



IN THE DISTRICT COURT OF NAURU
CRIMINAL JURISDICTION

Criminal Case No. 7 of 2018

THE REPUBLIC

Complainant

V.

AD

Defendant

Before: RM Penijamini R. Lomaloma
Prosecutor: Ms. Laisani Tabuakuro
Defence: Mr. Ravunimasei Tagivakatini
Date of Hearing: 21 May 2018
Submissions: 29 May 2018
Sentence: 1st June 2018

SENTENCE

Catchwords: *Sentence—Indecent treatment of girls under 17; section 216 of Criminal Code 1899; consecutive sentences;*

Introduction

1. You pleaded guilty 2 counts of Indecent Treatment of Girls Under 17: contrary to section 216 of the Criminal Code 1899. You pleaded guilty as soon as the summary of facts was provided on 21st May 2018. The offending took place between the 1st and 31st of December 2012.

Name Suppression

2. The victims in this case were your daughters aged 15 and 10 at the time of the offending. Pursuant to section 55(b) of the Child Protection and Welfare Act 2016, I order that the names of the victims shall not be published and your name shall not be published either to prevent their identification being made known. Further, no information shall be made public that can identify your children. The older child shall be called DI and the younger known as DR.

The Facts

3. In count 1, you admitted that sometime between the 1st of December 2012 and the 31st of December 2012, you entered the bedroom of your older daughter, DI whilst she was asleep. You laid down behind her, and reached over, and with intent to indecently assault your daughter, placed your hand on her breast, moved your hand towards her vaginal area and fondled her vagina over her undergarment. You then placed your hand inside her undergarment and fondled her clitoris. You did this on at least 2 separate occasions and you would leave her room after assaulting her. At the time of the offending, your older daughter DI was 15 years old.

4. In the second count, you admitted that sometime between the 1st of December 2012 and the 31st of December 2012, you entered the bedroom of your younger daughter, DR whilst she was asleep. You laid down behind her, and reached over, and with intent to indecently assault your daughter, placed your hand on her breast, moved your hand towards her vaginal area and fondled her vagina over her undergarment. You then placed your hand inside her undergarment and fondled her clitoris. You did this on several occasions and each time you would leave her room after the assaults. At the time of the offending, your younger daughter DR was 10 years and 2 months old.

The Submissions

5. Ms Tabuakuro made substantial and very helpful submissions on the sentences for this offence from the Supreme Court of Queensland that exemplify the principles to be applied and the actual sentences passed. In *R v AAR [2014] QCA 20 (21 February 2014)*, the Court of Appeal traversed sentences in about 15 cases from Queensland and Western Australia for this offence. In those cases, the maximum sentence was 20 years for contact with the victim such as licking her vagina and 10 years imprisonment for non-contact form of this offence.
6. However, in *Barbaro v The Queen; Zirilli v The Queen*¹ the High Court of Australia by a majority decision said that it would be impermissible to make submissions on the range of sentences available to the Court in sentencing submissions. The majority identified the roles of the prosecutor in sentencing is to put the facts before the court whose job it is to exercise its discretion by applying the principles of sentencing to the facts. By suggesting the range of sentences from other cases, the prosecution is expressing an opinion on what the outer bounds of the sentence should be and therefore is intruding into the task of the sentencing judge. The majority said however that the range of sentences should be used as a yardstick:

*As the plurality pointed out in Hili v The Queen in seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. **The history stands as a yardstick against which to examine a proposed sentence.** What is important is the unifying principles which those sentences both reveal and reflect. And as each of Buchanan JA and Kellam JA rightly observed] in MacNeil-Brown, the synthesis of the "raw material" which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge, not counsel.²*

[references deleted] (emphasis mine)

7. In *The Queen v Pham [2015] HCA 39*³, the High Court of Australia, a few months after *Barbaro* (supra) was decided said at paragraph 27:

(1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently.

¹ [2014] HCA 2, [2014] HCA 2 (12 February 2014) particularly at paragraphs [6] – [7], [39], [40] & 41 per (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

² Ibid at para 41.

³ (4 November 2015)

(2) The consistency that is sought is consistency in the application of the relevant legal principles.

(3).....

(4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form.

(5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided.

(Inapplicable sub-paras deleted)

8. An examination of the sentencing portion of R v AAR [2014] QCA 20 (21 February 2014), and the cases cited therein reveal that the gravity of the offending is increased or aggravated by:-
- a. touching the external genitalia of the victim;
 - b. contact between the defendant's penis and the external genitalia of the victim;
 - c. rubbing the penis on the external genitalia of the victim;
 - d. penetration of the external genitalia of the victim;
 - e. penetration of the vagina by a part of the defendant's body such as a finger or tongue;
 - f. use of threats;
 - g. use of force;
 - h. masturbating to ejaculation in front of the victim;
 - i. performing oral sex or cunnilingus on the victim;
 - j. the younger the victim, the more grave the offending;
 - k. any breach of trust and the degree of trust reposed in defendant; and
 - l. there is a big difference in age between the defendant and the victim.
9. If the victim and the defendant are related, or in another position of trust, the seriousness is increased depending on the degree of trust involved. This list is not exhaustive.

