



IN THE SUPREME COURT OF NAURU  
AT YAREN  
CRIMINAL JURISDICTION

Criminal Case No 9 of 2018

BETWEEN

The Republic

AND

UN

Before: Khan, J  
Date of Sentencing Submissions: 18 September 2019 and 29 November 2019  
Date of Sentence: 5 December 2019

Case may be cited as: *Republic v UN*

CATCHWORDS:

Criminal Law – Juvenile offender 17 years old – charged with one count of rape – victim 14 years old – no violence involved – whether a sentence of imprisonment is appropriate.

APPEARANCES:

Counsel for the Republic: RD Talasasa Jr  
Counsel for the Defendant: S Valenitabua

## SENTENCE

### INTRODUCTION

1. You are charged with one count of rape. The reads as follows:

#### Statement of Offence

Rape of child under 16 years old: contrary to s.116(1)(a), (b)(ii) of the Crimes Act 2016.

#### Particulars of Offence

UN on 2 July 2018 at Nauru intentionally engaged in sexual intercourse with JC a child under 16 years of age.

2. You were born on 29 June 2001 and on the date of the offence you were 17 years old. The victim was born on 8 July 2004 and was 14 years old at the date of the offence.
3. The maximum penalty for this offence is 25 years imprisonment.
4. Being an absolute liability offence after the prosecution proved the elements of the offence the onus shifted on you to prove the defence available to you under s.127(2)<sup>1</sup> that you honestly believed on reasonable grounds that JC was over 16 years old, but in the course of giving evidence you admitted that you knew that JC was 14 years old at the material time.
5. On 18 September 2019 a conviction was entered against you under s.207<sup>2</sup>.

### FACTS

6. 1) You were known to each for some time prior to the date of the offence. On the day in question you were riding your bicycle at around 8pm whilst JC was a pillion passenger on a motor bike driven by her friend Sigh Adire. As you went past each other at Capelle and Partner's container park you called out to JC and her friend stopped the motor bike. You asked JC to drop you to your home at Anabar. You gave your bicycle to Sigh and asked her to give it to your friend Jawe. You took over the driving of the motor bike and JC sat at the back as a pillion passenger. You drove the motor bike to Chad Park and turned off the motor by disconnecting two wires connected to the ignition. You walked over to the beach and asked JC to come over to you. She refused and made an attempt to start the motor bike but was not successful. She later joined you at the beach.
- 2) According to JC you kissed her and she pushed you away and you kept pulling her towards you and kissed her again and laid her down and pulled off her leggings and underpants and you inserted your penis in her vagina. She said it was very painful and asked you to stop and you did. And then later you had sex with her by holding her hands down.
- 3) In your version of the events was as follows as stated in the judgement:

"When we reached Chad Park, she started holding me. I got off the motor bike. I went straight to the beach and told her to come. She didn't want to come to me. She said she wanted to go for a practice for the disco. I said no it's going to be quick. She came to me. I asked for sex. She said no. I said please please. She told me to stop if it hurts and put it in slowly but I didn't care. I was rough when we were having sex. She kept telling me to stop. I did not stop because it was nice. I did not know that she was in pain."

### VICTIM IMPACT STATEMENT

7. In the victim impact statement JC states:

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<sup>1</sup> Crimes Act 2016

<sup>2</sup> Criminal Procedure Act 1972

1) Physical Injuries

I sustained physical injuries on my private parts (my vagina). I was treated for my injury.

2) Emotional and Psychological Effects

I feel angry but I don't know what to do. I feel angry at him because it was the first experience that happened to me and I was very scared. Apart from being very angry I feel very embarrassed and scared because of what was done to me and I feel I can't trust anybody.

3) Psychological

I am always thinking about it but I want to forget it. Every time I think about it I feel very bad because of what was done to me and I get very angry.

4) Life Changes

My dad told me not to roam around anymore and I now have the feeling that I should not trust anyone and not to go around anymore because of what happened to me.

8. Unfortunately, because of this incident, JC's whole life has changed. She now feels scared, angry and her freedom has been taken away.

SENTENCING SUBMISSIONS BY THE DPP

9. In the sentencing submissions filed by the DPP on 18 September 2019, he states:

"The Court in *Republic v Gadeanang*<sup>3</sup> at [21]:

[21] The offence of rape is a particularly distressing one for the victims as it brings the offender into close proximity with the victim, and reduces what our society values as an act of love into one of violence and degradation."

And later on, the DPP states:

"This Court is again called to view this type of offending sternly. The observation by this Court in *R v AB* [2016] NRSC 29 at [29] is still relevant today as it was at the time of survey."

10. In the case of the *Republic v AB* Crulci J imposed a sentence of 11 years imprisonment for the offence of rape. The victim was a 7-year-old stepdaughter of the accused and the accused was 35 years old and married to the victim's mother. Apart from the offence of rape there was ongoing sexual abuse.

