IN THE SUPREME COURT OF NAURU

CRIMINAL CASE NO. 1/2001

THE REPUBLIC

V

ANDY DOGUAPE

The D.P.P. for the Republic
Leo Keke for the Accused

Dates of Hearing : 7 and 11 September 2001
Date of Decision : 12 September 2001

JUDGMENT OF CONNELL, C.J.

The accused pleaded guilty to two charges, namely:

1. Unlawful and Indecent Assault: c/s 350 of the Criminal Code Act of Queensland 1899 (Adopted)

2. Unlawful and Indecent Dealing: c/s 216 of the Criminal Code Act of Queensland 1899 (Adopted).

The trial proceeded against the accused on two charges, namely:

1. Rape: c/s 347 of the Criminal Code Act of Queensland 1899 (Adopted)

2. Unlawful Carnal Knowledge: c/s 215 of the Criminal Code Act of Queensland 1899 (Adopted).

The victim in this action was a young girl, aged nine years, Linda Deraudag. Now in Grade 5 at Kayser College, she was a believable witness of the events of the night of April 19. 2001. She gave her evidence clearly and straightforwardly, though the events were exceedingly traumatic for her.

Her evidence disclosed, inter-alia, the following facts which I accept-

1. On the night of April 19, 2001 sometime apparently after midnight whilst outside her home she engaged in discussion with the accused, Andy Doguape, whom she knew as he often went to her neighbours. After some time, he wished to entice her to his car but she

was most reticent to do so. Then he came over and pushed her into the car. She tried to get out but could not.

2. When the accused's sister came towards the car and asked, "where is Linda", the accused replied "not here" and that she had already gone to her house. He, at that point, was in the driver's seat, whilst she was in the front seat on the floor where she had been told to be and not to make a noise.

3. The accused then drove the car away and went to the Location. On the way, he asked Linda to look for a knife either under the seat or in the pocket of the car. Linda found it in the pocket of the car. She gave him the knife. He then told her not to tell anyone about the event and that if she did, he would stab her with the knife.

4. In the Location, he stopped his car and ordered her out of the car on the driver's side. The car was outside some house, which later turned out, on the evidence of the police, to be the old Filipino Mess Hall. The accused then opened the door with either the key or the knife and went inside with Linda.

5. Once inside, the accused took off his clothes and stripped Linda of her pants and underclothing. He then began sexually abusing the girl.

6. The accused poked his finger into Linda's vagina more than once. At this time Linda noticed that his penis was erect. Soon after the accused tried to enter her vagina but he was unable to penetrate her. He kept trying but did not succeed. The accused then told her to hold his penis and try to arrange to enter her but the penis did not penetrate.

7. At that point, the accused told Linda to suck his penis. She then did so and she felt so sick she wanted to vomit but the accused told her to continue sucking. The accused stated to her that if she stopped sucking he would try to penetrate her again.

8. The accused then pulled her on her back again and tried to penetrate her but when he wasn't able to penetrate, he pushed his finger right into her vagina and tore her inside. Again he got on top of her and tried again to penetrate but did not succeed.

9. Then suddenly three policemen broke into the room. They arrived when the accused was physically lying on top of Linda and attempting to penetrate her. The two police who gave evidence remarked that they were led to the spot by the girl's screams of pain.

10. The accused, still naked, was stood up and handcuffed. Linda was assisted to dress. The police noticed that Linda was bleeding between her legs and Sergeant Detabene noticed blood on the penis of the accused. Linda was immediately taken to the hospital.

11. The evidence from Dr. Kieren Keke was that upon arrival the young girl was distressed and crying. There was blood on her thighs and between her legs with some active bleeding and clots in vagina. To carry out a full examination it was necessary to give her, with consent of her mother, a general anaesthetic.

12. Under the general anaesthetic, Linda was examined and there was found two large vaginal wall lacerations, which were bleeding actively. The lacerations were sutured. The posterior vaginal wall laceration extended towards but did not involve the rectum.

13. Dr. Keke gave the opinion that the damage to Linda in the vagina was caused by penetration of an object into the vagina. The tears in the vagina were akin to those suffered by women during childbirth. He further gave the opinion that the damage was not caused by a single finger but was considered with an adult penis. It was his opinion that the damage resulted from the diameter of the object inserted.

