



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 49A of 2016

THE REPUBLIC OF NAURU

v.

BRONSON NOTTE

Before: Crulci J.
For the Prosecution: F. Lacanivalu
For the Defence: S. Valenitabua
Dates of the Hearing: 14 July 2017
Date of Judgment: 19 July 2017

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

SENTENCE

1. Bronson Notte is charged with two offences under the *Criminal Code* 1899 ("the Code"):

COUNT ONE

Statement of Offence

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

Particulars of Offence

BRONSON NOTTE on or between a date of the 27th and 29th October 2013 at Nauru, had carnal knowledge of a girl namely YZ without her consent.

COUNT TWO

Statement of Offence

INDECENT ASSAULT: Contrary to section 350 of the *Criminal Code* 1899

Particulars of Offence

BRONSON NOTTE on or between a date of the 27th and 29th October 2013 at Nauru, did unlawfully and indecently assault a girl namely YZ.

2. The complainant victim was 14 years old and the defendant was 21 years of age at the time of the commission of the offences. He is a neighbour of the complainant. In order to protect the identity of the complainant her name has been suppressed and she is referred to as 'YZ'.
3. The defendant has been found guilty of the offence of rape and indecent assault, and convictions recorded. At trial the prosecution called two witnesses including YZ. The other evidence before the Court comprises the Agreed Facts and witness statements, the Record of Interview, YZ birth certificate, and a computer disc of a video recording of YZ.

THE FACTS

4. The defendant has lived next door to YZ since his childhood. Prior to the night of the commission of the offences, YZ had been staying in Meneng over the weekend with friends. She had consumed a considerable quantity of Vodka and Pure Blonde beer over the preceding 48 hours and when she arrived home at around 10 pm, she was drunk.
5. YZ recalls her sister letting her in to the house, however she blacked out, and she next recalls sitting on the trampoline outside the house. With her on the trampoline was the defendant, Renz and Royon.
6. YZ fell asleep on the trampoline and when she woke up the next day she was in her house. She got up, had a cold drink and went back to sleep. When she woke later to relieve herself, she discovered stains on her underwear. YZ was shocked to find stains as her period had finished earlier in the month, she had a shower and returned to bed.
7. When YZ and some friends went to a store to buy some goods later in the day she was made aware that there was a video of her, but she did not view it at that time. She spoke to the defendant about the video but he said he would speak to her later as he was busy.
8. The video showed YZ asleep on the defendant's bed, naked from the waist down being indecently assaulted. As a result of investigations by the Police the defendant was interviewed and admitted having sexual intercourse with YZ, and videoing her whilst she was asleep and he was indecently assaulting her.
9. In evidence to this Court the defendant stated that he had taken the video "*to show her as proof that she had been with me*". He agreed that the complainant hadn't actually agreed to have sexual intercourse with him. When questioned in interview he answered "*Well she didn't actually say yes, I just asked her to take off her clothes and she did*" further that "*Yes she was fully drunk as she was not speaking clearly too.*"¹
10. The complainant told the Court that "*I will never say yes to him*" and in relation to being alone with the defendant in his room "*he shouldn't have brought me into his room.*"

¹ ROI, at [A24], [A25]

Prosecution submissions on sentence

11. The prosecution reminded the Court that the counts are contrary to the *Criminal Code* 1899, and drew the Court's attention to the guidelines laid down in *Republic v Gadeanang*².
12. The prosecution outlined the provisions in the *Crimes Act* 2016³ in relation to sentencing and referred the Court to cases from this jurisdiction and other Pacific Island jurisdictions⁴ as a guide in reaching an appropriate sentencing tariff.
13. Counsel listed the following as aggravating factors:
 - The age gap between the parties;
 - The Defendant was her neighbor and older than YZ, so should have taken responsibility in his actions towards the Victim but instead breached that responsibility by raping her;
 - The Defendant had been drinking alcohol;
 - The Victim had to come to Court and go through the ordeal of giving evidence;
 - The shame and embarrassment suffered by the Victim with the video recording being viewed by other people.
14. The prosecution accepts that the defendant is a first offender; however considering the seriousness of the case in all the circumstances an immediate custodial sentence is warranted.
15. The complainant and family feel that there has been a breach of trust by a friend and neighbour through the commission of these offences.

Victim impact statement

16. YZ provided a statement to the Court in which she details her humiliation as a result of everyone having seen the video. She states that she feels guilty in

² *Republic of Nauru v Jacko Gadeanang* [2015] NRSC 14

³ Section 278 and 279

⁴ *R v FC* [2016] NRDC 53; *R v Adam* [2007] NRSC 4, *R v AB* [2016] NRSC 29

relation to her family saying that she felt: "... like I had broken my mum's heart with what happened."