DEFENCE SENTENCING SUBMISSIONS

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<sup>3</sup> [2015] NRSC 14 52 of 2015(29July 2015)



11. Mr Valenitabua in his submissions has stated:

- 1) You are a first offender;
- 2) The age difference between you and JC was 3 years and you were known to each other;
- 3) No violence was used except, as you admitted that the whole sexual encounter was rough, and she kept asking you to stop but you did not do so as you said it was nice and you did not know that she was in pain.

12. In the sentencing submission your counsel included an email from your father in which it is stated:

- 1) Your parents are separated and out of the 4 children you are the most badly affected as a result of their separation;
- 2) That as a result of the marital dispute between your parents you became rebellious and that affected your studies. You are the youngest child and as the father puts it you were 'mother's and father's boy'.
- 3) Your mother has a boyfriend which has affected you badly as you always thought that your parents might reconcile and when this failed you started inhaling butane gas, petrol and started smoking cigarettes.
- 4) Your father further states that you became dependent on inhaling butane gas and using other substances to overcome your parent's separation and the grief that it caused you."

### SENTENCE

13. Insofar as sentence is concerned your counsel relies on s.48<sup>4</sup> which states:

"Despite the provision of any other law to the contrary, the following applies to any criminal proceedings taken against a child:

- a) No child shall be sentenced to death or imprisonment for life for any act or for any offence;
- b) A sentence of imprisonment may only be imposed against a child as a sentencing option of last resort."

14. S.48 states that a sentence of imprisonment shall only be imposed as a sentence of last resort and at the time of the offence you were 17 years old and are now 18 years old but you will have to be sentenced as a child.

15. 1) The Child Support Protection and Welfare Act 2016 (the Act) in its preamble states that:

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<sup>4</sup> Child Protection and Welfare Act 2016

“An Act that provides for the welfare, care and protection of all children in Nauru and for the enforcement of rights of children as provided for by International Conventions, norms and standards, was taking account of Nauruan culture, traditions and values and for related purposes.

- 2) In the definition section it is stated that:

‘**Child**’ or ‘children’ means every child below the age of 18 years;

“**Convention of rights of child**” and “**the convention**” means the United Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and which entered into force on 2 September 1990.

- 3) Under the guiding principles it is stated at s.5(1) as follows:

“(1) The core principle of administering this Act that the safety, wellbeing and best interests of the child are paramount.”

16. At the date of the sentencing submissions (18 September 2019) your counsel stated that he wanted you to be assessed by a psychiatrist as you have been inhaling butane gas and it perhaps affected you mentally. I adjourned the sentencing to allow you to be assessed by a psychiatrist and in the meantime, you were remanded in custody and have been in custody since that date.

#### PSYCHIATRIC ASSESSMENT REPORT

17. In his report dated 19 November 2019, Dr Toobia Smith states that:

- 1) You informed him that on the day of the incident you had inhaled butane gas and you felt high.
- 2) Diagnostic formulation – Mr UN is a 17-year-old male who had multiple substance abuse in the last 3 years. He also dropped out as a student 2 years ago due to his substance abuse. Then 1 year ago he got involved in sexual activity with a 14-year-old girl in which he as arrested, remanded and under investigation.

He was seen twice by me and was assessed to be mentally stable. There is neither depressive nor psychotic disorder at this time. However, he was assessed to have substance use disorder (multiple substances – smoking, cannabis, alcohol and butane gas sniffing).

- 3) Management and recommendations –

At the moment he is mentally stable and his substance problems are controlled as he is in remand custody so has no access to those substances.

Whatever the result of his case is, he needs to be under close monitoring and refer accordingly.



18. Dr Smith clearly states that you have a problem when you resort to using butane gas and other substance abuse.
19. In an article in the Australian Institute of Criminology titled 'Sentencing and Treatment of Juvenile Offenders in Australia'<sup>5</sup> which I find to be very useful it is stated at page 3:

"These frame works provide for a separate system of criminal justice that is responsible to both the developmental needs of young people and their potential for rehabilitation (Richards 2011). Australia's juvenile justice system places a special emphasis on diversion, restoration and their rehabilitation in their dealing with young people (Weatherburn, McGrath and Bartels 2012). This emphasis is backed by several international instruments to which Australia is a signatory, which require the prioritisation of diversion and the best interests of the child and incarceration as an absolute last resort for the minimal time necessary (Convention on the Rights of Child arts 37(b), 40(3)(b); Beijing Rules, and Rules 11, 17.1(b)-(c), 19.1). Under these instruments, criminal sanctions must serve some rehabilitative or restorative function (Beijing Rules, Rule 17.1(b) commentary, see also O'Brien, cited in Mason – White & Payne 2015; 35). As a signatory to the Convention on the Rights of the Child, Australian executives must act in accordance with those provisions unless legislation specifies otherwise (*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273)."

