991) 172 CLE 1 in arguing that the election by the DPP here is an abuse of process as it was done to avoid the time limitation.
   - Based on the authority of the Fiji Court of Appeal in ***Ratu Jope Seniloli & Others v State,*** AAU 0041 of 2004S, the cases *of Bridges, Hibbered and Saraswati* are distinguishable.
   - The prosecution of this under Sections 347 and 348 of the CCQ stand on its own. It is a separate offence from 'Defilement of Girls under 12 years- (Section 212) and Defilement of Girls under Fourteen and of Idiots- (Section 215). In this case, the offence of 'rape' carries the additional element of 'consent.' The offence of 'defilement' does not.
   - Fatiaki CJ, in ***Republic v Zak Buramen***, Criminal Case No. 5 of 2021 distinguished the two offences as:

     '3. *If I may say so, it is unfortunate that with the enactment of a Crimes Act for Nauru in 2016, the draftsperson saw fit to adopt the term Rape in the description of the offence under s. 116 where under s. 126, 'consent' is clearly stated to be '.. not a defence.' I say unfortunate because Rape is a 'term of art' that has acquired a well understood even popular meaning, as the intentional act of having sexual intercourse with a woman or girl without her consent irrespective of her age.*

     4. This meaning is reinforced by the provisions of s105 which defines the offence of Rape in Nauru as ' *(a) defendant (having) sexual intercourse with another person (who) does not consent to sexual intercourse with the defendant.*' It is also exemplified by the distinction between the offence of Rape and Defilement in the now repealed Criminal Code (cf: ss. 212 and 347). In my view, the distinction should have been maintained given the all encompassing definition of what constitutes 'sexual *intercourse,*' '*oral sex*', and 'self-*penetration.*'

- In ***R v Bronson Notte***, Criminal Case No. 49A of 2016 Crulci J also distinguished between rape and defilement when he said:

> '61. There are offences under the Code which stipulate that certain sexual acts with a girl of a particular age is an offence, and consent is not an issue open to the defendant. For example, the offences under s. 211 Defilement of Girls under Twelve, s. 215 Defilement of Girls under Fourteen, and s. 216 Indecent Treatment of Girls...
>
> 62. For the offence of rape, however, the defence of consent is open to the defendant whatever the age of the girl. This is discussed in the case of ***R v Harting*** which was an application for leave to appeal by a 27-year-old defendant against a conviction for rape of a girl under 16 years. Humphreys J stated:
>
> *'It is desirable for this court to restate the law, which is not subject to doubt. Upon a charge of carnal knowledge of a girl under 16, while such a girl perfectly capable of consenting, such consent affords no defence to the accused man. Where, however the charge is one of rape, it is necessary that the prosecution should prove that the girl or woman did not consent, and that the crime was committed against her will. It may well be that in many cases the prosecution would not want much evidence beyond the age of the girl to prove no consent, but in every charge of rape the fact of no – consent must be proved to the satisfaction of the jury.*
>
> 63. *It is for the prosecution to prove beyond reasonable doubt that the defendant was aware that the complainant was not consenting or might not be consenting and was still determined to have intercourse. In this case the evidence put forward by the prosecution is that the complainant lacked the capacity to consent to the sexual intercourse because she was insensible due to her consumption of alcohol.'*

- Why it took so long to complain to the police is not relevant to the current application.

<u>Amended Information is bad for duplicity and latent ambiguity</u>

- The Amended Information accords with Section 93(f) of the CPA 1972. DPP refers to *Laken Degia v R Criminal Case No. 2 of 2021* looked at 'representative charge' and 'specimen and sample count'. The court held in that case that Nauru does not have provisions for 'representative counts.'

- DPP refers to *S v The Queen* [1989] 168 CLR 266 where, at [21] Dawson J observed that the form of pleading in the Information 'is quite proper where the date is not an essential part of the alleged offence and, of itself, does not render a count bad for insufficiency of particulars.'

