IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 23 of 2020

BETWEEN

REPUBLIC

AND

ERJ

Before:	Khan, ACJ
Date of Sentencing Submissions:	24 January 2023
Date of Sentence:	3 February 2023

Case to be referred to as: Republic v ERJ

CATCHWORDS: Sentence of child offender for the offence of rape – Section 48 of Child Protection Welfare Act 2016 provides that a sentence of life imprisonment cannot be imposed on a child and imprisonment shall be a sentence of last resort – Where the Crimes Act 2016 was amended and the sentence for the offence of rape was made mandatory life imprisonment with a minimum of 15 years to be served before parole or probation can be considered – Whether Child Protection Welfare Act 2016 prevails over the amendment in the Crimes Act 2016.

APPEARANCES:

Counsel for the Republic:	A Driu (DPP)
Counsel for the Juvenile:	R Tagivakatini (PLD)
Counsel for Secretary for Justice as Amicus:	M Tagivakatini

SENTENCE

INTRODUCTION

1. You were charged with the offence of rape contrary to s.116 of the Crimes Act 2016 (the Act). The particulars of the offence states that:

   ERJ on 16 November 2020 at Nauru intentionally engaged in sexual intercourse with a girl namely (ART) a child under 16 years old.

2. At the time of the offence you were 16 years 5 months old. You were born on 7 June 2004; and the complainant (ART) was 15 years 11 months old. The age difference between you and ART was 6 months.

CASE HISTORY

3. Your case was heard by Fatiaki CJ in March, April and May 2021 and a verdict of not guilty was delivered on 25 June 2021. In the judgement Fatiaki CJ stated as follows at [5], [6], [61], [62] and [72] as follows:

> "[5] For completeness, s.127 which inter alia applies to an offence against s.116, recognises two (2) specific defences to a charge under the section, in the following terms:
>
> "127 Defences for certain offences under Division 7.3
>
> 1) The section applies to an offence against s.116, ... if:
>
> a) A person in relation to whom the offence was committed was at least 13 years old; and
>
> b) None of the aggravating circumstances mentioned in s.102(1) apply to the offence.
>
> 2) It is a defence to a prosecution for the offence if the defendant proved that:
>
> a) The defendant:
>
> i) Took reasonable steps to determine the age of the other person; and
> ii) Honestly believed on reasonable grounds that the other person was 16 years old or older; and
>
> b) The other person wished to consent to the relevant conduct.
>
> 3) It is also a defence to a prosecution for the offence if the defendant proves that at the time of the offence:

a) The defendant was within 2 years of age of the other person; and

b) The other person wished to consent to the relevant conduct.

4) In this section: relevant conduct is, in relation to an offence, means conduct making up the physical element of the offence.

[6] It is clear from the wording of subsections (2) and (3) that the defendant has an evidential burden to establish the requirements in both sections. In the present case the defendant (ERJ) relies on subsection (3) which requires him to prove 2 elements:

a) That he is within 2 years of the age of the complainant (ART); and

b) The other person (ART) wished to consent to the relevant conduct...

[61] In light of the foregoing, defence counsel submits that there is sufficient evidence establishing the elements of the s.127(3) which the prosecution has failed to disprove beyond reasonable doubt. [See: s.25(2)]

[62] Even if the defence evidence does not establish the s.127(3) defence on balance of probability, nevertheless, counsel submits that it raises a reasonable doubt that the complainant agreed to have sex with ERJ.

[72] In all the circumstances, mindful that the prosecution has the burden of disproving the defendant's (ERJ's) defence beyond a reasonable doubt and conscious that in order to do so the prosecution is relying almost exclusively on the evidence and credibility of the complainant (ART), I have no hesitation in saying that I prefer and accept the evidence of the defendant ERJ where it conflicts with the complainant's evidence which leaves me with a reasonable doubt about his guilt and accordingly, I find ERJ not guilty and acquit him of the charge and order his immediate release from custody."