The Yardstick

10. In Republic v ND⁴ the 23 year old defendant was sentenced to 22 months imprisonment. The victim was 6 years old. Unfortunately, the particulars of the offending were not given in the sentence. In Republic v Namaduk [2012]⁵ the defendant was 24 years old and the victim was 15. He was initially charged with rape but this was reduced to indecent treatment of a girl under 17 when it was discovered he had sexual intercourse with her with her consent. He was sentenced to 150 hours of community service. The defendant and the victim were not related.
11. From R v AAR [2014] QCA 20 (21 February 2014), and the cases cited therein, the sentences for offences with similar facts to your case are:
- a. R v SAQ [2002] QCA 221.—3 years sentence upheld but Wilson J said this was at the top end of the range. The 41 year-old offender was the uncle by marriage of the 7 year old victim. The offender placed his hands inside her underpants and touched her on her vagina on 5 separate occasions. No force or threats were made.

⁴ (Cr. No. 19 of 2015 (unreported)).

⁵ NRSC 5 (13 March 2012)

- b. *R v Schrimmer [1995]*⁶. The victim was 9 years old and he touched the outside of her vagina (no penetration). The events were isolated, unpremeditated and they occurred within a relatively short period of time. There was no evidence of any threats or violence, no evidence of harm to the child and the appellant was not in any position of trust. The sentence was reduced from 3 years to 2 years when the maximum sentence was 10 years. Ambrose J, who wrote the judgment of the Court, said:

“It was contended, in my view correctly that acts constituting the offences were to be found at the lower end of the range of seriousness, touching her only on the outside of her vagina. There was no gross behavior sometimes accompanying such offences relating to perhaps oral sex or ejaculation or rubbing parts of the applicant’s body parts on the complainant.”

12. The sentences above would have to be scaled down because of the lower maximum sentences for this offence in Nauru but the scaling is not proportional to the length of maximum sentences but only as a yardstick.

The Seriousness or Gravity of the Defendant’s Offending

13. The starting point is to look at the gravity or seriousness of your offending which is the measure of the culpability of your offending with negligence at the bottom, followed by reckless indifference to consent, recklessness, knowledge and with intentional acts at the top. This was an intentional act and therefore highest on the culpability scale.
14. The harm caused to your daughters includes psychological harm. There was no victim impact statement with this offending and any attempt to do it now, 5 years after the offences took place would reopen the wounds. However, the Court can infer from the facts that the victims would have suffered shock and psychological harm from your offending, particularly in view of that they are your daughters.

Aggravating Factors

15. The aggravating factors of your offending in the first count are:-
- a. You touched the external genitalia of your daughter DI;
 - b. You penetrated the outer genitalia and fondled her clitoris;
 - c. You breached the trust that your daughter had in you;
16. The aggravating circumstances of the second count are:-
- a. You touched the external genitalia of your younger daughter DR;
 - b. You penetrated the outer genitalia and fondled her clitoris;
 - c. You breached the trust that your daughter had in you;

Personal Circumstances

17. You are 58 years old and are separated from your wife and live with your 3 children. You are employed and you contribute financially to the living expenses of your children. Your oldest daughter is now working.

Mitigation

⁶ QCA 242

18. In mitigation, your counsel submitted that you are remorseful; that you pleaded guilty at the first opportunity and that your plea has saved your children from having to relive their ordeal in a trial; that you are a first offender; and that you fully co-operated with police and admitted the offences.

Your Sentence

19. The maximum sentence for the first count, is 2 years imprisonment with hard labour. The maximum sentence for the second count, where the victim is under 12 years old, is 3 years imprisonment with hard labour, with or without whipping.
20. First Count. I have taken account of your culpability and the harm and considered your offending in both counts to be at the lower end of the scale of seriousness. This has been raised by the aggravating factors listed above to beyond the mid-point of the seriousness scale. I have taken account of the fact that you admitted 2 other incidence of the same offence against your older daughter in count 1 that you were not charged them. I have taken account of the matters offered in mitigation in particular your early guilty plea saving your daughter from having to give evidence and I sentence you on the first count to 12 months imprisonment.
21. Second Count. I have taken account of your culpability and harm for the second count against your younger daughter and consider your offending to be at the lower end of the seriousness scale. This has been pushed up to beyond the mid-point by the aggravating factors and reduced to about mid-point by the mitigating factors. I also take account of the other acts of the same offence which you were not charged with but which you admitted and I fix your sentence for the second count, which carries a maximum sentence of 3 years, to 14 months imprisonment.
22. You committed these offences against two different victims and I therefore order that your sentences be served consecutively.

Orders

23. You are sentenced to:-
- 12 months imprisonment for the first count;
 - 14 months imprisonment for the second count;
 - The second sentence is to be served consecutive to the first sentence.
 - You have 14 days to appeal.



PENIJAMINI R. LOMALOMA
Resident Magistrate