The Amended Information as per counts 1, 2, and 3 is unfair and unlawful

- Counsel refers to the New South Wales Court of Criminal Appeal decision in ***R v Saraswati*** [1989] 18 NSWLR 143. This was considered by the Fiji Court of Appeal (FCA) in the Ratu Popi **Seniloli & Ors v The State, Criminal Appeal No. AAUOO41 of 2004S**. The FCA, accepting the remarks of Shameem J in the High Court said-

  > *"In this case, it is not established that the evidence in this case will in fact prove the offence of treason. As I see it, an offence under section 5 or 6 of the Public Order Act is not necessarily a lesser offence in relation to section 50 of the Penal Code. ..the affidavit of Josaia Naigulevu does not explicitly concede the evidential possibility of laying the more serious offence. If that situation arises, then in accordance with the practice of the Fiji courts and with section 3 of the Penal Code, I adopt the reasoning of the English Court of Appeal in R v Jones [2002] EWCA Crim 2983, and consider that it is not an abuse of process per se, to lay a less serious charge when the time limitation of the more serious charge has expired. Further, I do not consider that the defence has shown, on a balance of probabilities that it would be impossible for the accused to be given a fair trial because a lesser charge had to be preferred.'*

  The Fiji Court of Appeal added:

  > *'The learned judge also relied on the decision of the New South Wales Court of Criminal Appeal in R v Saraswati [1989] 18 NSWLR 143. In which the court,whilst deprecating any attempt by the Crown to divide one incident into a number of separate charges, held that the prosecution is entitled to charge an accused with a less serious charge notwithstanding that the facts which it intends to prove would, if accepted, establish the commission of a more serious crime which includes all the elements of the lesser crime even if the more serious offence could no longer be prosecuted because of a statutory time limit.* ***We find the reasoning in the NSW case persuasive and in conformity with Jones which ruled that the decision as to the appropriate charge is one of prosecutorial discretion and responsibility and that a stay will only be granted for abuse of process if the court finds that the circumstances would prevent the accused from receiving a fair trial or that it would be unfair for him to be tried at all.'***

- Counsel also refers to the **Jones** case- that a responsible prosecutor is not precluded from taking the view that in particular circumstances, a fair trial is possible and that it is conducive, and not inimical, to justice to bring a different charge not subject to a period of limitation.'

- *R v Latif* [1996] 2 Crim App R 92 at 101 it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed.

- The inclusion of 'girl' in section 347 indicates the intent of the legislature to include instances where a 'girl', apart from a woman is a victim of rape. Thus, a girl, absent her consent, as in the present case will be captured by the section.

- **Counsel for the accused has not shown how the Amended Information is an abuse of process or how the accused will not receive a fair trial.**

The prosecution on the Amended Information as per Counts 4 and 5 is unfair and unlawful

- Counts 4 & 5 are laid under Section 350 of the Criminal Code 1899. It reads: 'Any person who unlawfully and indecently assaults a woman or girl is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years'

- The applicant submits that the appropriate charge should be preferred under Section 216 of the Criminal Code 1899- 'Indecent treatment of girls under 17.' Applicant supports this contention as the victim was 15 years old at the time of the alleged offending.

- DPP submits that based on her prosecutorial responsibility under Sections 45 and 46 of the Criminal Procedure Act 1972 and the remarks in the **Jones case**- *'the decision as to the appropriate charge is one of prosecutorial discretion and responsibility...'*

- DPP concludes:
  a. The application lacks merit
  b. Counts 1-5, as worded, the accused will not be prejudiced or embarrassed in defending the charges against him
  c. The applicant has not shown (on a balance of probabilities) that this prosecution will be unfair to him and an abuse of process
  d. No costs are awarded under Section 118 of the Criminal Procedure Act 1972

DISCUSSION

7. The Amended Information filed on 24/ 03/ 23 reads:

COUNT 1

Statement of Offence

Rape: contrary to Sections 347 and 348 of the Criminal Code 1899

Particulars of Offence

Gregory Ribauw between 01 January 1998 and 12 September 1998, at Boe District in Nauru, had carnal knowledge of a girl, RA, not his wife, without her consent.

