

N1495 21/04/97

PAPUA NEW GUINEA
[National Court of Justice]

CR 894 of 1996

CR 895 of 1996

CR 896 of 1996

THE STATE
-v-
JIMMY YASASA LEP

Lae: Sevua, J

1996: 5th, 6th, 9th & 10th December

Criminal Law - Sentences - Burglary - Pack Rape - Armed Robbery - Aggravated factors - Premeditated stealing with violence - Threats with shotgun and knives - Rape victim married woman aged 34 years - 3 year old daughter made to spectate whilst victim being pack-raped - Violence used - Violation of constitutional right.

Criminal Law - Sentences - Concurrent or cumulative - Burglary and robbery one transaction because planned - Rape a separate transaction - Sentences for burglary and robbery concurrent - Sentence for rape cumulative on sentence for robbery.

Criminal Law - Sentence - Guidelines for sentences on rape and armed robbery - outdated, unsuitable and no longer applicable.

Cases cited:

The following cases are cited in the judgment.

1. *The State -v- Peter Kaudik [1987] PNGLR 201*
2. *The State -v- John Aubuku [1987] PNGLR 267*
3. *William Gimble -v- The State [1988-89] PNGLR 271*

MS A. RAYMOND *for State*
MR B. TABAI *for Accused*

10th December, 1996

SEVUA, J: The prisoner, Jimmy Yasasa Lep was convicted, after a trial, of three counts contained in three separate indictments. The first count is break and enter, the second count is rape and the final count is armed robbery.

The facts are these. On the morning of 1st March, 1996, at approximately 3 am, the prisoner and three others entered the premises of Barry Bradshaw at Section 53 Lot 6, Fairywren Street, China Town, Lae, and opened the car-port rollerdoor from the inside. They went upstairs to the rear door and forced open the door with the use of a pinch bar. They were armed with a home-made shotgun and bush knives. They also had flashlights with them.

Inside the dwelling house, they entered the bedroom where Mr & Mrs Bradshaw, with their three year old daughter were asleep. The family was rudely and forcefully woken up. One of the burglars said, "wake up, wake up, this is a hold up, we want your money." The victims were menaced by the intruders with knives, whilst flashlights were shone on their eyes which caused disorientation at first.

After about ten or fifteen minutes of menacing the victims, two of the intruders forced Mrs Bradshaw and her daughter out to the balcony adjoining the bedroom. Knives were used to frighten Mrs Bradshaw and her daughter, whilst in the bedroom, Mr Bradshaw was being harassed and threatened with the gun and money demanded from him by the other two intruders.

At the balcony, one of the rapists held a knife against the prosecutrix's neck while the other removed all her clothes so that she became fully naked. She was then pushed down onto the floor and her legs were forced apart. The first person who raped her held a knife against her neck.

After he had raped her, the second person raped her. Then the two inside the bedroom who were detaining Mr Bradshaw at gunpoint were relieved by one of the first two rapists. The latter two then went to the balcony and raped the victim. Each person raped the victim once. Whilst the victim was being raped, her three year old daughter was made to sit on a chair and watch as her mother was being pack-raped.

After raping the victim, all the rapists returned to the bedroom where they further threatened Mr Bradshaw and continued ransacking the house stealing whatever they could get before escaping. The following personal and household items were stolen:-

1. 10 brand new baseball type caps valued at \$A500.00
2. \$US300.00
3. K600.00
4. Man's Tissot brand wrist watch
6. A silver ring
7. Sanyo portable radio cassette CD player
8. Calculator with black leather case
9. Bottle of Philippine Tanduay
10. Phillips TV remote control
11. Two ladies watches
12. Flare gun
13. Frozen meat and food from refrigerator
14. Ladies clothing

Other small personal items like family hair-loom were also stolen. During this ordeal, the telephone line was severed.

As I said in my judgment on verdict yesterday, the only direct evidence of the prisoner's participation in these crimes is his

confession in a record of interview which was admitted into evidence following a voir dire. It is necessary to refer to parts of the confession as I consider this relevant in sentencing this prisoner. At the end of the day, it becomes glaringly obvious that this prisoner was the gang leader, who at 28 years of age, corrupted the minds of the other three offenders, whom I have since become aware, were aged 13, 18 & 18 years respectively.

