



SUPREME COURT OF NAURU

[CRIMINAL JURISDICTION]

Criminal Case 15 of 2018

Between: **The Republic**

PLAINTIFF

And: **Grandell Tannang**

RESPONDENT

Before: Chief Justice Filimone Jitoko

For the Prosecution: Mr R Talasasa Jr, Director Public Prosecutions

For the Accused: Mr R Tagivakatini, Office of the Public Legal Defender

Date of Hearing: 30 July 2019

Date of Judgment: 9 August 2019

Case maybe cited as: *Republic v Grandell Tannang*

Catchwords: *Criminal law– Rape of child under 16 years old – section 116 Crimes Act – guilty plea – application of maximum penalty of 15 years – sentencing considerations – Sections 277, 278, 279, 280 Crimes Act*

JUDGMENT

Introduction

1. In the Information filed by the prosecution on the 18 October 2018, the accused Grandell Tannang, was charged with the offence of rape of a child under 16 years old, contrary to section 116 (1) (a) and (b) and (i) of the Crimes Act 2016, and in the alternative, the offence of indecent acts in relation to a child under 16 years old, contrary to section 117(1) (a) (b) and (c) and (i) of the Crimes Act 2016. The accused had been remanded in custody since he first appeared before the District Court on 18 September 2018 before finally being granted bail on 18 January 2019.
2. When the matter came before this court on 30 July 2019, counsel for the accused informed the court that his client wished to change his not guilty plea. The charge of rape of a child under 16 years old under section 116 was read to the accused for his plea and he pleaded guilty to the charge. The alternative charge was consequently abandoned by the prosecution.
3. The charge read as follows:

COUNT

Statement of Offence

Rape of a child under 16 years old: contrary to section 116(1) (a) and (b) and (i) of the Crimes Act 2016.

Particulars of the Offence

Grandell Tannang between the 1st of January 2018 to the 17th September 2018 at Nauru intentionally engaged in sexual intercourse with **SF**, a child under the age of 16 years old.

4. For the protection of the child victim and her juvenile cousins the court orders that their names be suppressed, and their details be not disclosed. The child victim is to be referred to as **SF**, and her juvenile cousins to be referred to as **LT** and **JT** respectively.

THE FACTS

5. The summary of facts in support of the Information, and admitted to by the accused are as follows:

*1. On a particular date between 1 January and 17 September 2018, the victim **SF** was asleep at the lounge together with her other cousins, **LT** (7 years old) and **JT** (12 years old).*

2. *Whilst asleep, the accused Grandell Tannang went to wake them up for school. Grandell was the victim's aunty's boyfriend, Caressa Tungi.*

3. *The other two didn't bother to get up. The victim was about to get up when the accused approached the victim and put his hand inside her pants. He was wearing only towel at the time.*

4. *The accused kept on putting his hands inside her pants and moving his hands over her vagina, at the same time inserting his finger in her vagina.*

5. *The victim tried to move her body away so as to indicate her disapproval and for him to stop doing that as it was painful to her. It took the accused sometime doing that.*

6. *Thereafter the accused removed his hand and woke everybody up for school.*

7. *The accused had done the same prior to this occasion but during the same period. He would do so, sometimes in the day and other times in the night.*

6. A record of interview of the accused by the Nauru Police Force on 18 September, 2018 submitted in support of police sergeant Sarema Arenwa's affidavit in conjunction with the accused's bail application, as well as SF's interview transcript are on record and are in support of the facts outlined above.

GUILTY PLEA

7. The accused had on 30 July 2019, pleaded guilty to the count of rape of a child under 16 years old contrary to section 116(1) (a), (b) and (i) of the Crimes Act 2016.

SUBMISSIONS ON SENTENCE

For the Defence

8. The maximum sentence for the offence of rape of a child under 16 years is life imprisonment if the child is under 13 years old or there are aggravating circumstances, and in any case, 25 years imprisonment.

9. The defence counsel concedes that given the Crimes Act had only been enacted since 2016 and that Part 15, Division 15.3 and specifically sections 277 to 280, a detailed analysis of the kinds of sentences, their purposes and the sentencing considerations has to be made by the court as there is only been a few cases decided so far by this court to guide it in arriving at an appropriate tariff for such offences.

