Papua New Guinea Law Reports

State v Kuman [2000] PNGLR 313 (20 December 2000)

[2000] PNGLR 313

PAPUA NEW GUINEA

[NATIONAL COURT OF JUSTICE]

THE STATE

V

APA KUMAN

KUNDIAWA: KIRRIWOM J
20 September; 20 December 2000

Facts

The prisoner, a 16-year-old boy, pleaded guilty to one count of rape and another count of intentional grievous bodily harm – both crimes he committed on a 7 year old female child on 15 April 2000. The victim child had gone to a garden on the outskirts of their village when the prisoner tricked her into following him into the bush to see a bird's nest, and on the way he raped her and initially threatened her by placing a bush-knife against her throat that if she reported the incident to anyone, he will kill her. Then when she tried to scream, he cut her across her stomach, causing extensive damage to her left and right lobes, which then bled profusely into the abdomen.

Held

1. In a simple rape incident, the offender, where there are no aggravating factors involved, is looking at a sentence between five and ten years subject to mitigating factors such as age (too young or too old), prior good record and whether he pleaded guilty or not guilty. This is as opposed to gang or pack rapes as in *The* ***State*** *v Peter Kaudik* [1987] PNGLR 201, *John Aubuku v The* ***State*** [1987] PNGLR 267, *The* ***State*** *v Anis Noki* [1993] PNGLR 426 or as in *The* ***State*** *v William Kapis Anis* (1997) unreported N1659. This single incident of rape appears quite clearly to be one of opportunity rather than of a deliberate planning where the prisoner saw the victim alone in a secluded place took advantage of her isolation to do what he did.
2. The aggravating factors in this rape are that not only did this 16 year old use his physical strength to over-power a 7 year old child and sexually attacked her, but he also used a bush knife to force the child into submission. And still not being content with what he did to the young girl, he then attacked her with the knife, and even threatened to take her life if she told anyone, including her parents, of what he did to her.
3. Young male offenders from 15 to 16 years of age are considered to be too old to be sent to rehabilitation institutions like Erap Boys Town in Lae and the Wewak Boys Town. They are considered to be near adults and bad influence on the much younger ones when they come into contact with them: *Acting Public Prosecutor v Joe Kovea Mailai* [1981] PNGLR 258 adopted.
4. Having considered all the circumstances in this case, I believe the most appropriate sentence for this rape would be four (4) years imprisonment; and for grievous bodily harm under s 319, *Criminal Code Act,* three (3) years imprisonment. Both sentences are to be served concurrently because the two incidents are related and connected with each other as to time and place. Sentence: four years.

Papua New Guinea cases cited

Acting Public Prosecutor v Joe Kovea Mailai [1981] PNGLR 258.
John Aubuku v The ***State*** [1987] PNGLR 267.
Kuri Willie v The ***State*** [1987] PNGLR 298.
Paulus Mandatitip & Anor v The ***State*** [1978] PNGLR 128.
The ***State*** *v Anis Noki* [1993] PNGLR 426.
The ***State*** *v Peter Kaudik* [1987] PNGLR 201.
The ***State*** *v William Kapis Anis* (1997) unreported N1659.

Counsel

F Kuvi, for the **State**.
M Apie'e, for the prisoner.

20 December 2000

KIRRIWOM J. This young offender came before me on 20 September 2000 charged with two serious indictable offences, namely, rape and with intent to do grievous bodily harm, did cause grievous bodily harm to one Saina Baka. Both these offences carry maximum penalties of life imprisonment subject to s 19 of the *Criminal Code Act*. If it were not for his very young age, this young man is already looking at a total of twenty (20) or so years in prison as his punishment for both crimes.

On the 15 April 2000 the prisoner saw the victim Saina Baka, a child of seven (7) years collecting firewood in the garden on the out-skirts of their village of Genabona, Gumine District, Simbu Province. Upon seeing her alone the prisoner went to her and tricked her into following him into the bush where he saw a bird's nest with its little ones. He picked up her bush-knife and told her to follow him. It is not clear on the facts whether she complied and followed him and if so, how far they travelled. However, it seems that they did not go far at all because according to the prosecutrix, without saying anything more the prisoner grabbed her by her hand and dragged her under the coffee trees. There he pushed her on the ground, spread her legs apart, lifted her skirt, removed his erect penis from his trousers and put it into her vagina. She felt his penis go in slightly and went no further. She felt terrible pain at the point of almost urinating. She saw him ejaculate onto her body as he stood up. He ordered her to suck his penis but she refused. He placed the bush-knife on her throat and warned her not to report to anyone. She then tried to scream and he cut her across her stomach causing extensive damage to her left and right lobes, which bled profusely into the abdomen. Quick admission to Kundiawa Hospital prevented further bleeding and saved her from death due to loss of blood.