4. The DPP appealed against your acquittal to the Nauru Court of Appeal and it allowed the appeal and set aside the acquittal and entered a conviction against you. The Court stated at [52], [53], [54], [55] [56] and [57] as follows:

"[52] It also appears that in jurisdictions where trial by jury operates the Appellate Court shows absolute reluctance to substitute acquittal with convictions and have preferred re-trials over convictions. The rationale behind this position seems to be that the Appellate Courts of those jurisdictions are of the view that the determination whether an accused person is guilty or not is for the jury, not for the trial judge or appellate judges: See *R v Bain* [2003] NZCA 294; [2004] 1 NZLR 638 .

[55] It is my considered view that in this jurisdiction the position is clearly distinguishable. In Nauru trial is by judge and not jury. Further s.53(6) of the Supreme Court Act 2018 throws some light on the issue as it provides for the Supreme Court to enter convictions in appeals against acquittals. It can be

more buttressed by the fact that Nauru Court of Appeal Act 2018 provides that the Court of Appeal can substitute a conviction of guilt in cases where the Court of Appeal is satisfied that the findings of the Supreme Court prove a person is guilty of some other offence as per Section 33(2). If the Court of Appeal is vested with power to enter a conviction based on evidence in special cases for offences other than what the defendant was charged for pursuant to section 33 of the Nauru Court of Appeal Act, I do not find any reason as to why a conviction cannot be entered for the same offence that the defendant is charged for, in an appeal against an acquittal. As such I am of the view that nothing precludes the Court of Appeal from substituting a conviction in an appeal against an acquittal where the circumstances so demand.

[56] However, the discretion to order a re-trial or to enter a conviction must be exercised only if the interest of justice so requires in the circumstances. Whether it should be a re-trial, or a conviction of guilt must be decided on a case by case basis. As the Respondent's counsel quite rightly noted the discretion must be used sparingly and only upon careful consideration of circumstances of each case. In *Police v Faasolo* [2001] WSCA 6 (23 November 2001) the Court of Appeal of Samoa stated that any process which seeks to challenge the acquittal of a person who has been tried for any offending must be strictly adhered to in all its facets.

[57] In light of the above discussed authorities, I will now consider whether a re-trial or a verdict of conviction is appropriate in the appeal under consideration. It is crystal clear that elements of rape as per Section 116(a) and (b) are well established in this case and the offence is proven beyond reasonable doubt. Further I have decided that the learned trial judge erred in interpreting the term "wished to consent" and no statutory defence is available to the defendant. In that backdrop ordering a re-trial would certainly be an otiose exercise. Besides, I do not see any reason as to why the Complainant should go through the ordeal of testifying again in Court on understandably a traumatic incident. As it was earlier noted the learned trial judge fell into error in applying the defence set out in Section 127(3) of the Crimes Act 2016. It is purely a question of law and it would not serve any purpose if the case is remitted back to the Supreme Court for re-trial. Although the Appellate sought an order for re-trial, I am of the view that the most appropriate recourse would be to enter a verdict of conviction in the interest of justice."

5. The matter is now before me to sentence you as Chief Justice Fatiaki resigned from the judiciary in June 2022. If you were to be found guilty of the offence of rape after a trial by the Supreme Court then after taking of all the evidence, the court would then be required to make findings against you under the provisions of s.207 of the Criminal Procedure Act 1972. The Court would be required to follow a two stage process:

a) Firstly, to find you guilty of the offence of rape; and

b) Secondly, to hear submissions as to your character and as to your mitigation and then convict you of the charge and pass an appropriate sentence or to make an order against

you in accordance with the law or if authorised to do to discharge you without proceeding to conviction [second stage].

6. The Court of Appeal in setting aside your acquittal and entering ***"a verdict of conviction"***, instead of making a finding of guilt has unfortunately deprived you of your right to make submissions as to the second stage of the process referred to in s.207 and also s.277 of the Act which is discussed at paragraph 19 below.

