



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 47 of 2016

THE REPUBLIC OF NAURU

v.

AB

Before: J. Crulci, A/CJ
For the Prosecution: L. Savou
For the Defence: R. Tagivakatini

Dates of the Hearing: 7, 8, 10 November 2016
Date of Judgment: 14 November 2016

CATCHWORDS – Criminal – Rape – Child – Aggravating features - Sentence

CASES CONSIDERED

Public Prosecutor v Andy [2011] VUCA 14
Public Prosecutor v August [2000] VUSC 73
Public Prosecutor v Scott [2002] VUCA 29
Public Prosecutor v Supe [2016] VUSC 137
Nandan v State [2008] FJHC 262
Raj v State [2004] FJSC 12
R v Billam [1986] 1 All ER 985
Republic v FC [2016] NRDC 53
Republic v Gadeanang [2009] NRSC 3
Republic v Gadeanang [2015] NRSC 14
Republic v Gadeanang [2015] NRSC 16
Republic v Maenisoa [2011] SBHC25
Republic v Scotty [2008] NRSC 5

Soni v R [2013] SBCA 6
State v Bulivou [2010] FJHC 382
State v Cakau [2010] FJHC 141
State v Talenasila [2010] FJHC 84

SENTENCE

1. AB is charged with four offences, three under the *Criminal Code* 1899 and one under the *Crimes Act* 2016.

COUNT ONE

Statement of Offence

INDECENT TREATMENT OF GIRLS UNDER SEVENTEEN: Contrary to section 216 of the *Criminal Code* 1899

Particulars of Offence

AB on an unknown date from the 23rd of April 2015 to the 8th January 2016 unlawfully and indecently dealt with another person namely XY by putting saliva on his fingers and touching the said XY's vagina.

COUNT TWO

Statement of Offence

RAPE: Contrary to section 347 and 348 of the *Criminal Code* 1899

Particulars of Offence

AB on an unknown date from the 10th April 2016 to 11 May 2016 had carnal knowledge with XY without her consent.

COUNT THREE

Statement of Offence

INDECENT TREATMENT OF GIRLS UNDER SEVENTEEN: Contrary to section 216 of the *Criminal Code* 1899

Particulars of Offence

AB on an unknown date between the 7TH May 2016 to 11th May 2016 unlawfully and indecently dealt with another person namely XY by forcing her to kiss and drag her head towards his private parts.

COUNT FOUR

Statement of Offence

INDECENT ACTS IN RELATION TO CHILD UNDER 16 YEARS OLD: Contrary to section 117(1)(i) of the *Crimes Act* 2016

Particulars of Offence

AB on the 15th June 2016 intentionally sucked XY's neck and the touching was indecent and AB was reckless about the fact that XY was a child under 16 years old.

2. The complainant victim in this matter is a young girl of 7 years of age in Grade 2 at school. The defendant, aged 35 years, is her step-father. In order to protect the identity of the victim both her and the defendant's name has been suppressed: the defendant is referred to as 'AB' and the complainant as 'XY'.
3. The defendant pleaded not guilty to four counts before the Court and the prosecution called three witnesses including XY. The day after the Court heard evidence from XY the defendant sought to be re-arraigned and changed his pleas to that of guilty. At the time of the guilty pleas, the prosecution had called all save one (medical) witness.
4. Subsequent to the guilty plea an agreed statement of facts, a medical report, a record of interview with defendant, and statements of three police officers were tendered by consent and put before the Court. A conviction was recorded and the matter adjourned for sentencing submissions.

The facts

5. The defendant married XY's mother in February of this year. Prior to the marriage they had been in a relationship for some four years. For most of the relationship XY lived with her maternal grandparents in Boe.
6. The defendant and XY's mother lived at Location with their young son. Although XY lived with her grandparent's she also stayed with her mother and AB at Location. In April of this year the maternal grandparents went overseas for medical treatment, returning in June 2016. During this time XY stayed with her mother and the defendant at Location.
7. The victim gave details of sexual abuse perpetrated by the defendant on an almost daily basis during her grandparent's absence from Nauru. She also gave evidence of offences that took place prior to her mother's marriage. For the most part the offending took place when her mother was away from the home. Opportunistically the defendant would engineer to be alone with her when the mother was at Bingo or out at the shops.

