



IN THE SUPREME COURT OF NAURU

AT YAREN

CRIMINAL JURISDICTION

Criminal Case No.3 of 2020

BETWEEN

Republic

V

Angaion Amwano

Before: Chief Justice F.Jitoko

APPEARANCES:

Counsel for the Prosecution: R. B. Talasasa Jr DPP
Counsel for the Offender: F.Akubor, PLD

Date of Hearing: 17, 18 June and 8 July 2020
Date of Submissions: 23 July, 2020
Date of Sentence: 30 July, 2020

Case may be cited as: *Republic v Amwano*

Catchwords: *Criminal law – Rape of child under 16 years old – section 116 Crimes Act – guilty plea – Indecent act in relation to a child under 16 years old- section 117 of the Crimes Act, - Indecent assault on a female- Section 350 of Criminal Code 1899, Circumstances – Sentencing guideline for sexual offences – Starting point of sentencing period.*

SENTENCE

The offender was found guilty of rape and indecent acts by this Court in the Judgment of 15th July 2020.

Facts

1. The offender pleaded guilty of rape of MI, a 14 years 8 months old girl at the time of the offending. The rape took place between 6am to 7am on the morning of Monday 17th February, 2020 at the complainant's house situated in Boe District, after the offender had entered the room solely occupied by the complainant. MI the complainant, and the offender, are first cousins. The offender's father is the brother to the complainant's mother. The offender resided, at the time of the offence, in the "summer house" a temporary hut with his father, some twenty or so steps away from the front door of the complainant's house.
2. According to the complainant, the offender on the morning in question had entered her room (Appendix 6 & 7 of Exhibit E) around 6am and had touched and caressed her thighs and when she stirred and opened her eyes, he ran out of the room. The second time he entered the room, he advanced to the bed, and pulled her pants down and pushed his right hand inside her panties and in the process had inserted one of his right hand fingers into her vagina.
3. The offender chose not to give evidence. His caution interview with the police taken on Wednesday 19th February, 2020 (Exhibit F), did not corroborate MI's story. He only denied that he visited the complainant in her room at any time at all on the morning of 17th February.
4. While, the Court is cautious in accepting uncorroborated evidence, this does not apply to the evidence of a child. In any case, her evidence before the court was clear as to the details of what the offender did to her on his visits to her bedside on the morning of 17th February, 2020.
5. The offender has been found guilty of rape of a child under 16 years old contrary to section 116 (a) (b) (ii) of the Crimes Act 2016 and guilty of other indecent act against a child under 16 years old contrary to section 117 (1) (a) (b) (c) of the Crimes Act.

6. In their sentencing submissions, counsel tabled the following reports:
 - (i) Victim Impact Statement
 - (ii) Pre-Sentencing Report

Victim Impact Statement

7. This was submitted as appendage to the Prosecution's sentencing submissions. The victim is the third youngest of siblings of 8 children of 3 brothers and 5 sisters. The report concedes that no physical harm was suffered by the victim. Emotionally, she felt anger and hatred towards the, for taking advantage of her, as they are first cousins; and of her vulnerability and helplessness. Psychologically, the victim is terrified of him and the incident haunts her time and again. She feels traumatised and whenever she thinks of the incident and of the offender, she becomes very angry. He was supposed to be someone she trusted but he betrayed the trust. The victim confirmed that she only "*hangs out*" with her female friends and keeps away from speaking to boys, especially those resembling the age and size of the offender.

Pre-Sentence Report

8. The Chief Probation Officer, Jansen Agir's Report was submitted into court by the defence counsel, as part of her sentencing submissions.
9. The family background of the offender is a sorry one to read. He and his sister had lost their mother early; she died when he was 8-year old. His father abandoned them and went to live with a new partner, a Kiribati woman, and at the beginning of this year, his father and his new partner moved away to Kiribati. He and his sister moved in with his auntie Miriam Udire and then adopted by his uncle where he resided until the incident. He only reached junior primary school level of education; is not meaningfully employed and fish to help support the family. He spends his other spare time drinking kava with a friend. He acknowledges his offence, and accepts the consequences and is most remorseful for his action. He asks for the court's mercy and asked to be given a second chance as he is still very young.

