



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 12 OF 2019

BETWEEN

THE REPUBLIC

AND

LUCETTE DETABOUW

First Accused

AND

KIMAGO COOK

Second Accused

Before:	Khan, J
Date of Hearing:	17, 18 and 19 November 2020
Submissions by Defence:	23 November 2020
Submissions by the Republic:	25 November 2020
Further Submissions by Republic:	4 December 2020
Date of Judgement:	30 July 2021

Case to be referred as: Republic v Detabouw and Cook

CATCHWORDS: Criminal offence – Where the first defendant charged with the offence of taking images of private acts of child – Section 122 of the Crimes Act 2016 – Whether the children were engaged in a private act – Where first defendant also charged with the offence of possessing and having control of offending material – Section 142 of Crimes Act 2016 – Whether the material was pornography or abuse material – Where second defendant charged with the offence of sending offending material – Section 142 of Crimes Act 2016 – Whether the material was pornography or abuse material.

Disclosure of documents – Any material held by the prosecution which weakens its case or strengthens the defence case – If not relied on as part of the formal case – ought to be disclosed to the defence.

APPEARANCES:

Counsel for the Republic: S Serukai and R Talasasa (DPP)
Counsel for the Defendants: R Tagivakatini (Public Legal Defender)

JUDGEMENT

INTRODUCTION

1. The hearing of this matter took place between 17 to 19 November 2020 and there was considerable delay in the preparation of the transcript, which only became available on 9 February 2021. There was further delay in completing the judgment as I went on leave to Brisbane in early March and returned to Nauru on 26 June 2021.

INFORMATION

2. The original information against both the accused was filed on 7 August 2019 which reads as follows:

First Count

Statement of Offence

Taking images of private acts of child: Contrary to section 122(1) of Crimes Act 2016.

Particulars of Offence

Lucette Detabouw on 5 February 2019 at Nauru took a video of children engaging in a sexual act.

Second Count

Statement of Offence

Possessing and having control of the offending material: Contrary to section 142(1)(a)(i) and (b), (c) of the Crimes Act 2016.

Particulars of Offence

Lucette Detabouw on 5 February 2019 at Nauru possessed and had control of a video of children engaging in a sexual act.

Third Count

Statement of Offence

Sending the offending material: Contrary to section 142(1)(a)(vii) and (b) and (c) of the Crimes Act 2016.

Particulars of Offence

Kimago Cook on 5 February 2019 at Nauru sent a video of children engaging in a sexual act to a group of IMO users.

AMENDED INFORMATION

3. Just before the close of the prosecution's case, the Director of Public Prosecutions filed an amended information without any objection from the defence counsel. The amended information reads as follows:

First Count

Statement of Offence

Taking images of private act of child: Contrary to section 122(1)(a), (b), (c) and (d)(i) of the Crimes Act 2016.

Particulars of Offence

Lucette Detabouw on 5th day of February 2019 at Boe District in Nauru, intentionally took a video of two children under the age of 13, doing a private act and she was reckless about that fact, and a reasonable person would reasonably expect that a child would be afforded privacy for that act.

Second Count

Statement of Offence

Possessing and having control of the offending material: Contrary to section 142(1)(a)(i), (b), (c) and (d)(i) of the Crimes Act 2016.

Particulars of Offence

Lucette Detabouw on 5th day of February 2019 at Boe District in Nauru, intentionally possessed or controlled a video of two children, doing a private act and the material is pornography or abuse material and she was reckless about that fact, and that the children in the video were under 18 years old and the said material was likely to offend an ordinary person and she was also reckless about that fact.

Third Count

Statement of Offence

Sending the offending material: Contrary to section 142(1)(a)(vii), (b), (c) and (d)(i) of the Crimes Act 2016.

Particulars of Offence

Kimago Cook on 5th day of February 2019 at Boe District in Nauru, intentionally sent a video of two children, doing a private act to a group of IMO users and the material is

pornography or abuse material and she was reckless about that fact, and that the children in the video were under 18 years old and that the said material was likely to offend an ordinary person and she was also reckless about that fact.