17. As a result of the incident her friends no longer visited her as their parent's would not allow them to socialize with her. Since the incident YZ has tried to limit her consumption of alcohol.

Defence submissions on sentence

18. The defendant is 25 years of age, single and lives with his parents and family. He has no previous convictions. Through his counsel he expresses remorse for his actions and apologises to the complainant and her family.
19. It is said on his behalf that he was a young man at the time of the commission of the offence, and that it was "the desire of youth" which led him to have sexual intercourse with the Complainant. The Court is asked to take into account the defendant's level of education into consideration, which is not high, having left school at Form 1 level. The defendant's level of understanding matters of life is different from that of a well-educated Nauruan
20. The delay of over three years in the matter coming before the Court and the Court is asked to take into account that this delay was not of the defendant's making.
21. Defence counsel draws the Court's attention to previous cases before this Court when determining the sentence for the offence of rape, citing a number of cases where the penalty was in the region of four years⁵.
22. Counsel also cites the case of *R v Gadeang*⁶ and adopts the Court's approach to the sentencing guidelines that were set out in that case.
23. In terms of sentence the defence state that the Court found that the Complainant was intoxicated and unconscious, however there is no evidence of physical force used to have intercourse with her or allegations of use of a weapon.
24. The sexual intercourse was not repeated, and there was no planning for the rape shown in evidence, and no evidence that the Complainant suffered pain

⁵ *Republic v Scotty* [2008] NRSC 5; *Republic v Adam* [2008] NRSC 16; *Republic v Notte* [2012] NRSC 18

⁶ *R v Gadeang* [2015] NRSC 14

and injury during the intercourse. Counsel further submits that there is not much disparity in their ages at the time of the offence (14 years and 21 years).

25. The Court is asked to take into account the defendant's remorse.
26. Counsel for the defendant refers the court to various Nauruan cases of indecent treatment and rape as a guide for consideration. In light of the cases cited above defence seek a starting point of 6 years imprisonment following the guidelines in *R v Billam* and *R v Millbury*⁷.

Pre-sentence Report

21. The defendant is reported to be a young man of no previous convictions. His family says that he gets along well with everyone and is generally known to be a shy person. This offence is very much out of character for him.
22. He previously worked as a security officer for three and a half years. He used to enjoy drinking alcohol but has reduced his intake.
23. The defendant is said to express sincere remorse and was surprised at his own behaviour which was out of character for him. He deeply regrets the negative impact his actions have had on the complainant and her family.

RELEVANT LAW

22. 347 Definition of Rape

Any person who has carnal knowledge of a woman or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations and as to the nature of the act, and or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

348 Punishment of Rape

Any person who commits the crime of rape is liable to imprisonment with hard labour for life.

⁷ *R v Billam*[1986] 8 Cr App R 48; and *R v Millbury* [2003] 1 WLR

23. 350 Indecent Assaults on Females

Any person who unlawfully and indecently assaulting a woman or girl is guilty of a misdemeanor, and is liable to imprisonment with hard labour for two years.

24. Although the *Crimes Act* 2016 had not been passed by Parliament at the time of the commission of these offences, the Court notes provisions of sections 278, 279 and 280:

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 *Crimes Act* 2016 updated the current offences and introduced new legislation. As stated by The Minister for Justice, The Honourable David Adeang M.P., on the 12 May 2016 when introducing the Crimes Bill to the House:

"The criminal laws of a country establish a standard of conduct by which all people must abide. It provides a means to maintain public order, protect people and their property and, for those who violate it, the Crimes Bill ensures they are punished in a just manner. Therefore it is important that Nauru's criminal law reflects the standards of conduct and morality that are not only appropriate for today's society, but reflective of the society we want to have. The current Criminal Code 1899 was written in Queensland to reflect both a different time and context. The time has come for Nauru to replace this Code with a law that is adapted to our time and our culture.

The Crimes Bill simplifies, modernizes and strengthens the criminal offences in Nauru. A major inclusion in this legislation is greater

protections in relation to sexual offences, particularly where children are victims. New offences have also been included to address the criminal misuse of modern technologies and emerging trends in criminal behaviour.

Penalties for sexual offences, particular relating to children, have been increased to protect those that are most vulnerable from being abused.”