Sentencing Guidelines for Sexual Offences

10. The judiciary of Nauru is yet to develop sentencing guidelines as is done in other jurisdictions. For example in the case of England and Wales, there is in practice a two-tier system which has subsequently found followings in New Zealand, Samoa and Fiji.
11. In England and Wales, a Sentencing Guidelines Council is set up by legislation with members comprising eminent jurists, academics, practitioners and lay persons, tasked with designing processes that the courts should use in arriving at a sentence of an offender. This is complemented by Guideline Judgments set by the Court of Appeal and the High Court that delve into the details including identifying starting points of sentences.
12. In New Zealand its Sentencing Act 2002 sets out the core principles the courts must take into account, such as gravity of the offending, the blameworthiness of the offender, the maximum penalty prescribed for the offence and whether restorative justice has been agreed upon or reached. The New Zealand Court of Appeal, in issuing sentencing guideline judgments in its role at reviewing decisions from the High Court, reviews past cases of similar nature, and establishes a sentencing range for the future.
13. Similarly in Fiji under its Sentencing and Penalties Act 2009, the court's guiding principles in sentencing are set out in Section 4. Both the Court of Appeal and Fiji's Supreme Court, as circumstances require, give a guideline judgment or review a guideline judgment that has been given (Section 6).
14. Nauru remains at the policy and general principles level which are intended to guide the Court in the sentencing of offenders. These are set out under *PART 15-ARREST, OFFENCES, PENALTIES AND SENTENCING, DIVISION 15.3 of the Crimes Act 2016* and specifically:
 - (i) *Section 277: kinds of sentences that a court may give*
 - (ii) *Section 278: purposes of sentencing*
 - (iii) *Section 279: sentencing considerations- general*
 - (iv) *Section 280: sentencing considerations- imprisonment*
 - (v) *Section 281: sentencing considerations- fines*
 - (vi) *Section 282: power to reduce penalties.*

15. In addition, the Court, in respect of a juvenile offender, is guided in sentencing, by the provisions of the Child Protection and Welfare Act 2016 and specifically section 48 thereof, and as well as the guiding principles, including the aggravating circumstances the court should consider, in sentencing for offenders under section 37 of the Domestic Violence and Family Protect Act, 2017.
16. Notwithstanding the fact that there has not been any sentencing guideline for the courts, it is very clear from the penal policy guidelines set out under sections 278 to 282 of Crimes Act, that the Nauru criminal justice system is firmly anchored on the reformation rather than retribution principle of criminal justice.

17. As the court stated in *Harris v DPP [1998] NRSC 2:*

“Certainly, in the case of serious offence such as those here, the starting point in the consideration of the quantum of the punishment must be imprisonment. However, a period policy, as in all countries with a system of justice similar to that of Nauru, is aimed at keeping people out of prison. Reformation not retribution is the prime object in sentencing. Mitigation circumstances pertinent to an offender are always a major factor to be weighed in sentencing.”

18. The court in *R v AD [2019] NRSCI* emphasised the duty of the court to not only ensure that the offending is adequately punished for offence committed against the person and to society, but also bearing in mind the policy considerations on reformation of the offending as clearly set out in Division 15.3 of the Crimes Act. The court said:

“The essence of the court’s deliberation on all the sentencing provisions above (sections 278 to 280), is the attempt to strike a balance between punishing a wrongdoer, against person(s) or society and such sentence to reflect the seriousness of the offence and, at the same time deter others from committing similar offences, while bearing in mind the goal of rehabilitating the offender and also too lending moral support to the victim(s).”

19. It is important in my view for the public to know and appreciate that there is a wide spectrum of guilt which is covered by the offence of rape. For example in the case of an unlawful sexual nature with a child under 16 years old, on one end of the spectrum, the offender may be of 16 or 17 years of age, who had established very close friendship with the victim, but had unlawful sexual intercourse with her. On the other end of the spectrum is an adult male in a supervisory capacity, or in a position of trust, who sets out deliberately to seduce the child under his charge.

