

**IN THE SUPREME COURT
REPUBLIC OF NAURU**

Criminal Case No. 39 of 2011

Republic of Nauru

v

Terry Diehm and Tekena Diehm

<u>JUDGE:</u>	Eames, C.J.
<u>DATE OF HEARING:</u>	29 November 2011
<u>DATE OF SENTENCE:</u>	30 November 2011 (1st Revision 6 March 2012)
<u>CASE MAY BE CITED AS:</u>	Republic v Terry and Tekena Diehm
<u>MEDIUM NEUTRAL</u>	[2011] NRSC 27
<u>CITATION:</u>	

Sentence – Rape – s.348 Criminal Code of Queensland Act 1899 – Knife used to intimidate victim – Male offender 66 years old, female offender 37 years old – no previous conviction – sentences of 3 years and 2 years imprisonment – s.656 of Criminal Code held not available to defendants.

APPEARANCES:

For the Republic	W. Kurisaqila DPP
For the Defendants	D. Aingimea (Pleader)

CHIEF JUSTICE:

1 Terry and Tekena Diehm, you have both been convicted of rape, contrary to s.348 of the Criminal Code of Queensland Act 1899, That carries a maximum sentence of life imprisonment. The victim was a 21 year old woman known to you both, and by custom she was regarded as the niece of Tekena Diehm.

2 The circumstances of this case have been extensively reviewed in my reasons for judgment, and I will not repeat them. In essence I am satisfied that on about 13 June 2011 you discussed together ways in which Terry Diehm could have sex with the complainant, who had come to your home after a fight with her boyfriend. She had, in effect, sought refuge in your home, but you both saw her arrival as an opportunity for involving her in sexual conduct. You Tekena Diehm tried to get the complainant to agree to the proposed sexual activity. You did so by telling her that your husband had had sex with many girls, and you later asked her would she be willing to have sex with him. The complainant said “No” to those suggestions. When you made the first such suggestion and were rebuffed. You, Tekena Diehm, tried to pretend it was not a serious proposition by saying, “It’s only a

joke. I can't do this because you are my niece”.

3 You did however continue to put pressure on the complainant until she became alarmed at what was proposed. She was drinking heavily as was Tekena Diehm. Terry Diehm was relatively sober.

4 The complainant became fearful and fled to a room, trying to hold the door shut with her feet. She rang her mother and expressed her fear of imminent attack and agreed the police be called. You, Tekena Diehm, eventually got the door open, and had a knife in your hand. You took the complainant back to the lounge room and told her to lie with your naked husband. He had intercourse with the complainant and you gained sexual pleasure from watching that, and had cunnilingus with the victim. I am not sentencing you for that. That is merely part of the narrative, which explains that you were not a horrified onlooker, but a willing participant.

5 Both of you knew she was not consenting. She had been pressured, and intimidated into having intercourse, and you knew it.

6 It is an aggravating factor that a knife was used.

7 You both pleaded not guilty. That is your right, but it means that the victim was not spared from giving evidence at committal or trial.

8 Neither of you has any prior convictions, a significant factor.

9 You Terry Diehm are aged 66 years. You have lived in Nauru for 23 years, employed as supervisor in the Ronphos mess room. You came from Australia, where you are a citizen, after serving 20 years in the navy. You have an exemplary work history. During the time of financial crisis in Nauru you remained at your post, although you did not get paid for 2 years. You are owed a lot of past salary. I accept what Mr Angimea says about that, it shows that you had great loyalty to Nauru.

10 Tekena Diehm, you are aged 37 years. You are totally dependent on your husband financially. You and your husband have 3 children, aged 4, 7 and 9 years old. They will suffer greatly as a result of your convictions and sentences. They had been brought up well by both of you.

11 A sentence of imprisonment is inevitable for you both. The only question is whether the sentence should be wholly or partially suspended pursuant to my powers under s.656 of the Criminal Code. Upon closer examination of that provision, it is clear that it does not apply. The section has two critical preconditions. First, there are these words:

“When a person who has not been previously convicted . . . of an offence of such a nature that upon conviction, a sentence may be imposed restricting the liberty of the offender for a period of six months or upwards . . .”

12 What that means is that to be eligible for a suspended sentence, the offender must not have had any prior conviction for any offence that carried a maximum sentence of more than 6 months. You meet that requirement.

13 The second precondition is in these words:

“is convicted of any offence of such a nature that he may be sentenced, upon the conviction, to imprisonment for a period not exceeding three years”.

14 You have been convicted of rape, which carries a maximum sentence of life imprisonment.

The provision is applicable only if you were being sentenced for to an offence that carries a maximum sentence of three years. Thus, you are not eligible for a suspended sentence under s.656.1

15 Rape is a serious offence in all instances, and this is a serious example of the offence. No other option to imprisonment, such as probation, is appropriate in this case.

16 You were both active participants in the offence but, notwithstanding that you held a knife to encourage the complainant's compliance, I consider that there is a mitigating factor in the case of Tekena Diehm. I believe that your husband was the originator of the scheme to manipulate the complainant into having sex. The argument in the car was probably because you did not want to be party to such an abuse of your niece. That reluctance was shown when you first raised the topic of sex with the complainant, and then said: "It's only a joke. I can't do this because you are my niece".

17 I believe your were pressured to take part by your husband. You were totally dependent upon him, and must have felt the pressure to facilitate his sexual interest in having sex with the complainant. Although you then became a very active participant, and got pleasure yourself from it, that factor justifies a reduced sentence in your case.

18 Terry Diehm, you will be convicted of rape, and I sentence you to three years' imprisonment to date from today 30th November 2011.

19 Tekena Diehm, You will be convicted of rape, and I sentence you to two years' imprisonment to date from today 30th November 2011.

20 The parole authorities will no doubt consider both prisoners' cases, in due course. I would encourage them to give particular consideration to the situation of Tekena Diehm, having regard to the findings I have made and to the fact that there are three young children to be considered.

The Hon Geoffrey M Eames AM QC
Chief Justice
30 November 2011

¹ My conclusion as to the proper interpretation of s.656 is consistent with the decision of the Court of Criminal Appeal in *R v Rosser, ex parte Attorney-General* (1980 Qd.R 462, per Lucas, A.C.J. at 463-464