



IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 9 OF 2021

BETWEEN

THE REPUBLIC

Prosecution

AND

BARRY QUADINA

Accused

Before: Khan, ACJ
Date of Sentencing Submissions: 25 July 2023
Date of Sentence: 31 July 2023

Case to be referred to as: *Republic v Quadina*

CATCHWORDS: Criminal law - Rape Section 105 of the Crimes Act 2016 – Where the maximum mandatory sentence is life imprisonment with a minimum mandatory period of 15 years to be served without parole or probation – Whether the minimum period of 15 years should be increased.

APPEARANCES:

Counsel for the Republic: A Driu (DPP)
Counsel for the Accused: R Tagivakatini

SENTENCE

INTRODUCTION

1. You were charged with the following offences:

COUNT ONE

STATEMENT OF OFFENCE

Rape contrary to s.105(1)(a)(b)(i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Barry Quadina on 21 March 2021 at Topside (inland) in Nauru, intentionally engaged in sexual intercourse with Tawake Marera without her consent and Barry Quadina knows that fact.

ALTERNATIVE COUNT

COUNT TWO

STATEMENT OF OFFENCE

Indecent act: contrary to s.106(1)(a) (b)(c)(i) and (i) of the Crimes Act 2016.

PARTICULARS OF OFFENCE

Barry Quadina on 21 March 2021 at Topside (inland) in Nauru, intentionally touched Tawake Marera on her vagina and the touching was indecent and Barry Quadina was reckless about that fact and Tawake Marera does not consent to the touching and Barry Quadina knew that fact.

2. After a 3 day trial between 31 May to 2 June 2023 you were found guilty of the offence of rape. The penalty for this offence is life imprisonment and a minimum of 15 years imprisonment has to be served before parole or probation can be considered.

FACTS

3. On 20 March 2023, whilst at work, you were chatting with your friends on Facebook with a view to organizing a drinking party at your house in Anabar. According to the evidence that you gave in your trial you wanted some girls to also be present at the party.
4. When you returned home you contacted the complainant's aunt Banaewa and asked her to join in for the drinking party but she declined and the complainant and her friend Joycee agreed to join in instead. Subsequently, you and your friend Fab went to pick them up from Location in Denig District on separate motor bikes.
5. The complainant and her friend spent a period of time at your house drinking and wanted to go back home as a commotion had broken out during the drinking. The complainant and her friend requested for you to drop them with two of them being passengers on your motorbike. You refused to do so and stated that the police were patrolling the roads. You agreed to drop them individually and took the complainant first on your motorbike. This was still before day break and it was still very dark. Instead of driving on the main road to Denig you veered off to the Topside and stopped your motorbike behind the Correctional Centre and asked her for sexual intercourse.

She refused to have sex with you and to put off having sex with you she said that “not here but in your room”.

6. You insisted on having sex and a struggle ensued and she fell to the ground and you came on top of her and despite the complainant saying no you insisted on having sex with her. The complainant was helpless and agreed to take off her pants and you inserted your penis into her vagina.
7. She asked you to take off your shirt and you were wearing a button shirt with buttons and instead of unbuttoning your shirt you stood up to take off your shirt over your head and as you were doing so she had the opportunity to escape. She stood up and ran towards the light coming from the Correctional Centre in a half-naked state and got to the security guard at the Correctional Centre. According to her version you ran after her and in her desperation to seek assistance of the security guard she jumped on his back as he was asleep. The security guard called the police.
8. The complainant was in a very vulnerable situation and despite the fact that she was a guest at your house earlier you took advantage of her and had sexual intercourse against her will.

VICTIM IMPACT STATEMENT

9. According to the victim impact statement the complainant feels haunted by darkness and feels very scared and unfortunately relives through the incident frequently.
10. She is very traumatized and has lost confidence in herself and is afraid of going anywhere alone.

PREVIOUS CONVICTION

11. You had a previous conviction in 2012 when you were sentenced to 18 months imprisonment for an offence of attempted rape. In that case you were referred to as Clive Kip Quadina - *Republic v Clive Kip Quadina*¹.
12. In this case you are referred to as Barry Quadina and the police said you birth certificate, but despite that they still chose to charge you as Barry Quadina. Under s.98 of the Criminal Procedure Act 1972 (enacted on 4 June 2020) the Registrar of the Court is required to maintain a register of records of criminal convictions. S.98(2) provides:

(2) The Register shall contain the following information of a person whose convictions are required to be kept and maintained:

- a) Full name and address;
- b) Date of Birth;
- c) A photograph or photo identity, where available;
- d) The Court in which the person was convicted;
- e) Case reference number given by the Court;

¹ [2012] NRSC 4

- f) Nature of the offence for which he or she was convicted;
 - g) Date when charge was filed;
 - h) Date of conviction, whether after pleading guilty or trial;
 - i) Date of sentence; and
 - j) Sentence
13. S.98(2)(a) is very clear in that the Registrar is required to enter the **full name of the accused** and if the police charge the accused persons by different names other than their correct and full name, as was done in this case, then how is the Registrar to keep and maintain a proper record.
14. S.98(5) provides that any record in excess of 15 years is deemed to be spent conviction and s.98(9) defines “**spent conviction**” where it is stated:
- (9) For the purposes of this Section and Section 98A:
 - a) ‘**Spent conviction**’ means a previous conviction for which an accused person has been sentenced in the past and which shall not be referred to in Court for any purpose or where it so referred, it shall be disregarded by the Court in its deliberations.
15. Your previous conviction is 11 years old and will therefore be taken into consideration in your sentencing.
16. In your previous case you acted in a very similar manner to this case. In that case the complainant’s mother, who was your cousin contacted you to assist her 14 year old daughter who had a flat tire on her trail bike. The complainant was your niece. Under the pretext of taking the complainant back to her house you veered off the track and went into the bush and at about 11.30pm you stopped the bike and asked the complainant to have sexual intercourse with you. She refused and ran screaming and you chased her and caught her and you threw her to ground and covered her mouth. She struggled to be released. You held her down and told her to shut up.
17. You told her that if she remained silent you would allow her to get up. As soon as you let her go, she stood up and ran bare foot and you chased her again and caught her and she kicked you and caused you to fall. She ran again and you followed her on the trail bike. She ran until she came to a security guard and was yelling for help.