20. The Director of Public Prosecutions forcefully made submissions that it is the duty of the court to enforce the law as set out under sections 116 and 117 of the Crimes Act. For a person who is guilty of sexual intercourse with a child under 16 years old the maximum sentence is life imprisonment if with aggravating circumstances, but otherwise 25 years imprisonment. In indecent acts against a child under 16 years old under section 117 of the Crimes Act the tariff is set at 15 years maximum imprisonment, with aggravating circumstances and 12 years in all other cases.
21. It is useful to remind oneself that the tariffs for rape and indecent acts set out under sections 116 and 117 are maximum sentences and rarely, if at all, will a court impose such periods of sentence in cases before it. There are wide spectrums of guilt for the court to consider alongside the special circumstances unique to the case and the offenders. Our laws recognise these circumstances that constitute the policy principles for penalties and sentencing in criminal offending already referred to above, under section 277, 278, 279 and 280 of the Crimes Act. These are the guidelines to assist our courts in arriving at the appropriate sentence for an offence. It cannot, in trying to stringently enforce the increase in maximum sentence for offences of rape and indecent acts, introduced in sections 116 and 117 of the Crimes Act 2016, ignore the general principles of reformation that are set out in sections 277 to 282 of the Act.
22. It is what the court in *Republic v AD (Supra)* referred to as balancing the need to enforce the law and punish the offending while bearing in mind the reformation of the offender. As Lawton LJ succinctly put in *R v. Taylor [1997] 3 ALL ER 527, at 530:*
“Like all laws, this one must be entered with mercy. The range of guilt is so wide that there is ample room for both mercy and severity.”
23. Chief Justice Spigelmann JJ of New South Wales expressed the dilemma often confronted by the court, this way, in his address on the topic “Sentencing Guideline Judgments” to the National Conference for District and County Court Judges, in Sydney on 24 June, 1999:
“The...core of sentencing task is a process of balancing overlapping contradictory and incommensurable objectives. The requirement of deterrence, rehabilitation, denunciation, punishment and restorative justice, do not generally point in the same

direction. Specifically, the requirements of justice, in the sense of just deserts and of mercy, often conflict. Yet we live in a society which values both justice and mercy."

24. This balancing act exercise without any firm guidelines for the court to rely on, has tendered to create some disparity in the quantum of sentencing for similar offences, especially in sexual offending on Nauru.
25. It might be useful in my view that, until such time as legislators make appropriate provisions for mechanisms through legislation for setting up of an independent agency to supervise sentencing guidelines and/or, recognise the authority of the courts to give guidance through Guideline Judgments, as is the trend in other jurisdictions, that I give some sentencing guidelines for sexual offences of digital rape and indecent acts under section 116 and 117 respectively, of the Crimes Act 2016.
26. The Court is mindful that offences like sexual abuse and offences against women generally, are on the rise in Nauru and to rein in the rise of such offences a much more responsive and stringent custodial sentencing guidelines is needed so as to send a firm message to the public. The evolving social mores and particularly, the society's total abhorrence to rape is a serious concern not only to those who govern, but equally to those responsible for enforcing the law.
27. In this regard, it is the duty of the sentencing judge not only to see that the punishment is not excessive as to defeat the object of law in ensuring the rehabilitation of the offender, but also to ensure that no lenient sentencing is passed which is manifestly inadequate that will result in miscarriage of justice and negating the deterrence factor.
28. This sentencing guidelines set out below follows examples in other jurisdictions. It is divided into three stages or steps, based on the severity of the offence and the degree of culpability of the offender. The first stage is to determine the starting point of sentence; the second, to find out aggravating and mitigating factors; and the third to see if any deduction and discount is available for the offender based on his cooperation at the stage of investigation and during trial. The Court in passing sentences period must give serious considerations to deterrence, the state of mind of the offender and the chances of rehabilitation of the offender. These are subjective factors, "focusing on the state of mind

of the offender,” are often considered by a sentencing court in assessing the offender’s prospects of rehabilitation and the need for specific deterrence.