4. In the original information the particulars of offence stated that the allegation in count one was that the first defendant took images of children engaged in a sexual act, and in count two it was alleged that she had possession and control of a video of children engaged in a sexual act. The allegation against second defendant in count three was that she sent the video of children engaged in a sexual act to a group of IMO users.
5. In the amended information in count one it is alleged that the first defendant intentionally took a video of two children under 13 years doing a private act, and that she was reckless about that fact, and a reasonable person would expect that the children would be afforded privacy for that act. In count two it is alleged that she had possession or control of a video of the two children doing a private act and the material is pornography or abuse material, and she was reckless about that fact and the material was likely to offend an ordinary person. In respect of count three it is alleged that the second defendant sent a video of two children doing a private act to a group of IMO users and the material is pornography or abuse material which was likely to offend an ordinary person.
6. Private act is the main element of the offence in all three counts. The charges as framed by the prosecution suggest that private act is that the children were engaged in is pornography or abuse material, so everything depends on whether the prosecution is able to successfully prove that the children were engaged in a private act.

BACKGROUND TO THE CASE

7. The two defendants are sisters. The first defendant lives in Boe District and her house is adjacent to the Boe Infants School. The second defendant lives in Aiwo District. It is not in dispute that the first defendant saw the two children aged between 5 to 6 years touching or hugging or kissing each other outside the toilet block of the school. She took a video of what the children were doing on her mobile phone. Later the second defendant downloaded the video on her mobile phone by using Xender App and sent it to her friend Lanieta Waqa who was part of the IMO group which included 6 other people including the second defendant.
8. Later that video went viral all over the island. The second defendant only admits to sending the video to Lanieta Waqa and that she does not know how it went viral. Lanieta Waqa was one of the potential suspects and took part in a record of interview conducted by the police. At that point in time the first and second defendants were witnesses for the police. The file was sent to the Director of Public Prosecutions for advice and no charges were laid against Lanieta Waqa but charges were instead laid against the first and second defendants.

RELEVANT LAW

9. Section 122 and section 142 reads as follows:

Section 122

Taking Images of private acts of child

- 1) A person commits an offence if:
 - a) the person intentionally takes an image of another person; and
 - b) the person whose image is taken is a child; and
 - c) the child is doing a private act and the person is reckless about that fact; and
 - d) in the circumstances, a reasonable person would reasonably expect that the child would be afforded privacy for that act.

Penalty:

- i) if the child is under 13 years old – 15 years imprisonment; or
 - ii) in any other case – 10 years imprisonment.
- 2) A strict liability applies to subsection (i)(b).
- 3) The question whether a reasonable person would reasonably expect that a child would be afforded privacy for an act is one of fact.

Section 142

Dealing with offensive material involving children

- 1) A person commits an offence if:
 - a) the person intentionally:
 - i) possesses or controls material; or
 - ii) accesses or solicits material; or
 - iii) produces material; or
 - iv) advertises or offers material for sale, distribution or supply; or
 - v) sells, distributes or supplies material; or
 - vi) exhibits material; or
 - vii) sends, communicates, transmits material or makes it available; or
 - viii) enters into an arrangement to do any of the matters mentioned in subparagraphs (i) to (vii); and
 - b) the material is pornography or abuse material and the person is reckless about that fact; and
 - c) a person described, depicted or represented in the pornography or abuse material is, or appears or is implied to be, under 18 years old; and
 - d) the way that the material describes, depicts or represents the person is likely to offend an ordinary person and the person is reckless about that fact.

Penalty:

- i) If the other person is under 13 years old – 15 years imprisonment; or
 - ii) In any other case – 10 years imprisonment.
 - 2) A strict liability applies to subsection (i)(c).
 - 3) The question whether the way the material describes, depicts or represents the person is likely to offend an ordinary person is one of fact.
10. Abuse material, pornography and private act are defined in Part 2 of the Crimes Act 2016 (the Act) under the title interpretation as follows:
- 1) Abuse material –

Abuse material means any material (whether pornography or not) that:

 - a) describes, depicts or represents a person, or part of a person:
 - i) as a victim of extreme violence or cruelty; or
 - ii) in a degrading or dehumanising manner; or
 - iii) doing any activity that involves physical contact by the person with a dead person for sexual gratification or sexual arousal of any person (whether of the people involved or some other person); or
 - iv) doing any activity that involves physical contact by the person with an animal for sexual gratification or sexual arousal of any person (whether of the person involved or some other person); or
 - b) describes, depicts or represents the death of a person.
 - 2) ‘Pornography’ means any material that describes, depicts or represents a person, or a part of a person:
 - a) doing an act of the following kind:
 - i) sexual intercourse;
 - ii) masturbation or sexual penetration;
 - iii) any activity that involves physical contact act by the person with another person (other than a dead person) for sexual gratification or sexual arousal of any person (whether of the people involved or some other person); or
 - b) in a sexual context.
 - 3) ‘Private act’ means:
 - a) an act of the following kind:
 - i) sexual intercourse;
 - ii) masturbation or sexual self-penetration;

- iii) any activity that involves physical act by the person with another person for sexual gratification or sexual arousal of any other person (whether of the people involved or some other person); or
- b) an act involving an intimate bodily function (for example using the toilet); or
- c) an act involving undressing so that the body is clothed only in underwear; or
- d) an act involving nudity.

INGREDIENTS OF OFFENCES

11. The ingredients of the offence in count one are:

a) Count One – Section 122 of the Act

- i) That images were taken intentionally of child/children;
- ii) That the images taken were of child/children;
- iii) That the child/children were doing a private act;
- iv) That a reasonable person would afford privacy to the child/children for the act;
- v) The question is whether privacy is to be afforded to the child/children is a question of fact.

b) Count Two – Section 142 of the Act

The ingredients of the offence in count two are:

- i) That the accused intentionally possessed or controlled material;
- ii) That the material is pornography or abuse material;
- iii) That the accused was reckless about that fact;
- iv) That the person described, depicted or represented in the pornography is under 18 years.

c) Count Three – Section 142 of the Act

The ingredients of the offence in count three are:

- i) That the accused intentionally sends, communicate, transmits material;
- ii) The material is pornography or abuse material;
- iii) That the accused was reckless about that;
- iv) The person or persons is under 18 years of age.
- v) That the material is likely to offend an ordinary person.

DISCLOSURE

12. Before I move on to discuss the evidence, I shall make some observations about the disclosure of documents by the prosecution and the importance thereof for a fair trial.

13. Before the charges were laid against the two accused, Laniata Waqa was a suspect in this case. She was interviewed by the police and according to Miss Serukai she participated in a

record of interview. At that time the two accused gave statements to the police as witnesses. Neither their statements or the record of interview of Laniata Waqa was disclosed to the defence or formed part of the deposition filed in Court. This only came to light during the trial. Miss Serukai when asked as to why those documents were not disclosed to the defence or formed part of the deposition, she stated that she would have provided copies to the defence if they had asked for them. That is not how disclosure is done. Prosecution cannot simply cherry pick and disclose what is beneficial to its case it must disclose all the documents in its possession regardless of whether it weakens its case.

The House of Lords in *R v H and C*¹ stated:

“Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of the formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.”

14. Disclosure of documents was recently enacted in the Criminal Procedure (Amendment) Act 2020 (4 June 2020) where it is stated at section 176 as follows:

176 Disclosure and notice to be given:

- a) The prosecution shall provide the disclosure documents, witnesses statements, expert reports, photographs and other disclosure documents to the accused as soon as practicable after the accused is charged and appears in Court in the first instance.

EVIDENCE

15. The entire prosecution case hinges on the video recording made by the first defendant on her mobile phone and which was later sent out by the second defendant to her friend Laniata Waqa, and it was subsequently sent out to the IMO Group which comprised of six people.
16. Sgt Illona Dowedia (Sgt Illona) was the main prosecution witness. She conducted the record of interview of both the accused, the first accused on 21 February 2019 and the second accused on 4 March 2019 respectively. In both records of interview, she put the allegations to the accused that the video recording shows that the children were engaged in “indecent acts”. Having put that as an allegation she later stated at question 19 of the record of interview of the first defendant that the children were engaging in “indecent acts”. At question 26 and 27 she asked the first defendant as follows:

Q26: What did you observe the two school children doing?

Answer: They were kissing, they were just staying outside, just loitering.

Q27: What do you understand by the action of the two school children? Was it sexual in nature?

Answer: It's wrong.

