

Aubuku v. The State

Supreme Court

Bredmeyer, Los, and Hinchliffe JJ.

29 July 1987

Criminal law - sentence - rape - principles of sentencing in rape cases - guidelines to be followed by trial courts.

10 *Criminal law - sentence - rape - person in position of power and trust - aggravating circumstances - threat to use knife.*

The appellant sought leave to appeal against a sentence of ten years' gaol for rape. The victim had been in custody at a police station; the appellant was a police officer at the station. He took the victim out of the cells, ostensibly for questioning. Threatening the victim with a bush knife, he then raped her. The appellant pleaded not guilty. An appeal against conviction was abandoned.

20 **HELD:** The sentence of ten years' gaol was not manifestly excessive; leave to appeal was refused. The Court took the opportunity to establish a matrix of sentencing principles to be followed by trial courts. General guidelines as to the proper length of sentence in rape cases were given:

[NOTE: The companion cases of *The State v. Kaudik*, infra at p. 252, and the *State v. Koupa*, infra at p. 259, should be read together with the instant case.]

A. Four categories of the crime can be identified:

- 30
- (1) Five years' gaol is the base line, or starting point, for adult rape with neither aggravating nor mitigating features.
 - (2) Eight years' gaol is the starting point where
 - (a) two or more men act together; or
 - (b) the defendant has broken into a home; or
 - (c) the defendant held a position of responsibility towards a victim; or
 - (d) the defendant abducted the victim and held her captive.
 - (3) Fifteen years is the starting point where defendant has waged a "campaign" of rape.
 - (4) A life sentence may be appropriate where defendant has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely to remain a danger to women for an indefinite time.

40 B. The following factors aggravate the 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 previous offences of a violent or sexual kind;
- (6) the victim is subjected to further sexual indignities or perversions;
- (7) the victim is either very old or very young;
- (8) the effect upon the victim, whether physical or mental, is of special seriousness.

C. The following factors mitigate the crime:

- (1) the defendant saves the victim extra stress by pleading guilty;
- (2) the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse.

D. The following factors do not mitigate the crime:

- (1) the victim exposed herself to danger by acting imprudently;
- (2) the victim has previous sexual experience.

OBSERVATION: The Court of Appeal of New Zealand has recently stated and restated a "matrix" of circumstances to be considered in rape sentencing - see:

R. v. Puru [1984] 1 N.Z.L.R. 248

R. v. Te Pou [1985] 2 N.Z.L.R. 508

R. v. Stoddart [1986] 1 N.Z.L.R. 264

Woodhouse P. had this to say in *R. v. Puru* at p. 249:

The Judges do actually live in society and share with many other citizens the same strong feeling concerning the uncivilized abuse and coercion of women which this crime represents. But their judicial obligation is to ensure that the punishment they impose in the name of the community is itself a civilized reaction, determined not on impulse or emotion but in terms of justice and deliberation.

Cases referred to in judgment:

The State v. Kaudik [1987] P.N.G.L.R. 201 and p. 252 infra

R. v. Billam [1986] 1 W.L.R. 349; [1986] 1 All E.R. 985; 82 Cr. App. R. 347 (C.A.)

E. Kariko for the appellant

V. Noka for the respondent

Judgment of the Court:

This is an application seeking leave to appeal against a sentence of ten years' imprisonment imposed by Kapi Dep C.J. for rape. The appeal against conviction has been abandoned. The appellant was a policeman based at Banz Police Station. The victim was a married woman taken into custody for stabbing another woman. The appellant took the woman out of the cells and into the office ostensibly for questioning and there raped her. He threatened her with a knife. The appellant denied the offence and was convicted after a trial.

We agree with Amet J. in *The State v. Kaudik* [1987] P.N.G.L.R. 201; infra at p. 252 where he set out the principles which should govern a sentence for rape. In that case he adopted and applied principles well expressed by the English Court of

100 Appeal in *R. v. Billam* [1986] 1 W.L.R. 349; [1986] 1 All E.R. 985; 82 Cr. App. R. 347. We think that those principles are not only right and worthy to be followed but that the tariff of sentences expressed there for the different kinds of rape in England are the kinds of penalties needed in Papua New Guinea at this time. We believe that rape is a very prevalent offence in Papua New Guinea and women in this country view rape with abhorrence. If we can paraphrase *Billam* (at p. 350 (W.L.R.); p. 987 (All E.R.); p. 349 (Cr. App. R.)), the physical consequences of rape are severe. There is the physical harm occasioned by the intercourse and associated violence or force. There is the emotional and physiological trauma. The woman feels violated and degraded. There are the continuing feels of insecurity, the painful memories, and the fear of venereal disease or pregnancy. Rape is particularly unpleasant because it involves such intimate proximity between the offender and the victim. Furthermore rape involves the abuse of an act which, in its right context, is a beautiful expression of love.

110 Although the kinds of rape can vary considerably we believe it is possible to lay down some general guidelines as to the proper length of sentence. We quote now from *Billam* (at pp. 351-352 (W.L.R.); p. 987 (All E.R.); p. 350 (Cr. App. R.)) with approval:

For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

120 At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

130 The crime should in any event be treated as aggravated by any of the following factors: (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 subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon 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.

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The

140 amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous
150 good character is of only minor relevance.

We apply these principles to the facts of this case. The case was a contested one; the appellant pleaded not guilty. The appellant was a policeman, the victim a suspect in his custody at the police station. He was thus in a position of responsibility and trust towards her like a doctor and patient, or a teacher and pupil. Then there is the aggravating factor that he used a knife to frighten her into submission. We assume that the appellant will be dismissed from the police force and that is a punishment - but it is one which does not weigh heavily in our view as he had been in the police force for four years only at the date of the offence.

160 We consider the sentence of ten years correct; it was not manifestly excessive. We refuse leave to appeal against sentence and dismiss the appeal.

Reported by: L.K.