First Step: The Starting Point

29. The first step for the court is to ascertain the appropriate starting point of the sentencing period. This period of imprisonment will vary based on the degree of culpability and severity of offence from case to case basis. The calculation of starting point for sentencing period will be based on the seriousness of the offence and the intent of the legislature for the particular offence. Although, the court will not consider the circumstances in which the offence was committed, personal, aggravating and mitigating factors will not be considered while analysing the starting point of the sentence period.
30. It is important again for the court to emphasise that the starting points are and remain, only as periods from when the court begins its assessment of the appropriate length of punishments of the offending. They are provisional sentences, subject to other factors. Like a barometer, the level/tariff will rise or fall depending on the pressure, in this analogy, the circumstances which are personal to the offender. It may very well be that in time with the changing social norms and expectations, that it will be necessary to amend these starting points.

Second Step: Assessment of factors personal to the offender:

31. At this stage the Court enters the second step of evaluating the aggravating and mitigating factors relating to the offending committed by the offender. The Court will look at the aggravating factors during the offending to determine how much enhancement or increase is to be made out in terms of sentencing period.

(a) Aggravating factors

Aggravating factors to be taken into account in determining the appropriate sentence for an offence would include:

- (i) Age of the victim (victim was very young or very old or had a disability),
- (ii) Harm caused to the victim (more the harm caused to the victim more serious the culpability),
- (iii) Degree of violation (seriousness will increase as the degree of violation increase, e.g. use of penis in sexual abuse will be more serious than the use of a finger),

- (iv) The offence was committed in a group,
- (v) Habitual offender with a record of previous convictions,
- (vi) The offence involved the threat or actual use of violence and the use of weapon,
- (vii) Offender caused injury including emotional harm and loss or damaged caused by the offence was substantial,
- (viii) The offence involved multiple victims or a series of criminal acts,
- (ix) The offender abused a position of trust or authority in relation to the victim,
- (x) The offence was committed without regard for public safety,
- (xi) The offence was committed while the offender was on parole,
- (xii) Age of the offender (a fully mature adult will be more culpable than an immature young adult).

The list is not an exhaustive and the court may at its discretion, add any other aggravating factors depending upon specific circumstances pertaining to that case.

(b) Mitigating factors

After adding the aggravating factors to the starting point, the Court must evaluate the mitigating factors available for the offender and deduct from the period of sentence. The court sets out below some mitigating factors to be taken into account in determining the appropriate sentence for an offender. Again, the list is not exhaustive:

- (i) Injury including emotional harm, loss or damage caused by the offence was not substantial,
- (ii) The offender does not have any record (or any significant record) of previous convictions,
- (iii) Offender is very young,
- (iv) First time offender with no previous record and antecedent,
- (v) The offender was provoked by the victim,
- (vi) The offence was not part of a planned criminal act,
- (vii) The offender was acting under duress,
- (viii) The offender has good prospects of rehabilitation, whether by reason of offender's age or otherwise,
- (ix) The offender is remorseful of the offence,
- (x) The offender is unlikely to re-offend,

- (xi) Offender supported prosecution in discovery of evidence and pre-trial disclosure,
- (xii) Probation officer report is positive about the offender,
- (xiii) There was substantive delay in trial proceeding without any fault of the offender,
- (xiv) Sole bread earner and young dependent,
- (xv) Mental disorder and low intelligence, and
- (xvi) Female offender.

Third Step: Discount of Provisional Sentence for Guilty Plea

32. At this third step the court should consider about discount on sentence to be applied after calculating aggravating and mitigating factors. For example, the discount on sentence will be applied if the offender has entered guilty plea. It shall be crucial for the Court to analyse at what stage the offender has entered his guilty plea. The Court may give significant consideration to the guilty plea which has been entered at the first reasonable opportunity. The Court may not give any discount to the offender if the charges have been defended throughout the trial.
33. A guilty plea is considered as an indication of remorse on the part of offender and it is generally accepted across all jurisdictions as one of the mitigating factor. It is also considered as a rightful initiative of the offender to facilitate the course of justice in reaching truthfulness and bringing an end to the lengthy criminal proceedings along with sparing witnesses from facing the strain of giving evidence, and by saving the community the cost of a trial.
34. In the end that the trial judge is the best person to assess the length of sentence to be delivered since every case is unique and facts of one case are not similar to the facts of the other. It is the discretion of sentencing judge to seek guidance from the sentencing guidelines set out in this judgment.