¹ [2004] 2AC 134, at 147:

17. At question 31 when the first defendant was asked to describe as to why she made the video her response was:

“Why I made the recording of the video of the two children, was to show it to the teachers of the school what the children have been doing in the school.”

18. Sgt Illona in response to a question asked by Miss Serukai when the video was played in court stated:

“I think he is trying to off her undies or something, I’m not sure, but that it is how it is looking that they are trying to do something. It does not look innocent when you are looking at it.”

She further stated that:

“Yep, they are very close. He is helping to pull down her pants or something. He got his face right up to her. I think they are kissing now. I think he is trying to pull her dress and he trying to pull I don’t know what.” She further stated: “Yep. They are just standing together and he pulled her in again as they are standing right up against each other. He’s gone down to his knees in front of her and she’s got her dress up or something and he’s still in front of her on his knees and he’s up again.”

19. The video itself was not very clear and Sgt Illona gave evidence of what it showed and she repeatedly used the words “I think” and “I don’t know what”. She did her level best to inform the court of what was shown in the video.
20. The first defendant in her evidence admitted to making the video. She said that she took the video of what the children were doing and wanted to show it to the teachers, and she said that she saw the children touching and kissing each other. She said they were ‘kissing lip to lip’ and opening of their clothing. She further stated that she had seen the children do that before and complained to the teachers but no action was taken and so she took the video on this occasion as proof of what she witnessed.
21. In cross examination by Miss Serukai the first defendant again stated that she saw the children holding on to each other, kissing and leaning and embracing each other. She was asked a specific question about the boy’s mouth touching the girl’s genitals when he was kneeling and her response was: “I can see they are close but I am not sure whether the mouth is actually touching”; but Miss Serukai did not ask Sgt Illona to comment on the act of kneeling or whether the boy’s mouth was touching the girl’s genitals.
22. It was suggested to the first defendant by Miss Serukai that she waited for one minute 57 seconds before she called out to the children and she agreed that she did so to show the video to the teachers.
23. Sgt Illona is a very experienced police officer and she had difficulty explaining as to what the children were doing. She stated in many places that as I said previously: “I think” and “I don’t know”. This is not a criticism of how she gave the evidence as the video itself was not clear but she was really struggling to describe as to what she saw. From what could be seen in the video when it was played in court, as well as the evidence of Sgt Illona and the

evidence of the first defendant is that the two children were engaged in the act of hugging/embracing or kissing each other which is consistent with Sgt Illona's observations when she interviewed the two defendants and put the allegations to them that the children were engaged in "indecent acts".

24. Private act entails, as discussed in paragraph 10 above, the following:
- i) Sexual intercourse;
 - ii) Masturbation or self-penetration;
 - iii) Any activity that involves physical contact by a person with another person for sexual gratification or sexual arousal upon a person (whether the people involved or some other person).

There was no act of using toilet or act of undressing and their bodies only clothed in underwear or an act of nudity as mentioned in paragraph 10(b) hereof.

25. There was no evidence of an act of sexual intercourse, masturbation or sexual self-penetration, intimate bodily function in using toilet or an act of undressing so that the body is clothed only in underwear or an act of nudity.

SEXUAL GRATIFICATION

26. The DPP submits that what is shown in the video comes within the ambit of paragraph 10 (a)(iii) where it is stated "any activity that involves the physical contact by a person with another person for sexual gratification or sexual arousal of another person (whether the people involved or some other person)". He further submits that the activity shown in the video is for sexual gratification or arousal but he does not support his submission as to how it was for sexual gratification or arousal. The first defendant in her record of interview on 21 February 2019 at question 31 stated that "Why I made the recording of the video of the two children was to show it to the teachers at the school what their children have been doing in their schools" and at page 88 of the transcript she further stated that: "That is when I called out to the children those children and they ran away".
27. If it was indeed for sexual gratification or arousal then why would she call out to the children. She should have just continued to watch the children but she called out to them. Why? Because her intentions were to bring it the attention of school teachers. In *R v Court*² it is stated at page 222 by Lord Keith of Kinkel as follows:

"A wicked intention is an essential ingredient of the offence of indecent assault, as indeed it is of most other crimes against the person. For the most part, the wicked intention can readily be inferred from the facts found proved as to the circumstances of the assault, unless there are indications that those features of the circumstances which are capable of being considered indecent were not intended, as in the instance put of a common assault accidentally involving damage to a woman's clothing. In a narrow range of cases, however, the circumstances may not point unequivocally to the requisite wicked intention. The delivery of chastisement to the buttocks of a child is capable of presenting a case of that nature, since such chastisement is not necessarily indicative of an intent to do something indecent. Where, however, there is direct evidence, as there was in the present case in the shape of the appellant's statement about

² [1988] 2 ALL ER 221

buttock fetish, that is it was the assailant's intention to use the victim for the purpose of gratifying a particular self-instinct and this action did in fact amount to a using of her for that purpose, such evidence can, in my opinion, can properly be taken into account so as to resolve any ambiguity about the nature of the act. The contrary view seems to me to fly in the face of all common sense."

WHETHER A REASONABLE MAN WOULD HAVE AFFORDED PRIVACY?

28. The reasonable man test is described in Wikipedia as:

"In law, a reasonable person, a reasonable man, or the man on Clapham Omnibus is a hypothetical person of legal fiction crafted by the courts and communicated through case law and jury instructions."

29. In *Healthcare at Home Limited v The Common Services Agency*³ it is stated as follows:

"It follows from the nature of a reasonable man, as a means of describing a standard applied by the court, that it would be misconceived for a party to seek to lead evidence from actual passengers [i.e. "the right thinking member of a society," "the officious bystander," "the reasonable parent," "the reasonable landlord" "the fair minded and informed observer," ...] on the Clapham omnibus as to how they would have acted in a given situation or what they would have foreseen, in order to establish how the reasonable man would have acted or what he would have foreseen. Even if the party offered to prove that his witnesses were reasonable, the evidence would be beside the point. The behaviour of the reasonable man is not established by the evidence of witnesses but by application of a legal standard by the court. The court may require to be informed by evidence of circumstances which bear on its application of the standard of the reasonable man in any particular case; but it is then for the court to determine the outcome, and those circumstances of applying that impersonal standard."

30. I sit in this court as both the judge of law and fact and in my capacity as a judge of fact I am satisfied that a right-thinking member of society would have acted in the same manner as the first defendant did in taking the video, and not afforded privacy to the children as the sole purpose of taking the video was, as I have stated earlier, was to show the children's activities to principal and the teachers.

COUNT ONE

31. For the reasons given above I find that the prosecution has not proved the children were engaged in a private act or that a reasonable person would have afforded them privacy for the act that they were engaged in. These are essential elements of the offence and I therefore acquit the first defendant on count one.

COUNT TWO

32. For this count, the prosecution stated clearly in the particulars of the offence that the first defendant had possession and control of a video of the two children doing a private act and

³ [2014] UK SC 49 Supreme Court of the United Kingdom 30 July 2014

that the material in the video is pornography or abuse material. The prosecution did not adduce any evidence of any abuse material which is defined in paragraph 10 above.

33. I have already made a finding on count one that the children were not engaged in a private act. The definition of a private act and pornography is almost identical. Private act entails:
- i) Sexual intercourse;
 - ii) Masturbation or self-penetration;
 - iii) Any activity that involves the physical contact by a person with another person (other than that person) for sexual gratification or sexual arousal of any person (whether the person involved or some other person).
34. Pornography also entails the following:
- i) Sexual intercourse;
 - ii) Masturbation or self-penetration;
 - iii) Any activity that involves the physical contact by a person with another person (other than that person) for sexual gratification or sexual arousal of any person (whether the person involved or some other person).
35. I have already made a finding on count one that the prosecution has failed to prove that the children were engaged in a private act and that applies to count two as well. In the absence of private act, I find that the material in the video was not pornography. In the circumstances the first accused is acquitted on count two.

COUNT THREE

36. In relation to this count there is no dispute that the second defendant sent out the video to Lanieta Waqa and it was subsequently was sent to the IMO Group. The ingredients of this offence on this count are that:
- a) The children were doing a private act which was in the video;
 - b) That the material in the video is pornography.
37. I have already made a finding in respect of these matters in counts one and two and those findings apply to this count as well. In the circumstances, I acquit the second defendant on count three.

DATED this 30 day of July 2021

Mohammed Shafiullah Khan
Judge