10. In the case of *Republic v Olsson [2017] NRSC; Cr No. 01/2017* the accused was charged with digital rape of a child contrary to section 116(1) (a) (b) and (i) of the Act

as well as deprivation of liberty contrary to section 88 of the Act. The accused had three previous convictions for offences under section 116. The accused upon conviction of both offences was sentenced to 12 years imprisonment.

11. In the more recent case of *Republic v Aku & Ors [2018] NRSC 5; Cr No.26/2017*, the three(3) accused charged with rape contrary to section 116(1) (a) (b) and (i) of the Act were sentenced upon conviction, to eight(8) years imprisonment less two(2) months of remand period.

12. The accused in this case, in pleading guilty to the charge of rape, fully understands the consequences and given the seriousness of the offence, together with decisions of the court in cases with similar facts situation in the past, that a custodial sentence is inevitable. However, he prays that the court, in sentencing him, will be mindful of mitigating factors he outlines below.

MITIGATING FACTORS

13. The following factors are submitted in mitigation on behalf of the accused:

- (i) he acknowledges the offence he has committed;
- (ii) he acknowledges that it is a serious offence and carries a custodial sentence;
- (iii) he is remorseful for what he has done;
- (iv) he decided to enter a guilty plea and although it was entered very late and on the eve of the trial, one of the determinant reasons for the change in the plea was to avoid the victim being called to testify and in the process re-live the trauma of the event(s);
- (v) he has cooperated fully with the police during the investigations;
- (vi) he has been in fully compliant in adhering to his bail conditions and there has been no police adverse report against him since bail was granted;
- (vii) he is out of work, unemployed since Canstruct, his former employer, had discontinued employing him after he was charged;
- (viii) he is a first- time offender;
- (ix) he had been in remand from 18 September 2018 to 18 January 2019, a period of four (4) months;
- (x) he has an eight- year old daughter whose welfare has been and will be adversely affected by him being charged with the offence and its consequence; and
- (xi) he has provided to the court written references and testimonies from members of his family and friends vouching as to his character.

SUBMISSION ON SENTENCE

For the Prosecution

14. The prosecution emphasised in its written submission that the offence was very serious indeed and this is reflected in the maximum penalty of life imprisonment that may be imposed under section 116(1) (a), (b) and (i) of the Crimes Act 2016.

15. While the court may have had, prior to the new law in 2016, a different approach to the offence of rape, including the fact that under the old legislation, the 1899 Criminal Code, the offence of digital rape was only classified as indecent assault with maximum penalty of two (2) years imprisonment, digital rape or the penetration of a person's genitals with any part of the body of another person, is now included in the broad definition of sexual intercourse under section 8 of the Act. The prosecution contends that the fact that the accused is guilty of digital rape, it is still rape and carries the same punishment as in all other types or forms of rape defined under section 8.

16. The prosecution emphasised that it was important for the court to take into account the provisions of the Crimes Act, especially section 277(on the kind of sentences it can impose); section 278(the purposes of sentencing); section 279 (the general sentencing considerations); and section 280(imprisonment considerations).

AGGRAVATING FACTORS

17. The following considerations are submitted as aggravating factors by the prosecution:

(i) the accused at the time of the commission of the offence, was a 44-year old adult and his position vis a vis the child victim was one of trust, which trust he breached;

(ii) the accused agrees to the victim's claim that this was not the first and only time he had committed the offence against the victim; it had happened before and over a period of time;

(iii) the accused had persisted in forcing himself on the victim even though the victim had clearly showed disapproval of his action; and

(iv) there is clearly an unwelcomed increase recently in similar offences committed against minors, especially very young girls on the island.

VICTIM IMPACT REPORT

14. The report is submitted into court by the prosecution and was composed by a child protection officer from the Department following an interview with the child victim and in the presence of both parents.

15. In summary, the report stated that while the child victim did not suffer any physical injuries as the result of sexual assault, she does experience some emotional and psychological effects from the encounter. She said, *"I do not feel good and afraid. I don't want anyone to know about it."* She would like to forget the imagery but it *"pops up in my mind and I hate it."*

16. As to her daily routine, she adds that, *"I am afraid and embarrass and do not want anyone to know about it."* She accepts what has happened and determined that her life must go on.

