



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

Criminal Case No. 05 of 2024

BETWEEN: THE REPUBLIC

PROSECUTION

AND: BRANLEN KAM

ACCUSED

BEFORE: Keteca J

Date of Hearing: 10th December 2024

Date of Sentence: 17th December 24

Case may be cited as: Republic v Branlen Kam

Catchwords: Rape & Indecent Act in Relation to a Child under 16 years old: contrary to Sections 116(1)(b) and 117 (a) (b) (c) of the Crimes Act 2016. Accused opting not to give evidence.

Appearances:

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

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

SENTENCE

BACKGROUND

1. On 11th November 2024, the accused was found guilty of one count of Rape of Child under 16 years, contrary to Section 116(1)(a)(b) of the Crimes Act 2016 and three counts of 'Indecent Act in relation to a child under 16 years, contrary to Section 117(1)(a)(b)(c) of the same Act.

MAXIMUM PENALTY

2. The maximum penalty for Rape of Child under 16 years old is life imprisonment of which term at least 15 years to be served without any parole or probation.
3. For Indecent acts in relation to a child under 16 years old, the maximum penalty is 30 years imprisonment. At least one third is to be served without any parole or probation.

ANTECEDENT HISTORY

4. The accused is 29 years old with no previous conviction.

SUBMISSION BY THE PROSECUTION

5. The aggravating factors are:
 - i. The disparity in the ages of the accused and the victim. The victim was 9 and the accused 27 years old.
 - ii. The accused is the victim's stepfather. There is a breach of trust here. The victim had been living with her mother and the accused since she was 6 years old.
 - iii. The accused committed the indecent acts and the rape in the family home when her mother and other family members were at home.
 - iv. The three indecent acts occurred at night when the victim was sleeping.
 - v. After the first indecent act in Count 1, the accused stopped the accused from telling anyone. The victim's silence made her more susceptible to repeated offending by the accused.
6. The mitigating factors are:
 - i. The accused is to be treated as a first offender.
 - ii. The pre-sentence report notes that he is remorseful.
 - iii. His personal circumstances in the pre-sentence report dated 05th December 24 to be considered.

7. The Victim Impact Statement (VIS) was provided. Counsel refers to the case-Perks[2001] 1 Cr App R (S) 19(66) on VIS. According to Lord Judge C. in Perkins- *'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.'* Counsel adds: - *'It is a second opportunity for the victim to be heard about how she has coped and will be coping with her life after going through the criminal justice process.'*
- The victim is 13 years old now. She is confused and angry. Embarrassed too. She is afraid of adult men. The victim's mother was also hurt when she learned of the offending on her daughter. The victim prefers to stay home now.
8. Counsel referred to the sentencing principles in the Crimes Act 2016 under:
- i. Section 277;
 - ii. Section 278;
 - iii. Section 279;
 - iv. Section 280;
9. She referred to the following cases:
- i. ***R v Kanimea [2024] NRSC 7-*** The 25-year-old accused penetrated the anus of the 11-year-old victim with his finger. The accused was sentenced to life imprisonment with a minimum of 15 years to be served before probation or parole.
 - ii. ***R v Vision Bidimini Engar [2024] NRSC 11-*** The 23-year-old accused raped the 15-year-old victim twice. He licked her vagina and had sexual intercourse with the victim. They are first cousins; their mother being sisters. The accused was sentenced to life imprisonment with 18 years to be served before probation or parole.
 - iii. ***R v Renack Mau [2024] NRSC 26-*** The accused was convicted on 3 counts of rape of 2 victims below the age of 16 years. He had consensual sexual intercourse with the two victims on three occasions. The head sentence was 16 years imprisonment with a minimum of 15 years to be served before parole or probation.
 - iv. ***R v Daniel [2022] NRSC 15-*** The accused raped his 6-year-old biological daughter by licking her vagina. He was sentenced to life imprisonment with a minimum term of 16 years to be served before parole or probation.
 - v. ***R v Harris [2021] NRSC 44-*** The 27-year-old accused raped his 11-year-old first cousin by putting his penis into her mouth. He was sentenced to life imprisonment with a minimum term of 15 years to be served.
10. On indecent acts in relation to a child under 16 years old, Counsel referred to the following:

- i. ***R v Raiden [2024] NRSC 2***- The accused was convicted of indecent act in relation to a child under 16 years old. He rubbed his penis outside the victim's vagina. He was sentenced to 30 years imprisonment with a minimum term of 10 years to be served.
 - ii. ***R. Xavier Namaduk [2024] NRSC 24***- The accused was convicted of being found in a place without lawful authority and 2 counts of indecent acts in relation to a child under 16 years old. He grasped the breasts of the victim and touched her private part. He was sentenced to 15 years imprisonment for the 2 counts of indecent acts and 6 months for being found in a place without lawful authority. He will serve 10 years before being considered for parole or probation.
11. At paragraph [30] of the submissions, Counsel refers to the 'nature and circumstances of the offence' and submits:
- 'The accused was the partner of the victim's mother, and she regarded him as a step-father. The victim was very young when the mother moved in with the accused after leaving the victim's biological father. The accused was a trusted figure in the home until he started to exploit the victim. The incidents took place at different locations where family members including the complainant's mother were present. The locations on the 4 occasions were secure homes where a child such as the victim would least expect a member of the family to be intruding into the privacy and secure space where she should feel safe.'*
- At paragraph [31], Counsel submits:
- 'It has become a familiar narrative in the Nauruan Society, that stepfathers, cousins and uncles more than strangers have preyed on young female members of their family. The Court in R v Tsiode [2022] NRSC 7; Criminal Case 18B of 2020 (18 February 2022) recognises this where it states 'it is indeed very disturbing and worrying trend in the country that almost all sexual abuses are committed by close family members...'*
12. Ms Suifa'asia then refers to Sections 5 and 37 of the *Domestic Violence and Family Protection Act 2017*. Section 5 provides for the definition of 'domestic relationship'. Section 37 provides for what the court shall consider 'aggravating factors.' In this case, the aggravating circumstances are;
- (a) The offence was committed against a child or in the presence of a child
 - (b) ...
 - (c) ...
 - (d) The offence was committed at night
 - (e) ..
 - (f)
 - (g) The conduct constituting the offence was repeated.

13. Counsel concludes that this case attracts life imprisonment with a minimum of 15 years for Rape. She adds that the repeated offending of Indecent Acts should attract higher minimum sentences.

SUBMISSION BY THE DEFENCE

14. On the accused's rehabilitation and conduct whilst in remand, Counsel submits:
- i. He actively participates in counselling sessions and spiritual programs.
 - ii. He has learnt about farming and plumbing.
 - iii. He poses a low risk of reoffending.
15. He intends to appeal my judgment. *He recognises the gravity of the offences and expresses genuine remorse for the pain and trauma caused to the complainant and their family.* He disputes the chief probation officer's report that records-“ ..he himself appeared deeply confused on what led him to commit these offences and expressed deep regret and horror at his actions.”
16. Counsel refers to Section 282 of the crimes Act and the Court's discretion to impose a lesser sentence. In mitigation, Counsel submits the following:
- i. The accused has no prior criminal history and there is strong potential for rehabilitation.
 - ii. On expression of remorse- whilst he maintains his intent to appeal,' the accused acknowledged the harm caused, demonstrating awareness of the situation's gravity'- **(What does this mean?)**
17. Counsel recommends the award of concurrent sentences here and refers to *R v Namaduk [2024] NRSC 27* where I said- *'The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never lose sight of, and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits.'*
18. Recommending a sentence of a stated term rather than life imprisonment, Counsel refers to the following cases:
- i. *R v Pham [2015] HCA 39-* Counsel submits that *'the offender's background, efforts at rehabilitation and genuine remorse were pivotal in favouring a finite sentence over life imprisonment.'* **(I note that the accused has not expressed remorse at all in this case)**
 - ii. *R v Gladue [1999] 1 S.C.R. 688-* avoid awarding a sentence of life imprisonment where rehabilitation is viable.
19. Counsel recommends that a stated term of imprisonment rather than life imprisonment is more suitable here.