COUNT 2

Statement of Offence

Rape: contrary to Sections 347 and 348 of the Criminal Code 1899

Particulars of Offence

Gregory Ribauw between 01 January 1999 and 12 September 1999, at Boe District in Nauru, had carnal knowledge of a girl, RA, not his wife, without her consent.

COUNT 3

Statement of Offence

Rape: contrary to Sections 347 and 348 of the Criminal Code 1899

Particulars of Offence

Gregory Ribauw between 11 July 2000 and 12 September 2000, at Meneng District in Nauru, had carnal knowledge of a girl, RA, not his wife, without her consent.

COUNT 4

Statement of Offence

Indecent Assault: contrary to section 350 of the Criminal Code 1899

Particulars of Offence

Gregory Ribauw between 1 November 2001 and 31 January 2002, at Boe District in Nauru, unlawfully and indecently assaulted a girl, RA, by touching RA's vagina and sucking her nipple.

COUNT 5

Statement of Offence

Indecent Assault: contrary to section 350 of the Criminal Code 1899

Particulars of Offence

Gregory Ribauw between 1 November 2001 and 31 January 2002, at Boe District in Nauru, unlawfully and indecently assaulted a girl, RA, by pulling RA's hair and having her suck his penis.

8. The questions before me are:
   a. Based on the age of the victim at the material time, is it unfair on the accused, unlawful and an abuse of process, that the DPP charge the accused for the offence of Rape- under Sections 347 and 348 of the Criminal Code 1899 instead of defilement under Sections 212 (having unlawful carnal knowledge of a girl under the age of 12 years- prosecution time limit of 2 months) and 215 (having unlawful carnal knowledge of a girl under the age of 17 years-prosecution time limit of 6 months) of the Criminal Code 1899?
   b. In the exercise of the DPP's prosecutorial responsibility under Section 45 of the Criminal Procedure Code 1972, does it include the unfettered discretion to decide as to what is the appropriate charge to file against an accused person?

9. For the first question, I refer to *Bridges v King*, the accused was convicted of having had unlawful carnal knowledge of a girl under seventeen years of age (Section 215 of the Criminal Code- time limit for bringing a prosecution was 6 months.) The girl was in fact under the age of 12 years. Section 212 of the Criminal Code dealt with offences against girls below 12 years. The time limit for beginning a prosecution here was 2 months. Per Douglas J-'The *question for consideration is whether the prisoner may be charged with and convicted of an offence created by s. 215 of having carnal knowledge of a girl under the age of seventeen when the time for prosecution of an offence under s. 212 has expired? His Honour answered this question thus- 'The Crown has no right to prosecute under s. 215 when the offence is that prohibited by s. 212; otherwise there would be an extension of time to a period of six months in the case of girls under twelve..'*

10. The ratio decidendi for Justice Douglas' conclusion is stated as-*' The legislature may well have considered that where girls under twelve years were concerned it was not desirable that stale charges should be permitted after the expiration of two months because of the difficulty of refuting such charges where a considerable period of time has elapsed.'*

11. His Honour concluded-*'The facts bring the offence within s.212 and the time within which the prosecution must be commenced is of the essence of the offence. In my view the conviction of the prisoner is contrary to law and the appeal should be allowed and the conviction should be quashed.'*

12. In the same case, Mansfield J held: *'Where the legislature provides in a particular section a time limit for the prosecution of acts constituting a particular offence, that time limit ought not to be evaded by the prosecution of the same acts under a general section which has a more extended time limit.'*
    His Honor observed:

    ' In cases of carnal knowledge of girls under twelve a stale charge is comparatively unusual, and if a child does not complain shortly after the commission of the such an offence, it leads to the belief that she may be endeavouring to protect herself from possible consequences of disclosure or to protect the offender. In either case there is a possibility that an innocent person may be named. If an innocent person is put into the position of having to defend himself against such a charge some time after the commission of the offence, he may find that, because of the delay, evidence vital to his defence has disappeared or cannot be discovered. It is possible that guilty persons may be enabled to escape the consequences of their offences, but in my view, ***it is much more important that innocent persons who are accused should not be prejudiced by delay in being able to prove their innocence.*** *'*

13. In the above case, I note the following:
    - The offences under sections 212 and 215 of the then Criminal Code 1899, concerned the same offence of having unlawful carnal knowledge of a girl. The only variable is the age of the girl- under the age of 12 for section 212 and under the age of 17 for section 215.
    - The other difference is the time within which a prosecution of the offences should commence.

- The ratio decidendi for sticking within the prosecutorial time limits *stricto sensu* is that the accused is not to be prejudiced from the 'stale' charge.

14. It is noteworthy that a subsequent amendment to the above sections led to the same time limit of 6 months for both sections 212 and 215.

15. For the present case, the accused is being charged for rape under sections 347 and 348. The offence of rape, where the consent of the victim maybe a defence, is a totally different offence from defilement under sections 212 and 215. In this regard, the present case is clearly distinguishable from the ***Bridges*** case above.

16. If the ***Bridges*** case is to be applied strictly, and the DPP be bound to charge the accused under sections 212 and 215, this will mean that for every rape case, where the young victim reports the incident 6 months after the alleged offence, the perpetrator will not only walk but dance scot-free because the prosecution is commenced 6 months after the offence.

17. I find that this would not have been the intent of the legislature at that time. It is one thing being concerned of an innocent person facing a stale charge. It is quite another letting a perpetrator of a very serious crime like rape walk free just because the victim chose to report the crime outside the statutory time limit of the lesser offence of defilement. In any event, the time limit does not apply in this case as the offence of rape under sections 347 and 348 is a distinct and separate offence from that of defilement under sections 212 and 215.

18. The clear distinction between these offences are explained by CJ Fatiaki in ***R v Zak Buramen*** Criminal Case No. 5 of 2021.

19. I refer to what the Fiji Court of Appeal said in the **Seniloli case** when accepting the remarks from the High Court-

    'I *adopt the reasoning of the English Court of Appeal in R v Jones [2002] EWCA Crim 2983, and consider that it is not an abuse of process per se, to lay a less serious charge when the time limitation of the more serious charge has expired.*

    The FCA added-

    'We find the reasoning in the NSW case persuasive and in conformity with Jones which ruled that the decision as to the appropriate charge is one of prosecutorial discretion and responsibility and that a stay will only be granted for abuse of process if the court finds that the circumstances would prevent the accused from receiving a fair trial or that it would be unfair for him to be tried at all.'

20. I adopt the remarks of the FCA in that the decision of the DPP to lay the appropriate charge in the present case **'is one of prosecutorial discretion and responsibility.**

21. As to the first question- Based on the age of the victim at the material time, is it unfair on the accused, unlawful and an abuse of process, that the DPP charge the accused for the offence of Rape- under Sections 347 and 348 of the Criminal Code 1899 instead of defilement under Sections 212 (**having unlawful carnal knowledge of a girl under the age of 12 years- prosecution time limit of 2 months)** and 215 (**having unlawful carnal knowledge of a girl under the age of 17 years-prosecution time limit of 6 months)** of the Criminal Code 1899? As discussed in paragraphs [9] – [20] above, the two offences of defilement and rape are distinct and different. The elements to be proved are not the same. The offence of Rape includes the element of consent of the victim. The decision is one of 'prosecutorial discretion and responsibility of the Director of Public Prosecutions and the Information as it stands will not prejudice or embarrass the accused in his defence to the charges. I also find that it is not an abuse of process and the charges will not prevent the accused from receiving a fair trial. Therefore, my answer to the question is – No.