COURT'S CONSIDERATION

17. The accused is charged with the offence under section 116(1) (a), (b) and (i) of the Crimes Act 2016 which states:

"116. Rape of a Child Under 16 years

(1) A person commits an offence if:

(a) The person intentionally engages in sexual intercourse with another person; and

(b) The other person is a child under 16 years old

Penalty:

(i) If the child is under 13 years old or aggravating circumstances apply – life imprisonment"

18. The accused has pleaded guilty to the offence and the fact that the child in question was only 10 years old brings into contention the penalty of life imprisonment. Life imprisonment is the maximum penalty provided by the law for anyone committing such an offence. However maximum penalty provisions in law are intended to be applied only to the most serious examples of the offence. It is set by Parliament reflecting Parliament's and in turn the society's views on how serious such an offence is held in their estimations.

19. Notwithstanding the principles underlying the maximum penalty provisions, the peculiar circumstances of each individual case remains the deciding factor in the final determination as to the most appropriate punishment to be given.

20. It is evident in this case from the Facts filed and as well as from the victim's statement recorded by the police, that the accused had, on this singular occasion referred to, as well as other times in the past, improperly touched the victim SF's genitals, including the act of inserting his fingers inside her vagina. Such act constitutes *sexual intercourse* as defined under section 8 of the Act to mean, inter alia, "(a) the penetration to any extent of, or by any part of the person's genitals with any part of the body of another person".

21. The accused is guilty of rape under section 116 when he *intentionally* engaged in *sexual intercourse* with SF the victim, a child under 16 years old, on the occasion in question.

22. The guidelines for the court in considering the most appropriate sentencing must be premised on the purpose of sentencing and other specific or general considerations set out in great details in sections 277 to 280 of the Act. They are set out below.

277 Kind of sentences

If a court finds a person guilty of an offence, it may, subject to any provision relating to the offence and subject to this Act, do any of the following:

- (a) record a conviction and order that the defendant serve a term of imprisonment;*
- (b) with or without recording a conviction, order the offender to pay a fine; or*
- (c) record a conviction and order the discharge of the offender;*
- (d) without recording a conviction, order the dismissal of the charge for the offence;*
- (e) impose any other sentence or make any order that is authorised by this or any other law of Nauru.*

23. The purposes of sentencing are summarised under section 278 as follows:

278 Purposes of sentencing

The purposes for which a court may impose a sentence on an offender are as follows:

- (a) to ensure that the offender is adequately punished for the offence;*
- (b) to prevent crime by deterring the offender and other people from committing similar offences;*
- (c) to protect the community from the offender;*
- (d) to promote the rehabilitation of sentencing;*
- (e) to make the offender accountable for the offender's actions;*
- (f) to denounce the conduct of the offender;*

(g) to recognise the harm done to the victim and the community.

24. Of general considerations to be taken into account by the court in deciding the appropriate sentence are set out under section 279.

279 Sentencing considerations – general

- (1)
- (2) *In addition to any other matters, the court must take into account whichever of the following matters are relevant and known to the court:*
 - (a) the nature and circumstances of the case;*
 - (b) any other offences required or permitted to be taken into account;*
 - (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character – the course of conduct;*
 - (d) any injury, loss or damage resulting from the offence;*
 - (e) the personal circumstances of any victim of the offence;*
 - (f) the effect of the offence on any victim of the offence;*
 - (g) any victim impact statement available to the court;*
 - (h) the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence or in any other way;*
 - (i) if the person pleaded guilty to the charge for the offence – that fact;*
 - (j) the degree to which the person cooperated in the investigation of the offence;*
 - (k) the deterrent effect that any sentence or order may have on the person or anyone else;*
 - (l) the need to ensure that the person is adequately punished for the offence;*
 - (m) the character, antecedents, age, means and physical or mental condition of the person;*
 - (n) the prospects of rehabilitation of the person,*
 - (o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependants;*
 - (p) if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than another offender or victim of the offence)- those circumstances.*

25. Finally, the court, if it is minded to impose imprisonment on the offender, it should take into account the sentencing considerations set out under section 280.