YOUR PERSONAL CIRCUMSTANCES

18. You were born on 16 December 1980 in Melbourne, Victoria and your birth was registered both in Australia and as well as in Nauru.
19. You hold an Australian and a Nauruan Passport.
20. At the time of the offending you were working at Nauru Utilities Corporation as a power operator.

MANDATORY AND MINIMUM AND MAXIMUM TERM

21. The legislature has prescribed the maximum sentence of life imprisonment with a minimum penalty of 15 years imprisonment before you will become eligible for parole or probation. I discussed the implications of the minimum mandatory term and the maximum term in *R v Daniel*² where I stated at [23] and [24] as follows:

[23] Under the new sentencing regime Parliament has prescribed mandatory minimum and mandatory maximum terms and I discussed that in *R v Harris*⁷ and I stated at [10] as follows:

[10] At [4.3] of the NJC article the relevance of mandatory minimum sentencing is discussed where it is stated:

In *Bahar v The Queen* [2011] WASCA 249 the Court considered the interaction of statutory minimum penalties for offences against the *Migration Act 1985 (Cth)* with s 16A of the Crimes Act 1914. The Court held that mandatory maximum and minimum penalties reflect the seriousness of an offence for the purpose of s 16A and inform the proportionality assessment.⁸

McLure P (Martin CJ and Mazza J agreeing) stated at [54]:

[54] The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1). It would be positively inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the “just and appropriate” sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a “just and appropriate” sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be. **The statutory minimum and statutory maximum penalties are the floor and ceiling** respectively within which the **sentencing judge has a sentencing discretion** to which the general sentencing principles are to be applied (emphasis added).

...in very many cases, sentencing an offender will require the exercise of a discretion about what form of punishment is to be imposed and how heavy a penalty should be imposed. **But that discretion is not unbounded. Its exercise is always hedged about by both statutory requirements and applicable judge made principles. Sentencing an offender must always be undertaken according to law.**

In *Markarian v The Queen*, the plurality observed that **“[l]egislatures do not enact maximum available sentences as**

² [2022] NRSC 15 Criminal Case No. 18 of 2021 (7 June 2021)

mere formalities. Judges need sentencing yardsticks.” **The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.**

[24] Under the new sentencing regime the only sentence that I can impose upon you is one of life imprisonment of which at least 15 years has to be served without parole or probation and as I stated at [25] of *R v Harris* that” “[25] **...is one end of the yardstick and it can go up depending on the circumstances and seriousness of the offending.**” (Emphasis added)

22. The Court’s discretion in sentencing offenders for the offence of rape has been taken away by legislature and the only discretion left with the court is to determine whether the minimum term of 15 years should be increased and that: “discretion is not unbounded ... its exercise is always hatched ... statutory requirements and the judge made principles”.

DELAY IN TRIAL

23. You faced two sets of trials, one before me and the other before the former Chief Justice Fatiaki who heard your case between 5 to 7 October 2021 and after the trial he adjourned the matter for judgement and proceeded on leave in November 2021 and resigned in June 2022. You spent a period of 17 months in custody awaiting judgement until an order for trial de novo was made by me in March 2023.

24. You have suffered considerable delay in finalising your trial and you spent a total of 27 months in custody before you were found guilty on 20 Jun 2023.

25. Under s.282A of the Crimes Act 2016 (the Act) I am precluded from taking the remand period into consideration in the final determination of the term of imprisonment. I stated earlier that the legislature has already determined your maximum and minimum terms.

WHETHER TO INCREASE THE MINIMUM TERM OF 15 YEARS

26. I heard submissions from your counsel that I shall not increase the minimum term of 15 years whilst the DPP submits that the complainant had to relive through the traumatic incident of having to give evidence twice in court. It is correct that the complainant had to testify twice for the trials but you cannot be blamed for the first trial being aborted because of the resignation of Fatiaki CJ.

FINAL SENTENCE

27. You have already spent a period of 27 months in custody and you have had to wait a period of 17 months when an order for re-trial was made upon the resignation of Fatiaki CJ, and therefore, it would be unfair for me to increase the 15 years term and I decline to do so.

28. You are convicted as charged and as provided for in s.105 of the Act you are sentenced to life imprisonment of which term you are to serve at least 15 years without any parole or probation.

PRESIDENTIAL PARDON

29. It is my duty to inform you that your only recourse to seeking an earlier release from prison before the expiry of 15 year term is to seek the Presidential pardon under the provisions of Article 80 of the Constitution, and of course that is after you have exhausted your right of appeal against the judgment and sentence.

DATED this 31st day of July 2023



Mohammed Shabillan Khan
Acting Chief Justice

The seal of the Supreme Court of Nauru is circular, featuring a central emblem with a sun, a star, and a shield, surrounded by the text "SUPREME COURT OF NAURU" and "NAOERO".