



2. Sentencing did not eventuate as scheduled when the defendant absconded to Fiji before the sentencing date.

### **Summary of Facts**

3. On the afternoon of the 12<sup>th</sup> June 2014, the complainant was at home at Aiwo by herself having a shower when the defendant, her brother in law of Denig District walked into the shower and told her he had wanted her for so long and it was time for them to have sex there and then. She was shocked, she refused, she covered her naked body and told him to go away. But he wanted sex. He moved closer to her, touched her, pushed her against the shower wall and told her it was time for them to have sex. He then left the shower.
4. After recovering from the shock the complainant wrapped her towel around her and went to her room. As she entered she was suddenly pushed onto her bed. She turned and saw the defendant. She struggled with him as he tried to take off her towel. He went down and with his hands under her towel he tried to pull off the towel. She started to kick him while crying and shouting for help. He kept trying to open the towel and her legs.
5. She felt the defendant trying to lick her vagina. She then kicked him off. He stood up and sat on top of her still trying to remove her towel. He kept telling her that he wanted to have sex. She told him to have sex with his wife.
6. When her towel got loose he started to lick both her breasts. She then scratched his face. She was still crying out loud for help.
7. He then got up and went to the living room. The complainant then got her phone and managed to talk to Minnu. She told him about the attempted rape by the defendant. Police was notified and complaint laid.

### **The Complainant**

8. At the time of the offending, the complainant was 26 years old. Her sister was married to the defendant.

9. Without doubt the trauma she experienced on the afternoon of the 12<sup>th</sup> June 2014 had psychological and emotional impact on her. According to the Victim Impact Statement she now has difficulty in trusting people and she is scared of being alone.

### **The Defendant**

10. At the time of his offending the defendant was 33 years old, married with one child and was unemployed.
11. Through his counsel he contended that he and the complainant have been in an intimate relationship for some time but have never had sexual intercourse. He thought the day of the offence was the right occasion for sex. However he didn't realize that the complainant was not interested. After the incident he left the complainant's house with feelings of utmost regret.
12. The contention is denied by the complainant. For very obvious reasons the court cannot accept the defendant's explanation. His conduct completely negated any indication of an intimate relationship. It was through her courage, strength and resilience that prevented the defendant from fulfilling his evil intent. He tried not once but twice despite her obvious opposition and calling for help. He may have left the house with deep regret but the psychological and emotional harm has been inflicted.

### **Submissions**

13. Both defense and prosecution accept that a custodial sentence is the appropriate sentence.  
Prosecution submitted a sentence between 16 to 20 months. Defense submitted a 12 months sentence is appropriate in the circumstances.
14. I bear in mind the majority decision of the High Court of Australia in Barbaro v. The Queen<sup>1</sup> which stated at paragraph 7:

*“The Prosecutions statement of what are the bounds of the available range of sentences is statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take*

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<sup>1</sup> (2014) HCA 2



*into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so the prosecution is not required and should not be permitted to make such a statement of bounds to a sentencing judge.”*

15. The above statement was followed by Jitoko CJ in *The Republic v. Job Cecil & Others; and Job Cecil v The Republic*<sup>2</sup>. The High Court also recognized that the range of sentences nonetheless can be used as a yardstick against which to examine a proposed sentence.

*“What is important is the unifying principles which those sentences both revealed and reflect”<sup>3</sup>*

### **Aggravating Factors**

16. The prosecution identified five aggravating features of the offending:

- (i) the defendant’s breach of the complainant’s trust on him as his brother in law;
- (ii) the defendant’s persistence in his attempt to have sexual intercourse with the complainant
- (iii) the psychological and emotional effect of the offending on the complainant;
- (iv) premeditation; and
- (v) the age difference between the defendant and complainant.