14. The victim, Linda Deraudag, at the time of the attack was nine years old, having been born on 30 May 1991. The accused, approximately thirty years of age, is a married man with a young family comprising two boys, four and three years of age, and a girl, one year old.

15. The defence did not challenge the above facts to any degree. The accused produced two witnesses, his sisters who made some assertions that the accused had been hurt by the police at the crime scene. They also produced for the Court some family history, particularly, of the accused.

So far as both charges are concerned both require "carnal knowledge" which under section 6 of the Criminal Code Act is complete

upon penetration. The charge of rape requires an absence of consent by the victim in accordance with section 347 of the Criminal Code Act, but, consent is not a factor in section 215 where it is unlawful to have carnal knowledge if the girl is under seventeen. Section 215 of the Criminal Code Act has an alternative prong to it in sub-paragraph (1) where a person who attempts to have unlawful carnal knowledge is also guilty of the same misdemeanour as one who has unlawful carnal knowledge.

Further, whilst the crime of rape is spelt out in Section 349 of the Criminal Code Act, by section 130 of the Nauru Criminal Procedure Act 1972 where a person is charged with an offence, he may be convicted of having attempted to commit that offence, although he is not charged with the attempt. Section 349 of the Criminal Code Act provides the crime of an attempt to commit the crime of rape.

In relation to consent the defence did not challenge that there was no consent. ***R v Harling*** [1988] 1 All ER 307 establishes that the question of absence of consent is rarely an issue once the youth of the victim is established. However, in this instance, it is fortified by the fact of the uncontroverted evidence that the girl entered the car against her will, was

abducted and was informed on the car ride that she would be stabbed if she told anyone, and was taken to a deserted building and held there by a strong adult and sexually active male. She was in no position to decide whether to consent or resist. She had no option in such a terror situation but to comply.

On the question of penetration, it is law, that only a small penetration is required. Some jurisdictions have changed this law so that the insertion of a finger in the vagina or putting the penis in the mouth of the victim will constitute rape. However, that is not the present situation under Nauru law. The defence drew attention to the fact that on four occasions Linda denied that the accused penetrated her though he made every attempt. The tearing of her vaginal walls she attributed to rough handling by the accused's hand rather than his penis. The police evidence which corroborated the incident and the opportunity was not sufficient in itself to establish that there was penetration apart from the report of blood on the accused's penis, but, this could have occurred from contact with her then bleeding vagina which had spread to her thighs. However, the view of the doctor that it was the diameter of an erect male penis rather than fingers which tore the vaginal wall had to be considered. On this point, the

D.P.P. suggested that the evidence of Linda perhaps lacked sophistication as to what was required in the term penetration. Whatever the situation, it would be unsafe to take such a course and it is not beyond reasonable doubt that penetration took place. I,therefore, accept the evidence of Linda that there was no penetration.

However, to prove an attempt it is not necessary for the accused to have achieved penetration.

In terms of the Criminal Code Act 1899, if penetration cannot be satisfactorily proved, the accused may be convicted of attempted rape. ***R v Ball*** [1948] St. R Qd 212. Also note Section 130 of the Nauru Criminal Procedure Act 1972. An attempt under the Criminal Code Act is covered by section 4. In ***R v Williams; ex parte Minister for Justice and A-G*** [1965] Qd. R. 86 the matter of attempted rape was considered by the Queensland Court of Criminal Appeal. Stable J there adapted the following statement of Dr. Norval Morris in 1955 Crim. LR at 293 where he said –

> "The test which the Courts, both in England and Australia, seem to apply though it is formulated in the textbooks rather than in judicial pronouncements is one by which the actus reus

> necessary to constitute an attempt is regarded as complete if the prisoner does an act which is a step towards the commission of the specific crime and that act cannot reasonably be regarded as having any other purpose than the commission of that specific crime".

What is preparation and what is attempt must depend on the facts of each particular case.