From his own admission, they all met at Bumbu Settlement and planned to break and enter and rob. I accept that he did not specifically plan to break into the home of Mr Bradshaw to rob him. But I accept that he did plan to break into a home and rob, therefore his entry to the premises of the victims was not a coincidence or an unplanned act. They were armed with a home-made shotgun, a screw driver and a piece of iron rod. However, I accept the evidence of the Bradshaws that the offenders had knives with them and they used them to harass, threaten, frighten and menace the victims. This prisoner was the gang leader and it was him who issued instructions to the others to wake the family from sleep. It was him and David who pointed the gun at Mr Bradshaw and threatened him first. It was him who forced the female victim out to the balcony. It must have been him who removed her clothes. And it was him who first raped the victim followed by the others. It must have been him who held the knife against her neck prior to raping her.

It is quite disturbing to know that the gun had a bullet. He could have killed one of the victims with it. It was just too dangerous.

The facts I have outlined and the circumstances of how these crimes were perpetrated can only be described as a litany of terror and violence committed by all those involved. The burglary and robbery were planned. All offenders participated in the sustained activity and this prisoner played the leading role in this whole episode. He showed no respect and human dignity for this family, who I have no doubt, became helpless and hopeless throughout this ordeal. One could only imagine the fear, pain and degradation these events had brought upon the mind and body of the victim of rape, not forgetting the serious apprehension the husband must have felt.

No law abiding citizen, in my view, could ever appreciate the very serious nature of these crimes.

In relation to the crime of rape, the most degrading aspect of it is that, the victim's three year old daughter was made to spectate as her mother was being pact-raped. How could the prisoner behave in this manner? I cannot rule out the emotional scar and the psychological effect this may have on both the victim of the rape and the child.

I do not think one can equate this behaviour to animal behaviour because I do not know of any species of animal that would treat a child like this. It is very horrifying for a child to sit and watch the revulsion and degradation that her mother was being subjected to. In my view, this is tantamount to sexual indignity or perversion.

The ransacking of the victims' home, the threats, the violence and the use of dangerous weapons, in my view, demonstrated and manifested the level of commitment by these offenders. No civilised society could condone such criminal conduct and I consider that the enormity of these crimes, the degree of commitment to their perpetration and the manner in which they were committed would create fear and terror to the ordinary person. In my view, these crimes warrant very substantial and severe punishments and the punishments I have decided to impose is aimed at both personal and general deterrence. The crimes are very serious that they call for a very stern punishment.

It seems to me, the only mitigating factor is that there is no evidence of a permanent physical injury sustained by the rape victim. However, as alluded to earlier, I cannot overlook the possibility of an emotional and psychological effect she may have suffered. She was very distressed upon examination but I feel that did not describe the emotional scars felt by the rape victim and her husband and daughter. The prisoner had offered no remorse at all. He was given the opportunity to speak and he offered to remain silent. Such is his whole attitude to these crimes that he showed no remorse.

His personal antecedents do not assist him at all, to be frank because he has a string of convictions recorded in both the National and District Courts between July, 1981 and January, 1986. Two of these convictions were for break, enter and steal. On 14th July, 1981, the National Court at Waigani convicted him of break, enter and steal and imposed on him a 2 year good behaviour bond. However, it seems that whilst he was still under this bond, he was convicted of the same offence at the District Court and sentenced to 6 months imprisonment. He admits these previous convictions and really all these boil down to the fact that the prisoner had not learnt any lesson from his previous criminal convictions.

In this case, there are circumstances of aggravation which makes it one of the worst type of cases. The offences are of serious nature that they call for individual and general deterrence. The use of offensive weapons, the repeated threats, the sexual perversion and the actual violence are such that a stern deterrent punishment is called for. Another circumstance of aggravation, in my view, is the blatant violation of the victims' fundamental rights enshrined in our Constitution, in particular s.49 of the Constitution which provides for right to privacy. If ordinary law abiding citizens cannot be safe in their own homes, I do not know where else, they would be safe.

These crimes were perpetrated within the confines of the victims' dwelling home which the Constitution places much value on, and I consider that, breach of this constitutional right should also be reflected on sentence. The Supreme Court in the case of **Gimble -v- The State** [1988-89] PNGLR 271, had acknowledged this right when it said at p274,

"we consider that the robbery of the occupant of a home is more serious than robbery of a store or business because it is an invasion of privacy and family life. One of the basic rights enshrined in the Constitution is protection for the privacy of their homes'. A man's home, whether

it is a mansion or a shack is his castle and I think the punishment for robbery of a home should reflect those community values."