280 Sentencing considerations – imprisonment

A sentence of imprisonment may be imposed on a person only if:

(a) *In the opinion of the court:*

(i) *the person has shown a tendency to violence towards other people; or*

(ii) *the person is likely to commit a serious offence if allowed to go at large; or*

(iii) *the person has previously been convicted of an offence punishable by imprisonment; or*

(iv) *any other sentence would be inappropriate having regard to the gravity or circumstances of the offence; or*

(v) *the protection of the community requires it; or*

(b) *a sentence of imprisonment is necessary to give proper effect to sections 278 and 279.*

26. The court has carefully assessed both the prosecution and the defence submissions as to the most appropriate sentence the court can impose taking into account the sentencing guidelines set out in the relevant sections of the Crimes Act detailed above.

27. For the prosecution, the court is reminded of the increasing number of cases of sexual offences against children on the island and the need to punish the wrongdoers and perpetrators of such evil deeds. Although there are only a few cases of similar facts under the new Act, it does not lessen the seriousness of the offence. Prosecution referred to the guiding principles that underlie the approach to sentencing for similar offences in other jurisdictions and referred in particular to the Solomon Island High Court case of *Regina v Baomate [2012] SBHC 112* where the court noting the somewhat capriciousness in the range of sentencings for similar offences handed down by the courts there, observed that “... *the sentencing process was a living organism – it grows, develops and adapts to community needs and expectations.*”

28. The community’s needs and expectations that the court speaks of in the *Baomate* case are those I suggest, set out under section 278 of our Crimes Act.

29. The prosecution also referred to the Solomon Islands Court of Appeal case of *Regina v Tebaia [2017] SBCA 7* in its submission of sentencing process and in particular the starting points of sentencing for an offence. The offence in the case was one of rape, both adults, but the victim was the niece of the accused, who also used a knife to threaten the victim.

30. The court summarised the status of the law as to the starting points in case of rape as follows:

“...5 years for the case of an adult with no mitigating or aggravating features; 8 years where the offence was aggravated by the involvement of more than one person, or where it involves illegal entry into the victim’s dwelling house, where the perpetrator is in a position of responsibility to the victim or who holds her captive or abducts her.”

31. The court in that case decided that given that the case involved aggravating elements of breach of trust between uncle and niece, and as well as the use of the knife to threaten the victim into submission, the proper starting point was 8 years. The court then surmised as follows (at paragraph 17):

“Having determined the appropriate starting point for the offence itself, the sentencing must be careful not to use the same elements of the offence by which the starting point was fixed again when identifying aggravating features. In general terms the starting point is assessed on the seriousness of such additional features of the offence itself in the particular case.”

32. Thus on the facts of the *Tebaia* case (supra), the aggravating features is the carrying of the knife and the threat of its use as the starting point, and depending on whether the perpetrator uses it or otherwise will decide whether it is a mitigating or an aggravating element from the starting point.

33. The accused in this present case has admitted the offence and found guilty of digital rape of a child just over 10 years old. Digital rape is the penetration of the genitalia by the use of fingers. The accused had committed the same offence at other times before, according to the victim.

34. Under common law, rape was defined as carnal knowledge of a woman against her will. The definition of sexual intercourse under section 8 of our 2016 Crimes Act has extended and modified the common law crime of rape which now is not gender-specific and generally includes the penetration of the genitalia by a penis, object or part of the body.

35. The starting point for sentence in case of rape on Nauru may differ from that of the courts of the Solomon Islands but the guidelines and the applicable principles are the same.

36. In *Republic v Olsson [2017] 47* Khan ACJ set the starting point of sentence for rape at 16 years where the perpetrator was a 53 old multiple sex offender and the victim was his 7- year old niece.

37. In *Republic v Notte [2017] 53* Crulci ACJ set the starting point for rape at 6 years where the accused was a 21 – year old and a first- time offender and the victim was his 14-year old neighbour.

