



IN THE SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Case No. 26 of 2017

THE REPUBLIC OF NAURU

V

JOSEPH AKU, AA & DANIEL TOM

Before: CHIEF JUSTICE Filimone Jitoko

For the Prosecution: J Rabuku, Director of Public Prosecutions

For the Defence: R Tagivakatini

Date of the Hearing: 14 March 2018

Date of Judgment: 16 March 2018

CATCHWORDS – Criminal – Rape – Juvenile - Sentence

SENTENCE

1. The three accused persons, Joseph Aku, AA and Daniel Tom are charged (with two others) with one count of rape of a child under 16 years under the Crimes Act 2016:

COUNT

Statement of Offence

RAPE OF CHILD UNDER 16 YEARS OLD: Contrary to section 116 of the Crimes Act 2016

Particulars of the Offence

JOSEPH AKU, AA, DANIEL TOM and TWO OTHERS ON 13TH OF August 2017 at Ewa District in Nauru, in the company of each other, intentionally engaged in sexual intercourse with a juvenile victim, that is, under the age of 16.

2. For the protection of both the second- named juvenile accused person and the juvenile victim, the court orders that their names be suppressed and their details not disclosed. The second-named accused person is to be referred to as **AA** whilst the juvenile victim is referred to as **CD** hereinafter.

THE FACTS

3. The facts in support of the information and to which all three of the accused admitted to are as follows:

Into the early morning of the 13th of August 2017 some eight youths were drinking alcohol at what is called Beverly Hills in Ewa District. Beverly Hills is a drinking spot in Ewa District frequented by the youths of Ewa. The spot is a bushy and secluded area where youths are able to drink away from the residential homes nearby.

Among these youths were Joseph Aku, AA and Daniel Tom.

When dawn was breaking at approximately 6am in the morning, the complainant CD who was 14 years old and 2 months arrived at the drinking spot. She was dropped off by a friend on a motor cycle. CD was invited by the youths to the drinking party and she joined them. She was the only female in the party.

At some stage during this drinking part, CD became very drunk and blacked out and fell off to sleep (knocked out).

The three accused persons, Joseph Aku, AA and Daniel Tom and others then had sexual intercourse with CD in turns.

The three accused persons, Joseph Aku, AA and Daniel Tom each intended to have sexual intercourse with CD and in so intending inserted their erect penis into CD's vagina and had sexual intercourse with she was completely knocked out from alcohol she had consumed with them.

CD was 14 years and 2 months and therefore was below the age of 16 years.

When CD woke up she found herself half naked in the bushes. The accused persons and others were still drinking nearby. She got dressed and confronted the youths what they had done to her. She was disappointed and frustrated that the youths had taken advantage of her when she was incapable of defending herself because of the alcohol she had consumed with them.

One of the youths then volunteered to drop CD off on a bike. CD was dropped off by a store right next to her father's house. She did not go home but proceeded to one Melina Notte's house where in her tears and frustration complained to Melina of what the youths had done to her. Melina soon thereafter took CD to the Commissioner of Police's residence where CD related her experience to the Commissioner and his wife. The Commissioner immediately made phone calls and instructed for the immediate investigation of the matter.

In the course of the investigation the accused persons and others were arrested. The accused persons were interviewed under caution by the police and the results of the interviews were as follows:

Joseph Aku – admitted to having sexual intercourse with CD

AA - admitted to having sexual intercourse with CD

Daniel Tom - admitted to having sexual intercourse with CD.

CD was medically examined on the same day at the RON Hospital and a medical report was prepared and furnished to the police by the Hospital.

The accused Joseph Aku, AA and Daniel Tom were then charged for the offence of rape of a child under 16 years old contrary to section 116 of the Crimes Act 2016 as represented on the Information and to which they have pleaded guilty to.

4. The following documents are submitted in support of the facts outlined above:
 - a. The Medical Examination Report of the victim CD of 13th August 2017;
 - b. A copy of the caution interviews of the accused persons Joseph Aku, AA and Daniel Tom; and
 - c. The statement of Sergeant Iyo Adam explaining the set of photographs of the scene of the crime collected by the Police.

GUILTY PLEA

5. All the three accused persons, Joseph Aku, AA and Daniel Tom have pleaded guilty to the count of rape of a child under 16 contrary to section 116 of the Crimes Act 2016.

