



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

Criminal Case No. 01 of 2024

BETWEEN: THE REPUBLIC PROSECUTION

AND: ALPHONSO KANIMEA ACCUSED

BEFORE: Keteca J

Date of Submissions: 31st May 2024

Date of Ruling: 14th June 2024

Case may be cited as: Republic v Alphonso Kanimea

Catchwords: Rape of a child under 16 years old- Section 116(1)(a)(b) Crimes Act 2016, Power to reduce penalties

Appearances:

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

Counsel for the Accused: **R. Tagivakatini**

SENTENCE

INTRODUCTION

1. On 24th April 24, Alphonso Kanimea, you pleaded guilty to the charge of 'Rape of a Child under 16 years old' contrary to section 116(1)(a)(b) of the Crimes Act 2016. You also admitted the Summary of Facts that was read out and filed in court.

FACTS

2. The facts of this case are as follows:
 - i. On the night of 29th December 23, the accused, who was drunk, went to the house of the victim's father. He asked for food. After eating, the victim's father went and dropped the accused at Ewa District;
 - ii. At 1am, 30th December 23, the accused returned to the victim's house. He asked for more food. He ate and left.
 - iii. The victim, MP.Q was sleeping in her room with her sister and cousin. 'She lay on her stomach and head facing down.' The accused went into the room. He slapped the victim on right cheek and on her forehead.
 - iv. The accused took off the victim's underwear and her pants. He touched her buttock. The defendant" used his finger to penetrate inside of the victim's anus (butthole).
 - v. MP.Q screamed in pain and cried. The accused 'closed her mouth using his hand.' He then ran outside the room.
 - vi. The victim's father saw the accused naked from the waist down.
 - vii. The accused ran away from the scene.

PENALTY

3. Section 116(1)(a)(b) of the Crimes Act 2016 provides:

'(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: life imprisonment, of which imprisonment term at least 15 years to be served without any parole or probation.

SENTENCING SUBMISSIONS

4. Both counsels submitted helpful submissions.
5. Ms Suifa'asia submitted as follows:
 - i. The accused is 25 years old and the victim, 11. They are related. There is an age disparity and a breach of trust.
 - ii. The accused had, earlier on that night asked the victim's father for food. This was provided to him. He was under the influence of alcohol. He reciprocated this kind deed by committing this offence when the victim was asleep in her own home.
 - iii. Three cases were referred to. In the first two cases, the accused persons were charged and convicted of the same offence of Rape of a child under 16 years contrary to section 116(1)(a) (b) of the Crimes Act 2016.
 - iv. In *R v Amwano* [2020] NRSC 28, the accused and the 14year old victim were first cousins. The victim was sleeping. The accused inserted a finger into the victim's vagina.

- v. The accused pleaded guilty. **He was sentenced to seven years imprisonment for the rape and three years concurrent term of imprisonment for indecent assault.**
- vi. The accused served a total sentence of 5 years and six months.
- vii. In *R v Daniel* [2022] NRSC 15, the accused was the biological father of the victim. She was six years old at the time of the incident.
- viii. The accused took his daughter into a room. He locked the door. He laid her on the bed. He licked her vagina.
- ix. Other siblings of the victim knocked on the door. The accused did not open it. The mother of the victim peeped through a window of the room. She saw the accused licking the victim's vagina. The wife removed the accused from the house.
- x. The accused pleaded guilty.
- xi. **He was sentenced to life imprisonment.** He has to serve 16 years before he will be eligible for parole or probation.
- xii. In *R v Harris* [2021] NRSC 44, the accused was convicted of the offence Causing a child under 16 years to engage in sexual activity contrary to Section 118 (1) (a) (b) (c) (iii) of the Crimes Act 2016.
- xiii. The accused was 27 years old. The victim, 11 years old.
- xiv. The accused asked the victim to accompany him to fetch water at his parents' house. The victim fetched some water. The accused did his laundry.
- xv. The accused then called the victim into the house. They lay on a bed. He kissed the victim. He then left to complete his laundry.
- xvi. After completing his laundry, the accused called the victim into the same room. He kissed her again. He pulled down his trousers and put his penis in the victim's mouth.
- xvii. Their uncle came into the house. The accused ran out naked. The victim relayed the ordeal to her uncle.
- xviii. The accused pleaded guilty to the charge. **He was convicted and sentenced to life imprisonment.** Fifteen years had to be served before he would be eligible to parole or probation.
- xix. The court observed: "Your only recourse to seeking an early release before 15 years prison term is to seek the grant of pardon by the President under Article 80 of the Constitution.