38. In *Republic v AB [2016] NRSC 29* the court (per Crulci ACJ), preferred 10 years sentence starting point in the case of a 35-year old male accused charged with indecent assault and rape of his 7 -year old step - daughter.
39. Both *Notte* and *AB* were rape cases brought under the old Criminal Code 1899 provisions and the guidelines applicable to them as set out by Lord Lane CJ in *R v Billam [1986] 8 Cr App R 48* are not dissimilar to those under our Crimes Act 2016.
40. In my view, having taken everything into consideration, the fact that this is a case of rape of a child under 13 years old, and the category of rape, that the appropriate starting point for sentence of this and similar offences is one of 6 years.
41. The aggravating or mitigating features will now be considered by the court to arrive at the appropriate sentence, taking into account all the circumstances of this particular case.
42. The prosecution has already alluded to the fact of the rise in the number of rape and sexual offences involving children or persons under the age of 16 years on Nauru. Added to that is the claim by the victim, and not denied by the accused, that the offence had occurred before and that the accused as an adult was in a position of trust in relation to the victim and he breached that trust.
43. For the defence, the court has given due consideration to the mitigating factors counsel submitted, including the applicable provisions of section 279(2) (h), (i), (j), (n) and (o) of the Act on the general sentencing considerations.
44. It is accepted that this is the accused first offence.
45. Important also in the court's view is the fact that the accused had changed his plea to guilty to avoid the possibility of the child victim being called to be examined before the court and the likelihood of further stressful and emotional damage.
46. The court has furthermore taken note of the testimonials as to the character of the accused from his friends and family. The accused, according to them, is a respected member of his district; a very humble and a quiet individual who is always ready to help everyone including strangers. His family including the accused are traditional healers and masseurs on the island and the community usually turn to him and the family when their services are needed.
47. I do not have any doubt as to the sincerity of the character witnesses called by counsel for the accused or their belief in their support of the accused.
48. I am nevertheless mindful that at the end of it all, the accused has admitted to a serious lapse of judgment resulting in an innocent life being traumatised by sexual abuse not once but also at other times.

49. While sexual offences generally are serious crimes, they are even more so when it involves a child which invariably means, child abuse that in turn endangers a child's physical and emotional health and development.

50. The authorities in recognising this concern and acting in accordance with its legal responsibilities under the International Convention of the Rights of the Child, enacted in 2016 our own Child Protection and Welfare Act. Its preamble reads: "*An Act to provide for the welfare, care and protection of all children in Nauru and for the enforcement of the rights of children as provided by the international conventions, norms and standards, while taking into account of Nauru culture, traditions and values.*"

51. It behoves this court, in recognition of the clearly stated goals of the government to abide by its legal responsibilities and its obligations under the relevant international conventions and instruments, to ensure that the laws of the land on child welfare and protection are strictly enforced.

52. What makes the episode even more distressing is, and this is readily conceded by the accused himself, that there are two child victims to this sordid affair, the victim SF and, the 8- year old daughter of the accused himself, a victim too, and who has sat quietly by her father's side right throughout this trial. This court cannot begin to imagine what explanation the accused has made to his daughter as to why they are in court nor of any consequences that she will in turn bear, the results of this proceedings.

53. In this regard, the court is grateful to the prosecution for working hard to get the very helpful victim's impact report. Notwithstanding the distressing and disturbing experience, the victim SF went through, I am also impressed with the very responsible and understanding way she seems to view her experience and what the future holds for her, considering that she is just past the age of 11. The victim has a very positive outlook of life and we can only wish her well for the future.

SENTENCE

54. There is no avoidance of a sentence of imprisonment for the accused. The starting point as stated above, is 6 years.

55. For the fact of the accused being remorseful knowing and admitting his grave mistake and that, by pleading guilty, the victim avoided being asked to testify and in the process re-live the terrible experience she had undergone, the court will deduct 6 months.

56. The fact that he is a first offender that he is the father of an eight- year old daughter, and that he had cooperated fully with the investigation, the court will deduct a further 6 months from the sentence.

57. The court will also take into consideration the fact that the accused had been in remand from 18 September 2018 to 18 January 2019, a period of 4 months. This too will be deducted from the totality of the sentence.

58. It is the sentence of this court that the accused be imprisoned for a term of 6 years less the 16 months discount to be applied, making the total sentence of the accused of 4 years and 8 months.

Dated this 9th day of August 2019.