I need to consider whether sentences for these offences should be concurrent or cumulative. Mr Tabai submitted that the sentences for the robbery and rape should be cumulative to the sentence for break and enter. However, I consider that the sentences for break and enter and robbery should be concurrent because I consider them as a single transaction on the basis that, the gang had planned to break and enter and rob.

The rape is a separate transaction which was committed after the offenders had executed their plan. In my view therefore, the sentence for rape should be cumulative to the sentences for the first two offences as they fall into different categories.

The prisoner is 28 years old therefore he is not a young offender. He was the gang leader and he exercised authority over the other co-offenders. He issued instructions to the others. He led out in the threatening of Mr Bradshaw with a loaded gun. He pulled Mrs Bradshaw outside, undressed her, held a knife against her neck and raped her first. There is not much that can be said in mitigation and Mr Tabai correctly submitted this.

As adverted to, the prisoner has six records of prior convictions. These are:-

1. 14th July, 1981 - National Court, Waigani, Break, Enter & Steal - 2 yrs good behaviour bond.
2. 22nd July, 1982 - Grade 5 Court, Boroko, Break, Enter & Steal - 6 months imprisonment.
3. 4th April, 1985 - Boroko District Court, Indecent Drawings - K50.00 fine.

4. 10th March, 1985 - Boroko District Court, Assault - K100.00 fine.
5. 20th June, 1985 - National Court, Waigani - Accessory in crime - 6 months imprisonment, and;
6. 20th January, 1986 - Boroko District Court, Escape - 6 months imprisonment.

In the light of these records, a severe deterrent penalty is warranted, in my view.

I have considered sentences imposed on the co-offenders by two of my brother Judges in August this year, two of whom were 18 years and the other 13 years. One of them I think escaped prior to sentence. The other two were each sentenced to 3 years for the robbery and 9 years for the rape. They all pleaded guilty and they were young offenders. In the case of this prisoner, he pleaded not guilty and was convicted after a trial. He is not a first young offender. Therefore considerations applicable to the co-prisoners are not applicable to him.

In relation to the rape charge, I adopt what His Honour Amet, J (as he then was) said in *The State -v- Peter Kaudik* [1987] PNGLR 201 at 207,

“the sentence of this Court I believe should reflect the society’s utter revulsion at this kind of violation of females, however old and of whatever race or nationality. They have the same right to be respected as do men, in their private person.”

That case established sentencing principles for rape which were later approved by the Supreme Court in *John Aubuku -v- The State* [1987]

PNGLR 267, about a month and a half later. It is my view that sentencing guidelines for rape in those cases and for armed robbery in *Gimble -v- The State* are out of date and no longer suitable or applicable in Papua New Guinea today.

Serious violent crimes like rape and armed robbery, since these cases were determined, have occurred more frequently. The frequency and prevalency of these violent crimes demand much more stern punishment than the guidelines suggested by the Courts. These crimes have become too serious that the Courts must consider the concerns expressed by the community in the imposition of criminal sanctions.

I have considered life imprisonment especially on the rape charge, but decided against it. I felt that a very long custodial sentence is called for instead. The punishment I have decided to impose in this case, I hope, will send a warning message to other possible offenders. It reflects the concern of the community that it is fed up with armed robbery and rape. The community of innocent victims and law abiding citizens are saying that enough is enough and I believe the Courts must respond positively to that concern. I believe the sentence of this Court should reflect that concern.

In respect of the first count of break and enter, the prisoner is sentenced to 10 years imprisonment with hard labour. In respect of the second count of armed robbery, the prisoner is sentenced to 15 years imprisonment with hard labour. These sentences are to be served concurrently.

In respect of the third count of rape, the prisoner is sentenced to 30 years imprisonment with hard labour. This sentence is to be served cumulative to the sentence of armed robbery, so that the total term to serve is 45 years in hard labour to be reduced by 8 months and 6 days, leaving the balance of 44 years 3 months 3 weeks and 1 day.

Lawyer for State : *Public Prosecutor*
Lawyer for Accused : *Acting Public Solicitor*