PENALTY FOR RAPE

7. Prior to the amendment of s.116 the penalty for this offence was life imprisonment. S.116 was amended to the effect that the penalty for the offence is life imprisonment of which at least 15 years has to be served before parole or probation can be considered[1]. Once an offender is found guilty for an offence of rape the Court must impose a sentence of life imprisonment out of which a term of 15 years has to be served before he or she is eligible for parole or probation. In simple terms this is called "mandatory sentencing" and the Court has no discretion as to the sentencing.

MITIGATION BY YOUR COUNSEL

8. Your counsel, Mr Tagivakatini, submits that you are now 18 years old and unemployed. Prior to being remanded in custody for sentencing by the Court of Appeal, you lived with your parents in Aiwo District.

9. On sentence your counsel initially stated that you should be sentenced to a term of life imprisonment with the minimum period of 6 to 10 years imprisonment before you become eligible for parole or probation.

SENTENCING SUBMISSIONS BY PROSECUTION

10. Mr R Talasasa in his sentencing submissions filed on 14 October 2022 submitted that a sentence of life imprisonment should be imposed. He further submitted that having taken into consideration the provisions of s.6 of the Child Protection Welfare Act 2016, a sentence of 15 years should be imposed.

CRIMES ACT AND CHILD PROTECTION WELFARE ACT 2016

11. The Crimes Act was enacted on 12 May 2016 and the Child Protection Welfare Act 2016 (CPWA) was enacted on 10 June 2016.

12. The preamble to CPWA provides:

> "An Act to provide for the welfare, care and protection of all children in the Republic and for the enforcement of the rights of children as provided for by international conventions, norms and standards, while taking account of Nauruan culture, traditions and values and for related purposes."

[1] Act 29 of 2020 – 23 October 2020

"Child" or "children" is defined in s.3 of CPWA as persons below the age of 18 years and the "convention" means United Nations Conventions on the Rights of the Children.

13. S.6 and s.48 are relevant to this matter and s.6 and s.48 provides as follows:

> "[s.6] Application to this Act
>
> 1) Any written law which relates to the rights of children, or which provides for processes relevant to dealing with children in any manner and in any context, shall be read and applied subject to the provisions of this Act, and in the event of any inconsistency between the provisions of this Act and any other written law, the provision of this Act shall prevail.
>
> 2) The following provisions apply to all laws which make provisions in relation to children, and such laws are deemed to be amended in accordance with this Section:
>
> a) The use of terms such as "infant", "young person" and any other expression referrable to a child is to be read as reference to "child" or "children", as the case may be; and
>
> b) The definition of child or children whether stated as "infant", "young person" and any other expression referrable to a child is as provided for in section 3."

SECTION 48 – CRIMINAL PUNISHMENT APPLYING TO CHILDREN

14. Section 48 of the CPWA provides as follows:

> "Notwithstanding the provision of any other written law to the contrary, the following apply to any criminal proceedings taken against a child:
>
> a) No child may be sentenced to death or to life imprisonment under any written law and for any offence; and
>
> b) A sentence of imprisonment may only be imposed against a child as a sentencing option of last resort."

SUPPLEMENTARY SUBMISSIONS BY DPP

15. Having filed submissions previously that the Court has no discretion in the sentencing, Mr Talasasa filed supplementary submissions in which he conceded that there is a conflict between the provisions of s.116 of the Act and s.48 of CPWA and that the Court has discretion on the sentence to be imposed upon you.

SECRETARY OF JUSTICE – AMICUS CURIAE

16. On 30 November 2022 I invited the Secretary of Justice to assist the Court in the interpretation of the conflict between the provisions of s.116 of the Act and ss.6 and 48 of the CPWA. I posed the following questions:

1) Whether s.6 and s.48 of CPWA prevails over Act 29 of 2020 and in particular s.116 of the Act; and

2) If it does prevail then does it mean that the mandatory sentence of life imprisonment is impliedly repealed and replaced by a sentence of life imprisonment that existed before the amendment by Act 29 of 2020; and

3) If the answer to (b) above is in the affirmative then no further submission is required but if it is in the negative then submission is required as to what sentence the Court can impose.