- 6. Counsel for the prosecution then referred to *R v Harris* above, where A/CJ Khan considered *Bahar v The Queen* [2011] WASCA 249 where the court considered the interaction of statutory minimum penalties for offences against the Migration Act ;1985 (Cth) w 160.
- 7. At [54] *The statutory maximum and minimum also dictate the seriousness of the offence for the purpose of s 16A(1). It would be.. inconsistent with the statutory scheme for a sentencing judge to make his or her own assessment as to the "just and appropriate" sentence ignoring the mandatory minimum or mandatory maximum penalty and then to impose something other than a "just and appropriate" sentence (whether as to type or length) in order to bring it up to the statutory minimum or down to the statutory maximum, as the case may be. The statutory minimum and statutory maximum penalties are the*

floor and ceiling respectively within which the sentencing judge has a sentencing discretion to which the sentencing principles are to be applied (emphasis added).

8. At [58] *Where there is a minimum mandatory sentence of imprisonment the question for the sentencing judge is where, having regard to all relevant sentencing factors, the offending falls in the range between the least serious category of offending for which the minimum is appropriate and the worst category of offending for which the maximum is appropriate (emphasis added).*
9. Counsel further submits that for the offence of Rape of a Child under 16 years of age, it “attracts a mandatory life sentence with a minimum of 15 years imprisonment.”
10. She adds that the facts in the R v Amwano case, is similar to this case against Alphonso Kanimea. In R v Amwano, the factors that were considered:
 - i. The accused pleaded guilty to the act of digital rape;
 - ii. First time offender and he was remorseful;
 - iii. They were cousins and there was a disparity in their ages- the offender 20 years old and the victim 14 years old;
 - iv. The victim suffered emotional and psychological harm.
11. Counsel concludes that the sentence to be given in this case is to reflect the sentencing principles in section 277 of the Crimes Act 2016.

COUNSEL FOR THE DEFENCE

12. Mr Tagivakatini submitted as follows:
 - i. The accused is remorseful and acknowledges that what he did was wrong.
 - ii. He accepts the seriousness of the offending and understands “that these offences attract heavy custodial sentences.”
 - iii. The accused “has had time to reflect on his actions whilst on remand and does not wish for the victim to relive the trauma in court.”
 - iv. Counsel also referred to *R v Harris* [2021] NRSC 44 and *R v Daniel* [2022] NRSC15.
 - v. The accused ‘offers no excuse nor has he tried to justify his actions.’
 - vi. Counsel submits that the most relevant case authority is *R v Harris* above and the sentence delivered in that case would be appropriate for accused here.
 - vii. This would ensure that the court complies with ‘the October 2020 amendments to the Crimes Act 2016.
 - viii. Under section 277 of the Crimes Act 2016, the court has a discretion to record a conviction or not.
 - ix. This offence warrants a conviction.
 - x. A minimum term of 15 years imprisonment should be imposed here.

PRE- SENTENCE REPORT

13. I have considered the Pre- Sentence Report submitted by the Chief Probation Officer. On 10th June 24.

14. I have also considered the Victim Impact Statement. In summary:

- She thinks a lot of what happened to her. She becomes scared each time she thinks about it.
- *She believes that the accused should not be allowed out of prison.*
- Her mother says that the victim used to be active. She likes to be by herself now. The victim has changed from a normal child to one that is withdrawn

THE LAW

Kinds of Sentences under the Crimes Act 2016

15. Section 277 provides:

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

- (a) record a conviction and order that the offender serve a term of imprisonment;
- (b) with or without recording a conviction, order the offender to pay a fine;
- (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;
- or
- (e) impose any other sentence or make any order that is authorized by this or any other written law of Nauru.

Purposes of Sentencing

16. The purposes for sentencing provided under section 278 are:

- (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 the offender;
- (e) to make the offender accountable for the offender's actions;
- (f) to denounce the conduct of the offender; and
- (g) to recognize the harm done to the victim and the community.