8. XY gave evidence that the defendant instructed her to lick his private parts; XY didn't want to comply so the defendant pulled her hair and head and pushed her head to his groin. The defendant put his saliva onto his fingers and inserted them into XY's vagina, causing her pain. On occasion the defendant would forcefully kiss her on her neck; this action hurt and left bruises.
9. On this occasion XY's mother was asleep and the defendant told XY to sleep on the floor. XY was lying on her side and the defendant lay behind her also on his side. The defendant had sexual intercourse with XY whilst the mother was asleep nearby, and as she (XY) reached out to her mother's hand, the defendant pulled her hand away. XY said that his actions caused her pain and that she hadn't told anyone for fear of the defendant 'beating her up'.
10. XY's mother gave evidence to the effect that the defendant was violent towards her on numerous occasions, abusing, beating and hitting the her badly. The mother saw 'love bite' marks on XY's neck and body. She realized that something was going on when she wanted to take XY to Bingo with her and the defendant became angry and insisted that XY remain home with him. On one occasion at night when they were lying down she saw the defendant holding onto XY's face in a forceful way and kissing XY with his tongue in her mouth. When she asked what was going on, the defendant said it was just a 'good night kiss'. She also witnessed the defendant pulling XY's head towards his groin.
11. When pressed by her mother, XY told her that something was going on and that she (XY) was being abused by her step-father. The mother told XY to wait until the grandparent's returned to Nauru and when they come to the house and blow the car horn, XY should run to the car and leave.
12. When the grandparent's returned and came to the house, the defendant locked them all inside the house with the grandparent's outside. There was a big argument and finally the defendant was convinced to let them go on the understanding that they would go to the grandparent's and come back. XY and her mother and younger brother left in the grandparent's car and went straight to the police station and reported these matters to the Police.
13. The investigating officer in this case gave evidence to the Court that when XY gave her statement she did not wish her mother or any other adult to be present. Giving evidence to this Court, XY spoke in a quiet, composed and firm

manner; however it was apparent from her demeanour that giving evidence of the events caused her significant embarrassment and distress.

Prosecution submissions on sentence

14. The prosecution reminded the Court that the first three counts are contrary to the *Criminal Code* 1899, and the last count is contrary to the recently enacted *Crimes Act* 2016. This is the first matter to come before this Court since the guidelines in *Republic v Gadeanang*¹ were laid down.
15. The prosecution draws the Court's attention to the provisions in section 211(1) of the *Criminal Procedure Act* 1972² and the *Crimes Act* 2016³ in relation to sentencing and helpfully referred the Court to cases from other Pacific Island jurisdictions as a guide in reaching an appropriate sentencing tariff.
16. Counsel listed the following as aggravating factors: the victim is a child; she is the step-daughter of the defendant; the indecent treatment is not an isolated incident and has been repeated; there is a breach of trust; there has been re-victimisation in the reporting of the incident to police, medical professionals and by giving evidence to the Court; the defendant knew that the victim had previously been abused by a male relative; the Victim Impact Report indicates that as a result of the sexual abuse the victim now suffers from Post-Traumatic-Stress-Disorder.
17. Taking all the matters into account the prosecution seek a substantial term of imprisonment, asking the Court to issue sentencing guidelines in matters relating sexual offences against children.

Victim impact report

18. The victim impact report was compiled by Dr T. Smith who specialises in mental health matters. He noted that the XY suffered from Acute Stress Disorder (ASD) following the trauma of the sexual assaults, and is emotionally and psychologically affected. As the symptoms of her traumatic experience have persisted she is diagnosed as having Post-Traumatic Stress Disorder (PTSD).
19. This PTSD manifests itself with XY having disturbed sleep; being afraid of her step-father and other males; becoming distressed when she sees other men

¹ *Republic of Nauru v Jacko Gadeanang* [2015] NRSC 14

² 211 Evidence, etc., admissible after finding of guilt

(1) Where the Court has found any accused guilty, it may, before or after conviction, receive such evidence as it thinks fit, in order to inform itself as to the sentence or order most appropriate to the case.

³ Sections 278 - 280

who are similar in appearance to her step-father; and becoming upset when she hears stories regarding assaults. The report notes that she is a very intelligent young girl who has hopes for a future career.

20. The report concludes that XY is to continue to be reviewed every two weeks at the Mental Health Clinic and to receive clinic and home visits as necessary to support her recovery. Dr Smith expresses the hope that she will go back to school.