CONSIDERATION

Starting Point

35. In this case, the offence of rape the offender had pleaded guilty to is, one of digital rape or digital penetration as opposed to penile penetration. There is a clear distinction to be

drawn between penile penetration which has more aggravating features such as the risk of pregnancy or transmission of sexually transmitted diseases from digital penetration.

36. In *Jack Nampo v Public Prosecutor [2018] VUCA, Case no 17/3321*, the Vanuatu Court of Appeal accepted that sexual intercourse by digital penetration “*was different from and less serious than penile penetration and that such distinction should be recognised for sentencing purpose.*” The absence of aggravating feature, in digital penetration in the courts view, may result in a lower starting point for digital rape; the Court of Appeal confirming of its earlier statement in *Public Prosecutor v Andy [2011] VUCA 14*.

37. This court approves the Vanuatu Court of Appeal position recognising the distinction between penile penetration and digital penetration, and also agrees that the absence of such aggravating factors in the latter may result in a lower starting point.

38. As to the appropriate starting point for digital penetration, there are two previous decisions of this court on digital rape of child contrary to section 116. In the *Republic v Olsson [2017] NRSC Crime Case No: 01/2017*, the offender had three (3) previous similar offences.

The court set a starting point of 16 years and a sentence of 12 years imprisonment after mitigation. In the second case of *Republic v Tannang [2019] NRSC 25*, the starting point for undefended charge of digital rape was 6 years and following mitigation, an imprisonment sentence of 4 years 8 months.

39. In *State v Vusolo [2018] FJHC 659*, the Fiji High Court sentenced the offender to 10 years imprisonment for penile and digital penetration of his 16 year old niece. The Court of Appeal in *Daulako v State [2019] FJCA109* sentenced a defended to 15 years imprisonment for both digital and penile rapes.

40. The Vanuatu Supreme Court’s decisions in *Public Prosecutor v Enock Tao [2012] VUSC 219* and *Public Prosecutor v Harkenson Moise [2016] VUSC 5* both involving offences of digital penetration, adopted a starting point of 4 years imprisonment. In *Public Prosecutor v Amos Telukluk [2017] VUSC 162*, the court set the starting point of 7 years for repeated digital penetration of the victim over a period of two days.

41. The offender in this case had inserted his finger into the victim's vagina. He did it once only because he withdrew his finger and quickly ran away when the victim began to move and opened her eyes. She testified that she felt some pain but it is clear from the medical report that there was little or no physical damage caused to her genitalia and vagina by the offender's insertion of his finger. The medical report concluded that:
- "There was no perianal tear or bleeding. The hymen can be seen which was intact. No tear or cut in the hymen. No visible fluid bleeding or discharges seen at the introitus of the vagina."*
42. Notwithstanding these facts and, taking into account cases of digital penetration or rape here and in neighbouring jurisdictions, the courts believes that in all cases of digital penetration the proper starting point of sentencing is 5 years imprisonment.
43. The starting point for cases of indecent acts, under section 117 of the Crimes Act 2016, again is dependent on the facts and seriousness of the offending. The Nauru Supreme Court case of the *Republic v AB [2016] Crim Case No. 47/2016* involved the offender, a minor, charged with lead offence of rape under section 116 and indecent acts in relation to a child under section 117. The court, in finding the offender guilty of in respect of indecent acts, sentenced the offender to 12 months imprisonment.
44. For indecent acts to child under 13 years old, the New Zealand cases in *R v B (2002) 19 CRNZ 342 (CA)*; *R v Parker [2007] NZCA 534*; *Walker v R [2010] NZAC 288*; and *Kennedy v R [2011] NZCA 569* are all cases involving offences of indecencies committed on girls aged between 8 and 13. The offences involved touching the girls' vaginas, sometimes under their clothing's, squeezing their breasts through clothing's or kissing them on their lips. They are all short of sexual violation. The courts starting points ranged from 3 to 4 to 5 years depending on the frequencies the offences were committed and the period.
45. In the court's view the recommended starting point for any indecent acts short of sexual violation should be similar to those set by the New Zealand Courts on like offences ranging from 3 to 4 to 5 years.
46. In this case, the court is satisfied that the appropriate starting point is one of 3 years period of imprisonment.