17. In written submissions filed on 23 January 2023 the Acting Secretary for Justice, Miss Narayan, conceded that the Child Protection Welfare Act must prevail over the Crimes Act. It is stated at [17] and [18] of the submissions as follows:

> "[17] In conclusion therefore, in the event of any inconsistency between the provisions of the *Child Protection Welfare Act 2016* and the *Crimes Act 2016*, the provisions of the *Child Protection Welfare Act* must prevail. This is provided for under s.6 of the *Child Protection Welfare Act 2016*.
>
> [18] The mandatory life imprisonment penalty set by Parliament under s.116 of the *Crimes Act 2016* emphasis the public deterrent aspect of the punishment, however, when it comes to a child the *Child Protection Welfare Act 2016* will apply."

18. Section 48 of the CPWA clearly states that no child shall be sentenced to life imprisonment and when the CPWA Bill was introduced in Parliament its explanatory note stated the following:

> "Clause 48 prohibits a Court from imposing ... life imprisonment ... that imprisonment be a sentence of last resort ..."

KINDS OF SENTENCES

19. Under the sentencing part of the Act it is stated at s.277 as follows:

> "Where a Court finds a person guilty of an offence, it may, subject to any particular provision relating to the offence and subject to this Act, do any of the following:
>
> a) Record a conviction and order the offender serve a term of imprisonment;
>
> b) With or without recording a conviction, order the offender to pay a fine;
>
> c) Record a conviction and order the discharge of the offender;
>
> d) Without recording a conviction, order the dismissal of the charge for the offence; or

e) Impose any other sentence or make any other order that is authorised by this or any other written law of Nauru."

20. In your case, as I stated earlier, in allowing the appeal, the Nauru Court of Appeal in setting aside the acquittal, proceeded to convict you without first making a finding of guilt.

21. You were remanded in custody between 17 November 2020 to 25 June 2021 awaiting trial as bail could not be granted under the Bail Amendment Act 2020. This remand period is 8 months 7 days; and you were remanded in custody by the Nauru Court of Appeal since 29 September 2022 after the appeal was allowed. This period of remand is 4 months 7 days. You have spent a period of 12½ months in custody in total.

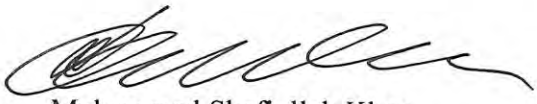
22. Miss Driu the Director of Public Prosecution, rightly submitted that imprisonment should be a sentence of last resort.

23. The only case in this jurisdiction relating to a child is *Republic v UN*[2] in which I sentenced a juvenile to a term of 15 months imprisonment and stated at [23] and [24] as follows:

> "[23] Although the provisions of s.48 of the Act states that a sentence of imprisonment shall be an option of last resort, however, I think that imprisonment will be beneficial to you and also will be in your best interest as provided for in s.5 of that Act. I say this because a medical reports states that when you abstain from using butane gas you had no behavioural problems and are mentally stable. I will impose a custodial sentence and I urge you to use that period of time to reflect on as to where you are heading to. You are still a young person you turned into an adult when you turn 18 and I am certain that you want to live a good adult life. I note that you have a very caring and supportive father and he should be your best friend and mentor and I am certain he will guide you through the next phase of your life.
>
> [24] You are sentenced to a term of 15 months imprisonment and I order that the time you have spent in custody (18 September 2019 to 5 December 2019 equals 2 months 17 days) shall be deducted from the sentence…"

24. You have already spent a total of 121/2 months in custody on remand and I therefore do not intend to impose a term of imprisonment. Under s.277(c) of the Act a conviction has already been recorded against you by the Nauru Court of Appeal and I order that you are to be discharged forthwith.

DATED this 3 day of February 2023



Mohammed Shafiullah Khan
Acting Chief Justice

[2] [2019] NRSC 45; Criminal Case No. 9 of 2018 (5 December 2019)