17. The above provisions codify the common law sentencing principles of deterrence, totality and parity.

18. The general sentencing considerations are set out in section 279.

19. The sentencing considerations for imprisonment are set provided in section 280. The court notes that this Section 116 Rape of a Child offence prescribes a mandatory imprisonment sentence.

20. The court has the power to reduce penalties under section 282. It provides:

- (1) Where, under this Act, an offender is liable to life imprisonment, a court may nevertheless impose a sentence of imprisonment for a stated term.

- (2) Where, under this Act, an offender is liable to imprisonment for a stated term, a court may nevertheless impose a sentence of imprisonment for a lesser term.

Entering of Conviction

21. Considering the provisions of the Crimes Act 2016 above and the submissions from counsels, I **convict you accordingly**.

Maximum Penalty

22. The legislature provides that the penalty for this offence is life imprisonment with fifteen years to be served without any parole or probation.

23. On the relevance of maximum statutory penalties, the High Court of Australia, in *Markarian v The Queen*¹ said:

“Careful attention to maximum penalties will almost always be required, *first because the legislature has legislated for them; secondly because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they provide, taken and balanced with all relevant factors, a yardstick.*”

24. The increase in the penalty for this offence, and other offences under the Crimes Act 2016, came about on 23rd October 2020. It reflects how Nauru society, through their representatives in the legislature condemn this type of offending.

25. As stated by Kirby J in *Ryan v The Queen*²:

“A fundamental purpose of the criminal law, and of the sentencing of convicted offenders, is to **denounce publicly** the unlawful conduct of the offender. This objective requires that a sentence should **also communicate society’s condemnation of the particular offender’s conduct**. The sentence represents “a symbolic, collective statement that the offender’s conduct should be punished for encroaching on our society’s basic code of values as enshrined within the substantive criminal law.” (my emphasis)

How about the Courts power to reduce penalties under Section 282?

26. Section 282 of the Crimes Act 2016 provides:

- (1) Where, under this Act, an offender is liable to life imprisonment, a court may nevertheless impose a sentence of imprisonment for a stated term.
- (2) Where, under this Act, an offender is liable to imprisonment for a stated term, a court may nevertheless impose a sentence of imprisonment for a lesser term.
- (3) Where, under this Act, an offender is liable to a fine of a stated amount, a court may nevertheless impose a fine of a lesser amount.
- (4) The power conferred on a court by this Section is not limited by any other provision of this Division.
- (5) This Section does not limit any discretion the court has, apart from this Section, in relation to the imposition of penalties.

¹ (2005) 228 CLR 357

² (2001) 206 CLR 267 at 302

Should the Court Award a Sentence Less Than Life Imprisonment?

27. To answer this question, I refer to the sentencing considerations under Section 279 of the Crimes Act 2016. The following are relevant:

- **Section 279(2)(a)-*The nature and circumstances of the offence-*** the accused was drunk. He asked the victim's father for some food. He ate. He went away. He came back and asked for some more food.
- He was given more food. After finishing his food, he raped the victim, the child of the person who had given him food.
- *The court notes that this is one of the ugliest and ghastliest form of reciprocity.*
- **Section 279(2) (f), (g)- *The effect of the offence on the victim & Victim Impact Statement-*** The victim has suffered psychologically. She is no longer the normal child that she was. She is now withdrawn and is scared each time she thinks of the incident.
- In her words- 'the accused should not be allowed out of prison.'
- **Section 279(2)(i)-** The fact that the accused pleaded guilty.

28. Considering the matters in paragraph [30] above, the cases submitted by counsels, in particular *R v Harris* [2021] NRSC 44, the intent of the legislature that reflects the Nauru society's condemnation of sexual offences against children, I am of the firm view that this is not an appropriate case where the court should impose a sentence of imprisonment for a stated term.

SENTENCE

29. You are sentenced to life imprisonment. You shall serve at least fifteen years before any parole or probation.

30. This sentence communicates Nauru society's condemnation of your conduct and represents '*a symbolic, collective statement*' that when one commits any sexual offence against a child, such a person will go to prison for a very long time.

DATED this 14 day of June 2024


Kiniviliame T. Keteca
Judge