DISCUSSION

20. This is another case where a child has been sexually abused. Not once, but on several occasions.

21. 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;
- iv. Section 280- Sentencing considerations- imprisonment;
- v. Section 282- Power to reduce penalties
- vi. Section 282A- Pre-trial detention not to be considered for offences under Part 7

22. Considering the above provisions and the case authorities, **I enter convictions against the accused on all counts.**

23. In *Republic v Bill* [2024] NRSC 22; Criminal Case 1 of 2023 (6 September 2024), I said the following:

‘27. I am required to give reasons for the sentences that I pass. In *WO (a child) v Western Australia* (2005) 153 A Crim R 352 (WA CA), in a joint judgment, the court said:

‘Every court sentencing an offender is required to give reasons for that sentence. The reasons need not be elaborate, but must in every case, be sufficient to enable the offender, and the public, to understand why that sentencing disposition was chosen and to preserve to the offender the right of appeal.

The court added:

‘In a context where a sentence of imprisonment is a last resort (as it is both for children and for adults, although the principle has greater weight in respect of the former), those sentencing remarks will always be deficient if it is not possible to discern from them why a sentence of detention or imprisonment, as opposed to some other disposition, was selected.’

28. In *R v Thompson* (2000) 49 NSWLR 383; 115 A Crim R 104 (CCA), Spigelman CJ said (at 394-395; 113-114[42]-[44]):

‘Sentencing judges are under an obligation to give reasons for their decisions. Remarks on sentence are no different in this respect from other judgments. This is a manifestation of the fundamental principle of common law that justice must not only be done but manifestly be seen to be done. The obligation of a court is to publish reasons for its decision, not merely to provide reasons to the parties.’

29. In my sentencing remarks in *R v Xavier Namaduk*, Criminal Case No 24 of 2021 (sentence passed on 04th October 24), I referred to the deterrence and rehabilitation factors as purposes of sentencing. I mentioned the following:

‘ Under Section 278(b) of the Crimes Act 2016- it provides: “to prevent crime by deterring the offender and other people from committing similar offences.”

[28]. In *R v Radich* [1954] NZLR 86 (CA) the court said (at 87):
“We should say at once that this last argument omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment.”

The court added:

“If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.”

[29] On rehabilitation as a purpose of sentencing, Section 278(d) provides:
“to promote the rehabilitation of the offender.”

[30] In *Yardley v Betts* (1979) 22 SASR 108, King CJ said:
“The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.”

As in paragraph [20] above, this is another sad and unfortunate case where a child is sexually violated in her own home. It did not happen once. The offending took place on several occasions. The crime was not perpetrated by a total stranger. Like similar cases in the past, the accused is not only known to the victim. He holds a position of trust in the household as the victim’s step-father. The complainant had been living with her mother and the accused since she was 6 years old. She was violated when she was 9 years old. The accused pleaded not guilty. The victim had to go through each episode of the offending. It would not be too far-fetched to infer that she would have felt violated all over again. When it was suggested to her in cross-examination that the accused did not have sexual intercourse with her- she confidently said- ‘I’m the one it happened to me.’ The accused opted to remain silent. That is his right. Thus, there was no remorse shown at all. I repeat here what I said in my judgment- As was said in *Weissenteiner v R* (1993) CLR 217 at 227-8 :

'In a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when the evidence, if it exists at all, must be within the knowledge of the accused.'

24. I paraphrase what I said at paragraph [33], in the Tom Tom Bill case.

'33. Parliament has prescribed that those convicted of the rape of a child under 16 years, will be awarded a sentence of imprisonment. It is not a question of whether he should be imprisoned or not. Rather, it's how long he should be imprisoned for. This message should be declared aloud from the rooftops and pinnacles throughout Nauru. Accused persons who are convicted for sexual offences against children will be punished severely. The sentence will reflect Nauru society's condemnation of such criminal conduct. It also represents a symbolic, collective statement, as legislated by parliament, that when you sexually assault a child, be prepared to spend more than 15 Christmases behind bars.

CONCLUSION

25. The accused is sentenced as follows:

- i. Count 1, 3, & 4 (Indecent Act)- 15 years imprisonment.
- ii. Count 2- (Rape of a Child)- life imprisonment.
- iii. The sentences are concurrent to each other.
- iv. The accused will need to serve a minimum of 20 years before any probation or parole.

DATED this 17th day of December 2024.


Kiniviliame T. Keteka
Acting Chief Justice