Assessment of Factors Personal to Offender

47. The second step is the assessment of factors personal to the offenders. Such factors that will enhance or increase the sentencing (aggravating), and those that will act to discount the provisional sentence (mitigating).

Aggravating Factors.

48. First factor is the consanguineous relationship between the victim and the offender. They are first cousins, although the offender was adopted into the family. As the older cousin to the victim, he was in a position of trust vis a vis the victim in their relationship. He betrayed that trust and for this betrayal, the court will add 6 months to the starting point of 5 years imprisonment.
49. Second is the age disparity between the offender who was 20 years and 4 months old and the victim who was 14 years and 8 months at the time of the offending, a disparity of some 5 and half years. The offender is an adult and is expected to behave responsibly to the child. The court will add 6 months for this factor to the sentence.
50. The offence occurred in the home privacy of the victim's own room, which the offender became a trespasser to committing the offence. The court in acknowledging this factor, will add 6 months more to the sentence.
51. Finally, the offender has caused emotional and psychological harm to the victim which is detailed in the Victims Impact Statement submitted to the court. For this aggravating factor, the court adds a further 6 months to the sentence.

Mitigating Factors

52. The offender is a first-time offender with no previous record or antecedent. He is relatively young, and the probation officer's report appears positive on the real possibility of rehabilitation. The court will grant a discount of 3 months from the total sentence.
53. There was no physical harm or injury directly resulting from the sexual violation of the digital penetration of the victim that would have aggravated the offending. Sparing the

victim from physical harm is a mitigating factor in the offender's favour and the court will deduct 6 months from the total sentencing.

54. The offender is remorseful of his action and accepts the consequence of his misdeed and seeks the court's forgiveness, although I note, no effort is made to reconcile with the victim and her mother. The fact that he knows that what he did was wrong and is remorseful is a mitigating factor and the court will grant 3 months discount from the total sentence.

Guilty Plea

55. The final and third step in the sentencing consideration is on deduction or discount to guilty plea and/or assistance to the authorities.
56. In this case, the court agrees that the offender pleaded guilty at the earliest available opportunity, after having discussed the charges and the evidence with his counsel.
57. The reasons why it is considered as mitigation in favour of an offender are firstly, it avoids the often, traumatic experience of the victim being called to give evidence in court, and secondly, it saves the court time. Unfortunately, in this case, the offender's guilty plea did not altogether prevent the victim from court appearance as she was required to give evidence in respect of the lesser charge of indecent acts allegedly committed by the offender against her.
58. Notwithstanding the defended count 2 charge, the guilty plea to count 1 of rape did avoid the victim from giving evidence on the details of the sexual violation incident and also shortened the trial. For these matters, the court is prepared to give a discount of 6 months from the total aggregate imprisonment term.

SENTENCE

- (i) On count 1 of being found guilty of rape, and specifically, unlawful digital penetration, the offender is sentenced to 5 years imprisonment with a further 2 years added for the aggravating circumstances, making the total term of 7 years aggregate.

- (ii) On being found guilty on count 2 for indecent acts, the offender is sentenced to 3 years imprisonment.
- (iii) The sentence under count 2 is to be served concurrently with count 1.
- (iv) The discounts of:
 - i. One year from the mitigation factors, and
 - ii. 6 months from the guilty pleaare to be deducted from the aggregate total term, arriving at a final sentence of 5 years 6 months.

ORDER

The offender Angaion Amwano, is hereby sentenced to imprisonment for a term of 5 years 6 months, such time to begin to run from 15 July 2020, the day of the judgment and the beginning of his incarceration.


Filimone Jitoko
Chief Justice