### **Mitigating Factors**

17. Mr Tagivakatini submitted a number of mitigating factors in favor of the defendant which included:

- (i) a first offender status;
- (ii) he is remorseful
- (iii) he entered a guilty plea at the earliest opportunity,

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<sup>2</sup> (2018) NRSC 15 (29/3/2018) at para 229

<sup>3</sup> Para 41

- (iv) he promised not to re-offend and is willing to perform if given the opportunity
- (v) he has reconciled with the complainant.

### **Discussion**

18. In considering the appropriate sentence I am mindful of sections 277 to 280 Crimes Act 2016; in particular section 280 (a) (v) and 280 (b) which provides that a sentence of imprisonment may be imposed only if the opinion of the court:
  - 280 (a) (v): the protection of the community requires it;or
  - 280(b) : a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.
19. A custodial sentence as both counsels agree is the appropriate sentence satisfies the requirements of section 278 Crimes Act 2016 which requires the court to ensure that the offender is adequately punished, is deterred, is made accountable and is rehabilitated. The sentence will also protect the community and recognize the harm inflicted on the victim and community.
20. The frequency with which this type of disturbing sexual offending is coming before the court is on the increase and the court should respond appropriately and swiftly to protect the community particularly the most vulnerable – our women and young girls. The term of imprisonment to be imposed should reflect society’s denunciation of the criminal conduct.
21. One of the most serious aggravating features of the offending is the invasion of privacy. The defendant was attacked in the privacy of her home where she was supposed to be and was entitled to feel she was safe. She was set upon not once but twice.
22. Hopefully the complainant has recovered and continue to lead a normal life. No information was provided to the court. But the serious, and sometimes long lasting effects on a woman who is subjected to this kind of criminal attack must be considered.

23. Fortunately for the complainant, the defendant withdrew from the attack. It was also fortunate for the defendant, for the purpose of this sentence, that he did withdraw from completing the act of rape.
24. For the purpose of this sentencing the court confines its determination to the relevant factors and considerations as well as sentences imposed by the court for similar offending in 2014 when the offence was committed.
25. In *Republic v. Quadina*<sup>4</sup> Eames CJ sentenced a 31 year old defendant to 18 months imprisonment for attempting rape of his 14 year old niece. There were 3 separate attempts by the defendant to have sexual intercourse although the 3 events were treated as amounting to one offence. Although no weapon was involved there was some degree of violence involved.
26. Eames CJ considered an earlier decision of Gilbert CJ in *R v. Kennedy*<sup>5</sup> which he considered relevant and helpful. The case involved the use of a weapon by the defendant armed with a knife, but the victim's cries were heard by others who intervened. Gilbert considered 2 ½ years as appropriate for an armed intruder who attempted to rape a woman in the privacy of her home at night. A longer sentence would have been justified if injuries were inflicted. An end sentence of 21 months was imposed after making deductions for mitigating factors.
27. The two cases I have referred to provide a yardstick against which I should examine an appropriate sentence. The sentences imposed suggests a starting point of sentencing at 3 years to 3 ½ years. There must be some consistency in sentencing for similar offending. Unjustified deviations can result in the erosion of public confidence in the court's sentencing process.
28. The offending has an element of predetermination; the defendant invaded the privacy of the complainant when she was alone and naked in the shower and afterwards in her room when she only had a towel around her. It was through sheer courage and strength that the defendant did not succeed. Although she did not suffer injuries the complainant was obviously terrified. I consider a sentence of 3 and half years to be appropriate in the circumstances.

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<sup>4</sup> (2012) NRSC 4

<sup>5</sup> (1984) NRSC 2



29. I accept his plea of guilty at the earliest opportunity as a statement of remorse on his part for which I will reduce sentence by 1/3<sup>rd</sup>. He is also entitled to be given credit for voluntarily withdrawing from completing the act of rape and for other mitigating factors I have mentioned above. A further 6 months is deducted.

**Orders**

30. On the charge of attempted rape the defendant is convicted and sentenced to 22 months imprisonment. Any time spent in custody shall be deducted.

Dated this 16<sup>th</sup> day of May 2019



**Judge R. Vaai**

