



**IN THE SUPREME COURT OF NAURU
AT YAREN
[CRIMINAL JURISDICTION]**

Criminal Case No. 11 of 2023

BETWEEN: THE REPUBLIC **PROSECUTION**

AND: VISION BIDINIMI ENGAR **ACCUSED**

BEFORE: Keteca J

Date of Hearing: 30th, 31st, July, 02nd, 3rd August 2024

Date of Submissions: 16th August 2024

Date of Judgment: 23rd August 2024

Date of Sentence: 06th September 2024

Case may be cited as: Republic v Vision Bidinimi Engar

Catchwords: Rape of Child under 16 years old: contrary to Section 116(1)(a)(b) of the Crimes Act 2016

Appearances:

Counsel for the Prosecution: **M.Suifa'asia**

Counsel for the Accused: **S. Hazelman**

SENTENCE

A. BACKGROUND

1. On 23rd August 24, the accused was found guilty on two counts of Rape of a Child under 16 years old: contrary to Section 116(1)(a)(b) of the Crimes Act 2016.
2. The facts are that on the morning of 07th of May 2023 at Aiwo District, Nauru, he raped SD twice in her bedroom.
3. The accused and the victim are first cousins; their mothers being sisters.

B. FACTS

4. The facts of this case are as follows:
 - i. The victim was asleep. She felt the cold on her vagina. She woke up to see the accused between her legs, licking her vagina. He then stood up, went to the door, turned and said- "not to tell anyone as what will happen next will be worse.'
 - ii. On the second incident, she again felt the cold. The accused was on top of her. He covered her mouth with his hand. He inserted his penis into her vagina. He then told her not to tell anyone about it.

C. MAXIMUM PENALTY

5. The maximum penalty for this offence is life imprisonment, of which at least 15 years are to be served without any parole or probation.

D. ANTECEDENT HISTORY

6. The accused is 23 years old and a first offender.

E. PRE- SENTENCE REPORT

7. The accused's parents separated when he was three years old. He lives with his mother in Aiwo. From a de-facto relationship, the accused has two daughters aged 4 and 2 years respectively.
8. He's a school dropout. He used to work at the Post Office.
9. He accepted Jesus Christ as his Savior whilst on remand.
10. He is remorseful and regrets his actions.
11. On the effect of sentence on any family member- the report submits that his young family are dependent on him for their livelihood.
12. The report appreciates that the accused has committed a serious crime 'and should not be tolerated in this small community.'

F. SUBMISSIONS BY THE PROSECUTION

AGGRAVATING FACTORS

13. There is disparity in the ages of the victim and the accused, 15 and 23 respectively. In law, the victim is in a non- consensual age for sexual activities.
14. The accused is the victim's first cousin; their mothers are sisters. There is a breach of trust here.
15. Another family member was sleeping in the same room. The accused was daring as he held PW1's mouth shut as he raped her.
16. The accused threatened the victim after the first rape. He returned and raped her again.

G. MITIGATING FACTORS

17. The accused has no previous convictions.
18. He has two children.
19. He is remorseful and has accepted Jesus' Christ whilst in remand.

H. VICTIM IMPACT STATEMENT (VIS)

20. Counsel refers to *R v Perks*[2001]1 Cr App R (S) 19 where the Court, referring to VIS. said-
'They provide a practical way of ensuring that the court will consider the evidence of the victim about the personal impact of the offence. The process is not

an opportunity for the victim to suggest, or discuss, the type or level of sentence to be imposed.'