Defence submissions on sentence

21. The defendant is 35 years of age, was married this year and has a three year old son. He has no previous convictions. Through his counsel he expresses remorse for his actions to both his wife and XY. He has been in custody since the 4 July 2016 following his arrest for these offences.
22. The Court is asked to take into account the defendant's pleas of guilty giving as a reason for the lateness of the plea the difficulty the defendant has in controlling his emotions.
23. Counsel for the defendant refers the court to various Nauruan cases of indecent treatment and rape as a guide for consideration. The defence submits a starting point of 6 years imprisonment with the aggravating factors and matters in mitigation taking the sentence to a period of eight years imprisonment.

Considerations

24. The Court is grateful for the submissions of both counsel and the cases put before the court. The Court notes the provisions of sections 278, 279 and 280 *Crimes Act 2016*:

278 Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other people from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for the offender's actions;
- (f) to denounce the conduct of the offender;
- (g) to recognise the harm done to the victim and the community.

279 Sentencing considerations—general

- (1) In deciding the sentence to be passed, or the order to be made, in relation to a person for an offence against a law of Nauru, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.
- (2) In addition to any other matters, the court must take into account whichever of the following matters are relevant and known to the court:
 - (a) the nature and circumstances of the offence;
 - (b) any other offences required or permitted to be taken into account;
 - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct;
 - (d) any injury, loss or damage resulting from the offence;
 - (e) the personal circumstances of any victim of the offence;
 - (f) the effect of the offence on any victim of the offence;
 - (g) any victim impact statement available to the court;
 - (h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;
 - (i) if the person pleaded guilty to the charge for the offence—that fact;
 - (j) the degree to which the person cooperated in the investigation of the offence;
 - (k) the deterrent effect that any sentence or order may have on the person or on anyone else;
 - (l) the need to ensure that the person is adequately punished for the offence;
 - (m) the character, antecedents, age, means and physical or mental condition of the person;
 - (n) the prospects of rehabilitation of the person;
 - (o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependants;
 - (p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than another offender or a victim of the offence)—those circumstances.

280 Sentencing considerations—imprisonment

A sentence of imprisonment may be imposed on a person only if:

- (a) in the opinion of the court:
 - (i) the person has shown a tendency to violence towards other people; or
 - (ii) the person is likely to commit a serious offence if allowed to go at large; or
 - (iii) the person has previously been convicted of an offence punishable by imprisonment; or
 - (iv) any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or
 - (v) the protection of the community requires it; or
- (b) a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.”

25. The guidelines set out by Lord Lane CJ in *R v Billam*⁴ in relation to periods of imprisonment of five, eight and 15 year starting points, depend on the circumstances of each case. Lord Lane CJ listed the following as aggravating features of a crime:

- (1) "Violence is used over and above the force necessary to commit the rape;
- (2) A weapon is used to frighten or wound the victim;
- (3) The rape is repeated;
- (4) The rape has been carefully planned;
- (5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;
- (6) The victim is subject to further sexual indignities or perversions;
- (7) The victim is either very old or very young;
- (8) The effect on the victim, whether physical or mental, is of special seriousness.

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point".⁵

26. There is clear evidence before this Court of sustained and systemic abuse on a young and defenseless child by an adult in a position of authority and trust. The abuse took place in her home, a place where she was entitled to feel safe, nurtured and protected. To whom could she turn? Her grandparents were out of the country and the defendant's beating and abuse of her mother reinforced her position of helplessness and powerlessness.

27. The defendant's role should have been to nurture, care and protect XY instead of which he subjected her to abuse and degradation knowing that she had been previously the victim of sexual abuse by another man who was imprisoned for those offences. These offences were committed for the defendant's self-gratification, without concern for XY's physical, emotional or psychological welfare. This is offending of a most serious nature.

28. The offences before the Court carry significant penalties which reflect the condemnatory views of the community through the legislature in regards to this kind of offending:

⁴ *R v Billam* [1986] 1 All ER 985.