SUBMISSIONS ON SENTENCING

For the Defence

6. The maximum sentence permissible under law for the offence of rape of a child under 16 years is life imprisonment if the child is under 13 years old or under aggravating circumstances or in any case 25 years imprisonment.
7. The Nauru courts have yet to develop and establish a sentencing guideline in keeping with the penal provisions of the new Crimes Act 2016. The defence counsel however referred the court to two recent cases that may usefully provide a guideline to the court in deciding the appropriate sentence(s). In **Republic v Olsson [2017] 47** Khan J set the starting point for rape at 16 years where a 53 old multiple sex offender and the victim was his 7 year old niece. In the **Republic v Notte [2017] 53** Crulci A/CJ set a starting point for rape at 6 years where the accused was a 21 year old first offender and the victim was his 14 year old neighbor.
8. Defence counsel submitted that given the facts and circumstances of this case, the correct starting point for sentencing should be 6 years as per the court's decision in the **Notte's** case. The facts of **Notte's** case according to the defence, are not dissimilar to the present as rapes that occurred in both were induced by alcohol and drunkenness.
9. In respect of the accused AA the juvenile, defence counsel argued that he should, in sentencing, be treated separately from the others, given the international Convention on the Rights of the Child as well as Nauru's Child and Welfare Protection Act 2016. The Convention emphasized that in the case of juvenile offenders, every effort other than incarceration, should be made to reintegrate the offending juveniles into society, through care orders, probation, counseling or training programmes. Under our Child and Welfare Protection Act, imprisonment should be the last resort when dealing with juvenile offenders.

MITIGATING FACTORS

10. The three accused persons are all relatively young. Joseph Aku is 23 years old, married with two children. AA is a juvenile at 17 and still attending school. Daniel Tom will turn 21 next month, April.

11. The mitigating factors submitted for all the three accused persons are as follows:
 - (a) They are most remorseful and seek the court's forgiveness;
 - (b) They all pleaded guilty to the charge at the first opportunity;
 - (c) They have fully cooperated with the police in its investigation;
 - (d) They are all first offenders; and
 - (e) They promise not to re-offend
12. Given all of these, the defence submits that should the court deem imprisonment appropriate, then a period of 3 to 5 years may be considered proper in the cases of Joseph Aku and Daniel Tom whilst the court's discretionary powers under section 277(d) and (e) of the Crimes Act in respect of AA the juvenile should be applied.

SUBMISSIONS ON SENTENCING

For the Prosecution

13. The Director of Public Prosecutions agrees that there is no guideline or tariff on sentencing on Nauru for the offence of rape of a child under 16 years old set out under section 116 of the Crimes Act 2016. Nevertheless the Director has carefully traced the existing case law using the court's analysis in **Republic v Notte**(supra) as a guide . While the **Notte** case and **Republic v AB**[2016]NRSC 29 were rape offences brought under the old Criminal Code 1899 provisions, the guidelines referred to there by Crulci A/CJ in the approach of the court under the new Crimes Act 2016, as well as the guidelines set out by Lord Lane CJ in **R v Billam** [1986]8 Cr App R 48 remain important signposts for our court today.
14. In the **Republic v AB**(supra), a case of a 35 year old male defendant charged with indecent assault and rape of his 7 year old step-daughter, the court after considering all the guidelines, preferred a 10 year starting point adding that depending on the circumstances, favourable or not to the offender, the sentence pendulum will swing accordingly. After admitting to the difficulty in laying down sentencing guidelines to sexual offences against children, but taking into account the **Billam** guidelines, the court nevertheless opined as follows:

“ The starting point in this jurisdiction for rape of children is 10 years. Thereafter the aggravating or mitigating features are considered to arrive at the appropriate sentence taking into account all the circumstances of the particular case.”
15. Similarly prosecution submitted that the appropriate starting point for sentencing in this case is 10 years. Taking into account its mitigating and aggravating features, the

prosecution submits that a 9 year prison sentence for all the three accused persons is appropriate.

16. With regards to the AA the juvenile offender, the prosecution, after referring to the relevant provisions of the Convention on the Rights of the Child, our own Child Welfare and Protection Act and as well as the United Kingdom's Sentencing Council's "Sentencing Children and Young People: Overarching Principles and Offence Guidelines for Sexual Offences and Definitive Guideline" opined that AA should not be treated any differently from the other offenders and that in any case, it was of the view that AA cannot be exempted from a custodial sentence, given the gravity of the offence.