22. I turn to the second question on the nature of the discretion and responsibility of the DPP to decide the appropriate charge against an accused person.

23. Section 45 of the Criminal Procedure Act 1972 provides:
'The President shall appoint a public officer to be the Director of Public Prosecutions and such Director of Public Prosecutions shall be responsible for the representation of the Republic in criminal proceedings before the court he or she shall be ex officio *a public prosecutor.'*

24. The discretion and responsibility of the Director of Public Prosecutions to decide the appropriate charge against an accused person is tied to the independence and accountability of the Office of the DPP. Some jurisdictions within the Pacific Islands region, establish the Office of the Director of Public Prosecutions in their Constitutions. Two examples are:
    a. **Constitution of Papua New Guinea-Section 176-Establishment of offices.**
    (1) **Offices of Public Prosecutor** and Public Solicitor are hereby established.
    (2) The Public Prosecutor and the Public Solicitor shall be appointed by the Judicial and Legal Services Commission.
    (3) Subject to this Constitution—
    (a) in the performance of his functions under this Constitution the ***Public Prosecutor is not subject to direction or control by any person or authority*;**
    b. **Constitution of Kiribati- Section 42- Attorney General**
    (4) The Attorney-General shall have power in any case in which he considers it desirable to do so- (a*) to **institute and undertake criminal proceedings** against any person before any court established for Kiribati in respect of any offence alleged to have been committed by that person;*
    (b) to intervene in, take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; and
    (c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(8) In the exercise of the functions vested in him by subsection (4) of this section the Attorney-General ***shall not be subject to the direction or control of any other person or authority***.

25. The common thread in these constitutional provisions is that those charged with instituting criminal proceedings, *'are not subject to the direction or control by any person or authority.'* This ensures the independence of the office of the Director of Public Prosecutions. As in paragraph [23] above, the Director of Public Prosecutions is appointed by the President under Section 45 of the Criminal Procedure Act 1972. Every public prosecutor including police prosecutors 'shall be subject to the express directions of the Director of Public Prosecutions.

26. There are no provisions under the Constitution of Nauru, Criminal Procedure Act 1972 or other legislation that provides that the *Director of Public Prosecutions* in Nauru ***is not subject to the direction or control by any person or authority.***

27. I turn to case authorities. In *Maxwell v The Queen* (1996) 184 CLR 501; 87 A Crim R 180; 135 ALR 1 Gaudron and Gummow JJ said (at 534; 26; 205-206) :

    '*It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature,* ***insusceptible of judicial review****. They include* ***decisions whether or not to prosecute****, to enter a nolle prosequi, to proceed ex officio; whether or not to present evidence, and which is usually an aspect of one or other of those decisions,* ***decisions as to the particular charge to be laid or prosecuted****. The integrity of the judicial process- particularly its independence and impartiality and the public perception thereof- would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what.'*

28. However, some prosecutorial decisions may be reviewed on appeals, applications for stay of proceedings or to quash an Information or whether to accept or refuse a *nolle prosequi.*

29. From the above case, I find that it is the Director of Public Prosecutions that decides as to the particular charge to be laid or prosecuted. This decision is not susceptible to judicial intervention.

30. On whether the decisions by the Director of Public Prosecutions are not subject to the direction or control of any other person or authority, with deference, I leave that question to the legislature.

CONCLUSION

31. I find, on a balance of probabilities that the accused will not be prejudiced or embarrassed in his defence to the charges laid against him as the Amended Information filed by the DPP on 24th March 23 is not an abuse of process, nor unfair, unlawful or bad for duplicity.

32. The application by the accused under section 190A of the Criminal Procedure Act 1972 to quash the Amended Information filed on 24th March 23 is dismissed.

33. This matter will proceed to trial.

DATED this 24th Day of June 2025

Kiniviliame T. Keteca

Judge.