Fortunately, the facts of this instant case are spelt out so clearly in that the accused took a pre-meditated course to rape this young girl. He dwelt on her availability late at night for the moment to abduct her away from parental care, forced her into a car and took her almost immediately to an unsupervised area of which he was undoubtedly aware. On the way he warned her to be quiet and not tell anyone otherwise she would be stabbed. At the mess hall, he quietly took off his clothes, stripped her and then engaged in what was nothing other than a violent sexual attack on an innocent young girl with every intention as stated by him to her to effect penetration with her. There could be no clearer example of an attempted rape. The attempt was still continuing when the police arrived.

Whilst, as outlined above, the accused cannot be found guilty of rape,

I find him guilty of attempt to commit rape pursuant to section 349 of the Criminal Code Act 1899.

With similar reasoning, I also find him guilty of attempting to have carnal knowledge of a girl under the age of seventeen years pursuant to section 215 of the Criminal Code Act 1899.

Before passing sentence on the above two charges and the two charges to which the accused earlier pleaded guilty, I shall receive such evidence as is fit in order to determine the sentences proper to be passed on such charges.

BARRY CONNELL
CHIEF JUSTICE

ORDER ON SENTENCE

CHARGE 1.

Attempted rape is one of the most serious of criminal offences which requires necessarily a long custodial sentence. It is noteworthy that under the Criminal Code a person is liable for imprisonment with hard labour for fourteen years.

The prisoner has committed a shocking offence against a young innocent girl of tender years. It is an event which may traumatize her for many years if not a lifetime.

Furthermore, it is a crime against the whole community. The freedom and trust which this community has for its children to be free of sexual molestation has now possibly been forever changed. The requirements of supervision have now to be stepped up. The old trust in absolute freedom has gone, where it is shown that a strong adult male with a family can perpetrate such a crime upon an innocent child he has known for the depraved intent of sexual passion.

In determining the penalty in this case, I have listened to the plea from your Counsel and the material about your family responsibilities given in evidence yesterday, and am aware that this is your first criminal offence.

It is to your eternal shame, sober as you were, that you did not consider on that night the possible consequences of your actions. Whilst the community pressure may prevent you from transgressing again, the length of the sentence should ensure that you do not again engage in such heinous acts.

In a famous statement of the New Zealand Court of Appeal in ***R v Radich***, that Court warned about the purposes of punishment in protecting the public from the commission of crime. The Court said: "If a Court is weakly merciful and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences".

The fact that you have been convicted of an attempt to rape rather than rape itself does not effect, given the circumstances , my ultimate view of the appropriateness of the actual sentence. On this, I am justified in my conclusion by the decisions of the English Court of Criminal Appeal. In ***R v Billam*** [1986] 1 All ER 985 when assessing a number of rape convictions the Court emphasized the requirement of a substantial custodial sentence

and drew attention to the fact that in certain cases attempted rape where there were aggravating features merited as heavier a custodial sentence as rape. The manner of this attempt together with the young age of the victim presents aggravating features demanding a lengthy custodial sentence.

I sentence you on Charge 1 of attempted rape to 10 years.

CHARGE 2.

You pleaded guilty namely to unlawful and indecent assault upon a woman or girl, I sentence you to the maximum sentence allowed under the Act of two years.

CHARGE 3.

You also pleaded guilty namely to unlawfully and indecently dealing with a girl under the age of seventeen years, I sentence you to the maximum sentence allowed under the Act of two years.

CHARGE 4.

Under section 215 of the Act I have found you guilty of an attempt to have unlawful carnal knowledge of a girl under the age of seventeen years.

I sentence you to four years.

My reasons for giving the maximum sentence allowable on Charges 2 and 3 are simply that as described in Charge 1 the offences were horrendous and in terms of the indecency deserving of the maximum when given the age of the victim and the nature of the acts.

Serving of Sentences.

As to Charges 2, 3 and 4 –

The sentences on Charges 2 and 3 are to be served concurrently.

The sentence on Charge 4 is to be consecutive to the sentences on Charges 2 and 3.

The sentences on Charges 2, 3 and 4 are to be served concurrently with the sentence to Charge 1.

Remove the Prisoner.

BARRY CONNELL
CHIEF JUSTICE

A Certified True Copy

SAMPATH B. ABAYAKOON
REGISTRAR, SUPREME COURT

THE SEAL OF THE SUPREME COURT
REPUBLIC OF NAURU