AGGRAVATING FACTORS

17. The following factors submitted by the prosecution may be summarized as the aggravating features of this case:
 - (a) The offence is one of a group attack, a gang rape
 - (b) The victim was an innocent and defenceless 13 year old girl
 - (c) The accused persons took advantage of the victim's state of insobriety
 - (d) While the accused persons feel remorseful, no apologies had been tendered to the victim or her family.

VICTIM IMPACT REPORT

18. No interview of the victim for the purpose of victim assessment was done or submitted, but the prosecution tendered two Victim Family Impact Statements from the victim's mother and grandmother respectively.
19. The statements tendered speak of a hospitable and friendly young individual who loved socializing with friends, but who suddenly because of the incident, has become closed, an introvert who preferred staying indoors in the dark, covers her face from shame when she comes out and contemplates suicide. She is aggressive and argumentative with her mother and refused to attend school for sometimes.
20. For the time being, the victim is attending school away from Nauru in Fiji.

COURT'S CONSIDERATION

21. In deciding, pursuant to the powers vested in it under section 277 of the Crimes Act, what kind of sentencing it should impose, the court is required to consider the elements

of sentencing under sections 278, 279 and 280 respectively. Section 278 reminds the court of the purposes of sentencing; section 279 outlines the general sentencing considerations that should be borne in mind, including the pervading circumstances; and finally section 280 is the guide in imprisonment sentencing.

22. The accused persons are charged under section 116(1) of the Crimes Act 2016. It states:

“116. Rape of a child under 16 years old

(1) A person commits an offence if:

(a) the person intentionally engages in sexual intercourse with another person;

and

(b) the other person is a child under 16 years old.

Penalty:

(i) if the child is under 13 years old – life imprisonment; or


(ii) in any other case – 25 years imprisonment. “

23. The three accused persons have pleaded guilty to the one count of charge of rape under section 116(1). The fact that all had been drinking and were all intoxicated when they raped the young girl does not excuse their appalling behavior. Their action is made the more serious by the fact that the victim was in a state of intoxication and had blacked out or passed out when she was rape by the accused persons.
24. Court statistics show that there has been a gradual increase in the number of rape cases, as well as other sex offences, in both juvenile offenders and the victims, in the last five years. It is the court’s responsibility to ensure that the community is protected especially young females from the predatory behavior of other members of the community. The court can do this by ensuring, in condemning the acts, that the offenders properly bear the responsibilities of their actions and are adequately punished for their misbehavior.
25. There is no doubt as to the seriousness of the offence under section 116(1), and this can be gauged from the prescribed penalty therein namely, life imprisonment if the victim is below the age of 13, and 25 years imprisonment in respect of others. In this case, the victim was ~~14~~ years and 2 months old at the time the offence was committed against her.
26. In the light of the very clear evidence before this court that the three accused persons were part of a group or participated together with others in the gang rape of CD, a juvenile, in the morning of 13 August 2017 in the circumstances where the victim was taken advantage of because she was dead to the world, being senseless from liquor intoxication, and such act debased the dignity and worth of a human person, the Court has no alternative but pass a sentence of imprisonment on each of the accused persons, in accordance with section 280 of the Act.

27. Having considered carefully the submissions of counsel as well as the guidelines alluded to by both the prosecution and defence, I am satisfied that the appropriate starting point for sentencing in this case should be 10 years.
28. Mitigating features including the fact that all of them are remorseful and also the fact that they are all first offenders, the court will reduce the sentence by two years. Their early guilty plea and their assistance to the police in its investigation reduces the sentence by a further year.
29. Aggravating features including the gang rape of a blacked out juvenile the court adds another 12 months to the sentence.
30. The 2 months that each of the accused persons had spent in custody to be deducted from the sentence.
31. There remains the issue whether AA the juvenile offender should be treated separately from the others. Having listened to counsel and their written submissions together with reference to international instruments and guidelines in other jurisdictions, the court agrees that AA cannot be treated differently from the other two accused, subject to further qualification below. He was complicit in the unlawful act, a part of the group or gang. He will turn 18 in November this year, and the court is of the view that he was totally responsible for his own action.

ORDERS

1. Each of the defendants, namely Joseph Aku, AA and Daniel Tom are hereby sentenced to a term of 7 years 10 months imprisonment.
2. That until 25th November 2018, when AA turns 18, he is to be kept separate from the adult population of Nauru's Department of Correctional Services.
3. That the names of the juveniles in these proceedings remain suppressed or until otherwise ordered by the court.


Filimone Jitoko
Chief Justice

Dated 16th March, 2018.