⁵ *Ibid* at 988

- (a) Indecent treatment of girls under seventeen, contrary to section 216 of the *Criminal Code* 1899 carries a term of imprisonment (if the girl is under twelve years of age) with hard labour for three years;
 - (b) Rape contrary to section 347 and 348 of the *Criminal Code* 1899 carries a term of imprisonment of hard labour for life;
 - (c) Indecent acts in relation to a child under sixteen years of age, contrary to section 117(1)(i) of the *Crimes Act* 2016, carries a term of imprisonment (if the child is under 13 years of age) of fifteen years.
29. A study published in 2014 by the Nauru Ministry of Home Affairs considered sexual abuse in childhood before the age of 15 years. Of the women who participated in the survey, over 30% reported sexual abuse in childhood, the majority of cases between the ages of 5 and 14 years, with male family members being mentioned as the most frequent offenders⁶. The prosecution of these offences sends out a clear message to the community that offending of this nature is not to be tolerated, and part of the Court's role when sentencing is to underline that message.
30. The aggravating features present in this case include:
 - XY is 7 years of age, a young child;
 - XY was subjected to other offences of sexual abuse, the offence of rape was not an isolated incident;
 - Whilst XY wasn't threatened with a weapon, she was frightened of the defendant who used violence in her presence towards her mother;
 - The defendant had numerous opportunities to consider his behavior and cease, but chose to continue offending;
 - The defendant's behavior towards XY was to habituate her to his offending and 'normalise' it;
 - The defendant knew that XY had previously been the victim of a sexual assault;
 - XY gave evidence in Court and was subject to cross-examination;
 - As a result of the offending XY is frightened of men who look similar to the defendant;
 - XY has disturbed sleep, she has stopped going to school;
 - XY has been emotionally and psychologically damaged and has PTSD.
31. Considering the guidelines referred to above, I conclude that the starting point for the offence of rape in this case should be 10 years. Taking into account the

⁶ Nauru Family Health and Support Study, *An exploratory study on violence against women*, Nauruan Ministry for Home Affairs, 2014

aggravating features in all the circumstances, the sentence for rape is increased by three years to 13 years.

32. The sentence for the other counts is: Count One - 3 years imprisonment; Count Three - 2 years imprisonment; and Count Four - 1 year imprisonment.
33. Credit is generally given for an early indication of a guilty plea as it reduces the stress to the victim and witnesses in anticipating the giving evidence at trial. It enables the victim to begin to heal and move on, and shows the Court that the defendant regrets and is remorseful for his actions. Additionally it saves the court time and the public purse money. A plea at the end of the prosecution case achieves few of these objectives.
34. I take into account his late guilty plea but do not give him the credit he would have received, had there been an early indication of the plea. Credit is also given for him being a first offender at the age of 35 years. His sentence for Count Two is reduced by two years to 11 years.
35. The question now arises as to whether the sentences should be concurrent or consecutive to each other. It is generally held that if the offending is a single course of conduct then the sentences should be concurrent. These matters took place over a fourteen month period - this is a long time in the life of a 7 year old child.
36. I am mindful of the totality principle and looking at the offending and the defendant's personal situation, his prospects of rehabilitation and the circumstances as a whole determine that Counts One and Two are to be consecutive to each other; Count Three and Four concurrent to each other and concurrent to Counts One and Two.
37. The Court was asked to issue guidelines in relation to sexual offences against children. Cases of this nature, and indeed sexual offences in general, vary so widely in their facts that it is impractical to list all the types of offending that will attract a certain penalty measured in years of imprisonment. It is my view that taking into account the guidelines from *Billam*⁷ (a case decided in 1986), society's views on the sexual abuse of children, and determinations in other neighbouring jurisdictions.

⁷ *R v Billam* [1986] 1 All ER 985

38. The starting point in this jurisdiction for rape of children is 10 years⁸. Thereafter the aggravating and mitigating features are considered to arrive at the appropriate sentence taking into account all the circumstances of the particular case.
39. As a young girl, XY has demonstrated great bravery before this Court in detailing the abuse she has suffered. It is hoped that following the sentencing of the defendant she can continue on the road recovery. The Court thanks the medical staff that assisted in the preparation of the victim impact statement and hopes that XY and her family will continue to receive the support they need.
40. ORDERS:
- 1) The names and identity of the defendant and the victim are to be suppressed;
 - 2) Count One - 3 years imprisonment;
 - 3) Count Two - 11 years imprisonment, consecutive to Count 1;
 - 4) Count Three - 2 years imprisonment, concurrent to Counts 1 and 2;
 - 5) Count Four - 1 year imprisonment, concurrent to Counts 1, 2 and 3;
 - 6) Total of 14 years imprisonment, backdated to 4 July 2016.



J.E. Cruici, Acting Chief Justice

Dated 14 November 2016

⁸ Fiji cases refer to a starting point of 10 years for rape of children, see *Raj v State* [2004] FJSC 12