21. I also looked at the same case and note what the Court of Appeal said:

'The Court of Appeal states:

*'The opinions of the victim and the victim's close relatives on the appropriate level of sentence **should not be taken into account**. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. ii) Where the victim's forgiveness or unwillingness to press charges provide evidence that his or her psychological or mental suffering must be very much less than would normally be the case.³¹'*

22. The victim stated- *'I was very scared and shocked and very angry that my 1st cousin, blood relative would do this to me when he knows I am younger than him and it was in our family home.'*

23. On the psychological effects, the victim says-*'I don't think about the incident at all, I have completely blocked it out of my mind. Sometimes I will see something or go somewhere that will trigger the memory of what happened to me and I feel disgusted with what I went through so I quickly push it away from my mind and I move on.'*

24. Counsel refers to the following:

- i. Section 277- Kinds of Sentences;
- ii. Section 278- Purposes of Sentencing;
- iii. Section 279- Sentencing Considerations; and
- iv. Section 280- Imprisonment considerations.

25. Counsel then refers to the sentences passed in the following cases:

- i. *R v Kanimea [2024]*- was also a case of rape of a child under 16 years. The victim was 11 years old and the accused 25. The victim was asleep. The accused removed the victim's pants, touched her buttock and used his finger to penetrate the victim's anus. The accused was sentenced to life imprisonment. He has to serve a minimum of 15 years before probation.
- ii. *R v Harris[2021] NRSC 44* – the accused was charged with Causing a child to engage in sexual activity contrary to Section 118(1)(a)(b)(c) of the Crimes Act 2016. The accused and the victim are first cousins. The accused was 27 years old and the victim 11. The accused called the victim into a room, pulled down his pants and put his penis in the victim's mouth. Their uncle came into the house and the accused ran out naked. Upon inquiry by the uncle, the victim related the whole story. The accused pleaded guilty to the charge and was sentenced to life imprisonment with a minimum term of 15 years.
- iii. *R v Amwano [2020] NRSC 28* - The accused was charged for rape of Child under 16 years contrary Section 116(1)(a)(b) of the Crimes Act 2016. The accused and victim were first cousins. The victim was 14 years old. The victim was sleeping. The accused touched and caressed her thigh. The victim woke up. The accused ran out. He returned, pulled down her panties and inserted a finger into the victim's vagina. *The accused pleaded guilty*. He was sentenced to 7 years imprisonment for the rape and 3 years imprisonment for the indecent assault. For the mitigation and

early guilty plea, the court deducted 1 year and 6 months. The accused served a total sentence of 5 years and 6 months.

26. Counsel submits that the offending took place in 'a domestic setting.' As such, the *Domestic Violence and Family Protection Act 2017* (DVFPA) is relevant. Thus, according to counsel, the accused is in a domestic relationship with the victim as a family member. Section 37 of the DVFPA provides:
- 'Where an offence occurred in the context of a domestic relationship and the court convicts the offender under the Crimes Act 2016 or any other written law relating to domestic violence, the court shall consider the following aggravating circumstances:*
- a) *The offence was committed against a child or in the presence of a child;*
 - b) *The offence was committed against a person with a disability;*
 - c) ...
 - d) ...
 - e) ...
 - f) ...
 - g) The conduct constituting the offence was repeated.
27. The mother of the victim states that the victim here is Dyslexic; having been diagnosed with the condition when she was 7 years old. That is a disability. The offence was committed against a child. It was repeated. These are aggravating circumstances under Section 37 above. I note that it is mandatory, under Section 37 that the court considers such aggravating circumstances.
28. Counsel concludes that a sentence of life imprisonment is appropriate here with a higher minimum term as the offence was repeated.

SUBMISSIONS BY THE DEFENCE

29. On the accused's personal circumstances and mitigation, Counsel submits:
- i. The accused is a victim of parental separation. His parents separated when he was only 3 years old. He only went up to Grade 8 at school.
 - ii. He has two young daughters and is a dedicated partner.
 - iii. He has become a member of the AOG Church. There is a low risk of reoffending.
 - iv. He has *"expressed profound remorse for his actions, extending heartfelt apologies to the victim, the court, and his own family"* (The court notes that the accused chose to remain silent and there was no remorse shown or apologies tendered by him in court)
 - v. Counsel submits that the accused should not receive a sentence of life imprisonment based on the following headings-
 - a) Demonstrated rehabilitation efforts;
 - b) Genuine remorse and apology;
 - c) Positive influence on fellow inmates;
 - d) Youth and potential for change;
 - e) Impact on dependents.
30. Counsel refers to *R v Pham [2015] HCA 39* and *R v Glaude [1999] 1 S.C.R.688* and submits that a stated term of imprisonment rather than life imprisonment would be suitable here.