It is noted that under the new legislation the definition of sexual intercourse includes penetration by any part of the body of another person (for e.g digital penetration). Offending such as that committed by the defendant in this case played a part in the changes made to the criminal law, and the new Bill reflects Nauru’s promotion of the protection of human rights of victims and defendants.

CONSIDERATIONS

26. Whilst the Court is mindful of the criminal legislation enacted since the commission of this offence and can draw upon the tenet in terms of sentencing considerations, the defendant falls to be dealt with under the Code as it was in 2013 at the time of the commission of the offences.
27. As in the *Republic of Nauru v AB*⁸, (a matter dealing with offences of rape and indecency of a child), notice is taken in this case of the guidelines set out by Lord Lane CJ in *R v Billam*.⁹ In *Billam* tariffs in relation to periods of imprisonment of five, eight and 15 year starting points were set, dependent upon the circumstances of each case.
28. 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;

⁸ *Republic v AB* [2016] NRSC 29

⁹ *R v Billam* [1986] 1 All ER 985.

- (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".¹⁰

- 29. There is clear evidence before this Court that the defendant took advantage of a young drunk girl and persisted in his attempts to get her to accompany him to his room. As rightly stated by YZ, she should not have been alone in the defendant's room with him, however the defendant had engineered it to be so. He compounded the rape by videoing himself indecently assaulting her. Although he was at the time a young man of 21 years of age, the seven year age gap between them was significant, as she was aged 14 years.
- 30. These offences were committed for the defendant's self-gratification, without concern for XY's physical, emotional or psychological welfare.
- 31. 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:
 - (a) Indecent assaults on females contrary to section 350 of the Code carry a term of imprisonment with hard labour for two years;
 - (b) Rape contrary to section 347 and 348 of the *Criminal Code* 1899 carries a term of imprisonment of hard labour for life.
- 32. As mentioned previously by this Court 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 years¹¹. 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 emphasise that such offending will be treated with severity.

¹⁰ Ibid at 988

¹¹ Nauru Family Health and Support Study, *An exploratory study on violence against women*, Nauruan Ministry for Home Affairs, 2014, at 34

33. The Court commends the complainant YZ for her resolve in this matter over the extended period of time that it has taken for the matter to come to trial. She gave evidence in a clear, quiet and determined manner, despite the embarrassment surrounding the personal nature of some of her evidence.
34. It is imperative that young women are able to come to the Court and give evidence in an environment that enables the facts of the case to be considered appropriately. The community at large requires that such offending is treated with severity by the authorities and that others are deterred from committing offences in similar circumstances against vulnerable young women.
35. The aggravating features present in this case include:
- YZ was a young girl of 14 years at the time of the offences;
 - YZ was subjected to further indecent assaults;
 - The video of YZ has been viewed by others which compounds the indignity and embarrassment to YZ;
 - YZ gave evidence in Court and was subject to cross-examination.
36. The mitigating features of this case include:
- The offence occurred three years ago and the defendant was not responsible for the extensive delay between offence and trial;
 - The defendant does not have any previous convictions;
 - The defendant is still a young man and his prospects for rehabilitation are good;
 - The defendant apologised in person to the Court saying "*I am very sorry and I deeply regret what I have done.*"
37. Considering the guidelines referred to above, I conclude that the starting point for the offence of rape in this case should be six years. The sentence for the indecent assault is 2 years. Taking into account the mitigating features and in all the circumstances, the total term of imprisonment for rape is reduced to five years.
38. The Court notes, but rejects, defence counsel submission to have the sentence for indecent assault wholly concurrent with the sentence for rape. Whilst it is correct that these offences occurred on the same night, the defendant videoed and assaulted the complainant when she was asleep. Whether the defendant is responsible or not for the video to have been seen by others, that fact is that it has been viewed by other young men and in a

close-knit community such as we have here in Nauru, the video has caused this young girl embarrassment and humiliation.

39. The Court is mindful of the totality principle, and determines a sentence that is an effective deterrent and reflects the community views on this form of offending, but allows for rehabilitation of the defendant who is still a young man.

40. ORDER:

- 1) Count One: For the offence of Rape the defendant is sentenced to five years imprisonment.
- 2) Count Two: For the offence of Indecent Assault the defendant is sentence to two years imprisonment, one year to be served consecutively to Count One and one year to be served concurrently to Count One.
- 3) The name and identity of the complainant victim is to be suppressed.
- 4) The total term of imprisonment imposed is six years (6 years); the sentence to commence on the 14 July 2017.

Judge Jane E. Crulci



Dated 19 July 2017