Further under the heading, Sentencing Juvenile Sex Offenders, it is stated at pages 6 and 7 as follows:

"Judge Robertson, former President of Childrens' Court of Queensland, has stated that 'in the most difficult of all tasks facing a Judge, the sentencing of offenders, the sentencing of youthful offenders for serious sexual crimes and other crimes of violence stands out as one of the most challenging' (quoted in Nisbet 2012:3). Judicial officers appear to struggle to balance the youth of the offender with the gravity of their crime. As the following cases will show, judicial officers take into account a range of factors when determining an appropriate sentence, including the age and maturity of both the offender and victim, the offender's level of remorse and the potential for rehabilitation.

The case of *OH v Driessen* (No. 2) [2015] ACTSC 354 is a recent example of the Court taking an individualised approach to justice in its determination, that despite the seriousness of the offence, the offender's circumstances did not warrant a sentence of severity. OH was convicted of engaging in sexual intercourse with a person under the age of 10 years, a crime which carries a maximum penalty of 17 years imprisonment (Crimes Act 1900 (ACT) s.55(1)). He was 13 years old at the time of the offence and the victim was aged 7. In sentencing OH to a 12-month good behavior bond with community supervision and therapeutic treatment, Acting Justice Refshauge noted that the offender's prospects for rehabilitation, his voluntary attendance at treatment and his positive engagement with education and employment (2015: [22] – [33]).

Similarly, in *Western Australia v 'a child'* [2007] WASCA 115, the Western Australian Court of Appeal upheld an 18 month intensive youth supervision for an offender, who aged 14, was convicted of indecent dealings and sexual penetration of a

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<sup>5</sup> By Riddhi Blackley and Lorana Bartels



child under 13 years of age in respect of a 6 year old victim. The court emphasized the rehabilitation in its decision to grant a non-custodial sentencing, citing the offender's adolescence, his significant cognitive limitations ... lack of any prior sexual offending [and] the continuing support and influence of his mother' (2007): [21]).

When offenders have a history of offending behavior and appear to lack remorse, judges are more likely to impose custodial sentences. In *R v The Queen* (2015) 90 NSWLR 234, the successful rebuttal of doli incapax was upheld against an offender, who aged 11 at the time of the offence, committed aggravated sexual assault against his 7-year-old half-brother. The applicant, an adult at sentencing, was a repeat offender who had already been sentenced for three similar offences against other siblings. This, along with offender's apparent lack of remorse, lead Justice Hamill in the New South Wales Court of Criminal Appeal to concede that 'personal and general deterrents [were] important considerations despite the applicant's age' (2015): [106]). The overall sentence of 2 years and 5 months with a non-parole period of 11 months was upheld.

In the *Queen v KAL* [2013] QCA 317, a sentence of 4 years and an order to serve 70% of the detention period was modified so that the offender was required to serve a total of 2 years in detention. The offender was 14 years old when he committed a violent rape against a 16-year-old. He was on probation at the time of the offence and had a long history of non-sexual offending. His background was described as 'shockingly dysfunctional' and involved extensive substance misuse, emotional and sexual abuse and neglect. The offender was judged to have limited empathy for the victim and had a high risk of reoffending. In upholding the relatively lengthy sentence but modifying the detention period, the Queensland Court of Appeal sought to balance the competing principle of community protection and detention of young offenders for the shortest time possible.

The focus on rehabilitation, even in serious cases of sexual violence, appears to be a common thread when sentencing juvenile sex offenders. Even when community protection is deemed to be an important consideration, such as in the case of KAL, the custodial sentence is typically framed as necessary for the offender to address the facts that underlie their offending behavior. Sentencing almost always includes a condition that the offender undergoes specialist treatment for sexually abusive behaviors (Bouhours and Daly 2007; Warner and Bartels 2015)."

20. The cases referred to in [19] above states that judicial officers often struggle to balance the youth of the offender with the gravity of the crime; and the Court taking an 'individual approach' to justice (see *OH v Driessen*); and focus on rehabilitation is a common thread when sentencing juvenile sex offenders.
21. In your case I am indeed struggling to strike a balance between your youth and the gravity of the offence. On the day in question you had inhaled butane gas and Dr Smith in his report states that you 'felt high' and your father also states that you tried to quit inhaling butane gas but without any success; and he states that you do so to get into the 'comfort zone' rather than face the problem; and further Dr Smith states that you are mentally stable now because your substance abuse problems are controlled as you are in custody and he further states that regardless of the outcome of the sentence you need to be under close monitoring.

22. In sentencing you I am going to take an '*individual approach to justice*', and of course your rehabilitation is upper most in my mind. It seems that when you inhale butane you get disturbed; and when you committed this offence you had inhaled butane gas and if you continue to do so then it would cause more harm to you.
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 the medical reports states that when you abstain from using butane gas you had no behavioral 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 are you heading to. You are still a young person you turned into an adult when you turned 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 that he will guide you through in 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 and 17 days) shall be deducted from the sentence. I further order that a copy of the sentence as well as Dr Smith's report dated 18 November 2019 shall be made available to the Commissioner of Prisons and I request him to make arrangements for your further consultation by Dr Smith.

DATED this 5 day of December 2019

Mohammed Shafiullah Khan  
Judge