DISCUSSION

31. I have considered the following provisions of the Crimes Act 2016:
- i. Section 277- Kinds of Sentences;
 - ii. Section 278- Purposes of Sentencing;
 - iii. Section 279- Sentencing Considerations; and
 - iv. Section 280- Imprisonment considerations.
- I have also looked at Section 282 on my power to reduce penalties.
32. Considering the above provisions, I enter convictions against the accused on both counts.
33. Since the accused pleaded not guilty and chose to remain silent I refer to *Signato v The Queen* (1988) 194 CLR 656, Gleeson CJ, Gummow, Hayne and Callinan JJ said (at page 663-663; 99; 189[22]):
- ‘A person charged with a criminal offence is entitled to plead not guilty, and defend himself or herself, without thereby attracting the risk of the imposition of a penalty more serious than would otherwise would have been imposed. On the other hand, a plea of guilty is ordinarily a matter to be taken into account in mitigation; first because it is usually evidence of some remorse on the part of the offender, and secondly, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case. It is also sometimes relevant to the aspect of remorse that a victim has been spared the necessity of undergoing the painful procedure of giving evidence.’*
34. I have also considered the submissions by Counsel for the accused. I note again what Counsel says in paragraph [28] (iv) above that the accused has- *“expressed profound remorse for his actions, extending heartfelt apologies to the victim, the court, and his own family.”* The accused is the first cousin of the victim. The victim, a very close relative of the accused was not spared *‘the painful procedure of giving evidence’* in this case. No apologies were forthcoming from the accused in court. I find the submissions by defence counsel at this sentencing stage less compelling in this regard.
35. Further, there are aggravating circumstances under Section 37 of the DVFPFA that are present in this case. These are-the victim being a child, the victim being a person with a disability, the accused warning the victim after the first rape that something worse will happen to her if she told anyone, the accused returning to the room and raping her for the second time- thus *the conduct constituting the offence was repeated.*
36. Other aggravating circumstances include- the breach of trust, the victim having to relive the traumatic experiences in court and the very obvious and visible distress she was experiencing as she was continuously sobbing whilst giving evidence. The victim was not spared *‘the necessity of undergoing the painful procedure of giving evidence.’*
37. In *R v Kanimeea [2024] NRSC 7* at paragraphs [24] & [25] I said:
- ‘24.The increase in the penalty for this offence, and other offences under the Crimes Act 2016, came about on 23rd October 2020. It reflects how Nauru society, through their representatives in the legislature condemn this type of offending.*

25. As stated by Kirby J in *Ryan v The Queen* :

“A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to denounce publicly the unlawful conduct of the offender. This objective requires that a sentence should also communicate society’s condemnation of the particular offender’s conduct. The sentence represents “a symbolic, collective statement

that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within the substantive criminal law.' (my emphasis)

38. Considering the totality of the above, and the prevalence of this offence in this jurisdiction which led to the increase in the penalty by the legislature, I believe that I must impose the maximum penalty here.
39. This sentence communicates Nauru society's condemnation of your conduct and represents 'a symbolic, collective statement' that when you commit any sexual offence against a child, don't expect any mercy from this court. You will go to prison for a very long time.

CONCLUSION

40. Count 1- Life imprisonment;
41. Count 2- Life imprisonment.
42. The accused will serve a minimum of 18 years imprisonment before any parole or probation maybe considered.

DATED this 06th Day of September 2024.


Kinviliame T. Keteca

Judge

