



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 1 of 2019

BETWEEN

Republic

V

Damoon Akibwib

Before: Khan, J
Date of Sentencing Submission: 20 and 21 February 2020
Date of Sentence: 24 February 2020

Case may be cited as: *Republic v Akibwib*

CATCHWORDS: Criminal Law – Sentence for rape where complainant was asleep – Whether guilty plea attracts a discount in the sentence.

APPEARANCES:

Counsel for the Prosecution: S Serukai
Counsel for the Defendant: R Tagivakatini

SENTENCE

1. You have been convicted for one count of rape contrary to s.105 of the Crimes Act after two days of trial. This is a very serious charge which carries the maximum penalty of 20 years imprisonment.

FACTS

2. The complainant had been drinking vodka (AK 47) from 1 to 2 am on 26 December 2018 in Boe District with her friends. At around 2am she and her friends moved to Meneng District where further drinking took place. At daybreak the complainant, her friends and others moved to your mother's house known as Akibwib's residence in which you occupy a room downstairs.
3. At your place everyone drank more vodka.
4. The complainant was with a person by the name of Billy and they were getting intimate. Billy requested you to use your room and you led Billy and the complainant to your room at around 12 noon to 1pm.
5. Once they got into your room, they saw a person by the name of Acsi sleeping on the floor. After you left, they locked the door and had sexual intercourse on your bed. Thereafter they put their clothes back on. The complainant was wearing a bra, a shirt, her panties and her knee length jeans and both the complainant and Billy went off to sleep on your bed.
6. After sometime the complainant woke up as she felt being squashed and uncomfortable. When she woke up she found that Billy had left and you were on top of her and you had inserted your penis in her vagina. She repeatedly asked you to stop but you continued to have sexual intercourse with her. She was asked as to how she recognised your face. Her response was:

"Because that day was a nightmare to me when I looked up and saw his face on top of me. I can never forget his face that I saw."
7. Despite her repeated attempts to ask you to stop and her attempts to push you off she was unable to do so as she felt weak and helpless and again fell off to sleep.
8. Subsequently the matter was reported to the police and you were questioned by the police and you made no admission.

COMPLAINANT'S WELFARE

9. Unfortunately, you had no regard for the complainant's welfare when you committed this sexual act. It was all about you and your sexual gratification. Subsequently when you were questioned by the police you made no admissions and as a result she was forced to relive through the entire incident as a witness in the trial and further you instructed your counsel to suggest to her that she was mistaken as to your identity.
10. When it was your turn to give evidence, you made an admission of performing oral sex on her, however, you still disputed that you had penile sexual intercourse. The complainant's version of the incident was that when she woke up, you had inserted your penis in her vagina. She did not give any evidence of oral sex being performed on her as she was asleep.

11. Your admission cannot be accepted as being remorseful as it was not a full admission and it was made when the trial was almost over.
12. What I find very disturbing about your act is that the complainant trusted you and others around her. She had only met you on that day. She was interested in Billy and you allowed them to use your bedroom and you took advantage of her when she was not in a position to protect herself. She was your guest, if I may say so, and you were obliged to protect her but you took advantage of her when she was in a very vulnerable condition.

VICTIM IMPACT REPORT

13. This incident has affected the complainant very badly. She hates you now and she stated in her report that she wanted to kill you because of this incident. Fortunately, with the support of her family and her boyfriend she is slowly recovering but her whole lifestyle has changed. She was a very outgoing person but now she has become very selective. She stated in her victim impact report:

“I am fine but every time I see his face I am reminded of what he did to me and I get very angry at him and want to kill him.”

MITIGATING FACTORS

14. There is hardly any mitigating factor in this case. You are 30 years old and a first offender.

TARIFF

15. The sentencing range for this kind of offence varies from 8 to 12 years.
16. I sentence you to 8 years imprisonment.

DISCOUNT FOR GUILTY PLEA

17. In *R v Mathew Batsiua and others*¹ Fatiaki J stated at [8] and [9] as follows:

“[8] ...the defendants have pleaded guilty. The effect of guilty plea is that each defendant is saying to the Court ‘I am guilty and I am sorry’. This is a powerful mitigating factor ... A guilty plea is also indicative of remorse on the part of the defendants ... on 24 & 25 April 2017 the appeal was heard in the Supreme Court of Nauru before ACJ Khan, who upheld the Republic’s appeal and re-sentenced the co-offenders on 2 May 2017, substantially increasing their sentences (see: Republic of Nauru v Jeremiah [2017] NRSC 26) ... and later (at para. 90) in dealing with ‘pleas of guilty’, he adopts the guideline set out in the judgement of Spigelman CJ in R v Thomson and Houlton [2000] 49 NSW LR 383 where the learned judge states:

¹ Criminal Case No. 12 of 2017 and 8 of 2018

'A sentencing Judge should explicitly state that the plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight;

Sentencing Judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so;

the utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 percentage discount on sentence. The primary consideration determining where it is in the range of a particular case should fall in the timing of the plea ... ;

In some cases, the plea in combination with other factors, will change the nature of the sentence imposed. In some cases the plea would not lead to any discount."

18. In *R v Olsson*² Khan ACJ it was stated at [30] as follows:

[30] There are hardly any mitigating features in this case except an early guilty plea for which I give a discount of 20% which reduces the sentence for the first count to 12 years and ten months. He has been in custody for 5 months and I will reduce his sentence for the time spent in custody so the total sentence will be 12 years and three months.

19. In *R v Aku and others*³ a sentence of 8 years was reduced by 1 year (12½ percent) and at [28] it was stated:

[28] Mitigating features including the fact that all of them are remorseful and also the fact that they are all first offenders, the Court will reduce the sentence by two years. Their early guilty plea and their assistance to the police in its investigation reduces the sentence by a further year.

20. As can be seen from the above cases, an early guilty plea attracts a discount in the range of 12 to 20 percent and in your case if you had made a full admission your sentence of 8 years could have been reduced by up to 20 percent, but you have lost that opportunity.

ALCOHOL

21. One issue that I wish to highlight in this case is that when the drinking took place at your house – some 10 to 12 bottles of vodka was consumed. I do not have before me the exact time as to when the alcohol was purchased but it appears that some was bought outside of the trading hours.

² Criminal Case No. 1 of 2017

³ Criminal Case No. 26 of 2017 Jitoko CJ.

22. In other cases that I have presided over alcohol is purchased with a great deal of ease even at all hours which would suggest that 'boot legging' exists. Unfortunately, excess consumption of alcohol leads to undesirable conducts ending up in criminal activities.
23. If 'boot legging' does exist then I would suggest that appropriate enforcement actions should be taken to curb this.

CONCLUSION

24. You spent a period of 20 days in custody before you were released on bail and I order that that is to be deducted from your 8 years imprisonment.

DATED this 24 day of February 2020



Mohammed Shafiullah Khan
Judge