When arraigned on both charges the prisoner pleaded guilty on both counts. As to the count of rape, the only evidence of rape is from the prosecutrix herself. There is no independent corroborative evidence. The medical evidence discloses nothing at all on the sexual invasion of the prosecutrix's vagina by the prisoner. The medical report was prepared primarily on the assault or grievous bodily harm occasioned to the prosecutrix. The report only makes reference to the sexual attack by simply stating that the prosecutrix was "raped" without any discussion as to how such conclusion was reached. The only reason I accepted the plea of guilty to rape was, firstly, in the record of interview the prisoner clearly admits to penetrating the prosecutrix’s vagina and also in the prosecutrix’s own statement she said: "He put his penis to my vagina (sic) and was pushing and rubbing his penis against my vagina (sic). I felt his penis slightly go into my vagina (sic) but could go no further. I felt a great deal of pain and I nearly urinated." This evidence shows clearly that the prisoner applied force to effect penetration and did succeed to some degree, however incomplete it maybe, thus causing extensive pain and discomfort to the prosecutrix. The law is quite clear that even the slightest degree of penetration is sufficient to satisfy that there was carnal knowledge as defined under s 6 of the *Criminal Code*. It was on this evidence that I felt satisfied in accepting the plea of guilty to rape regardless of the deficiency in the medical report supplied for the purpose of this case. If I am wrong in this respect it is a matter for the appellate court to correct me.

With regard to the second count, there is ample evidence supporting the plea. The prisoner made no secret about the fact that he attacked her with her own bush-knife when she called out to her father. The fact that the prisoner could attack this harmless and defenceless little child with a dangerous weapon clearly shows that young as he is, the prisoner is already showing that he has a violent temperament and is going to grow up to be a very bad boy.

His reason for what he did was that the little girl often stole his coffee cherries during the coffee seasons and he wanted to teach her a lesson. But the prosecutrix said that when the prisoner was talking to her in the garden, she could smell marijuana in his breath.

I do not accept the prisoner's reasons for his attack on the girl. No-one must take the law into his own hands when someone does him wrong. This little girl was hardly of age to appreciate right from wrong. She did not have to be raped for the reason given by the prisoner. Therefore, in my view this was not the reason she was raped. That may have been an underlying grievance but I think the real reason was that the prisoner was under the influence of marijuana. And because of the drug he did what normal human beings would not do to a small seven-year-old girl. There is no suggestion that the prisoner was 'long long' or mentally unstable. He

is a sane and perfectly healthy young boy but for that temporary drug affliction which impaired his mental faculty from distinguishing between right and wrong.

In a simple rape incident, the offender where there are no aggravating factors involved, is looking at a sentence between five and ten years subject to mitigating factors such as age (too young or too old), prior good record and whether he pleaded guilty or not guilty. This is as opposed to gang or pack rapes as in *The* ***State*** *v Peter Kaudik* [1987] PNGLR 201, *John Aubuku v The* ***State*** [1987] PNGLR 267; *The* ***State*** *v Anis Noki* [1993] PNGLR 426 or as in *The* ***State*** *v William Kapis Anis* (1997) unreported N1659. This single incident of rape appears quite clearly to be one of opportunity rather than of a deliberate planning where the prisoner saw the victim alone in a secluded place took advantage of her isolation to do what he did. As I mentioned earlier and for which I am convinced that marijuana played the leading role, not so much of any pre-existing misgivings over coffee cherries. Of course what aggravates this rape is that not only did this 16 year old use his physical strength to over-power a child of 7 years to sexually attack her, he had her knife at his side to force the poor child into submission to whatever he had in mind. And still not being content with what he did to her, he then attacked her with her own bush-knife. And from what he said to her, 'Your parents will not see you again' when he swung the bush-knife to cut her, it is quite obvious that he either wanted to terminate her life to conceal his crime or he really meant to do her very serious bodily harm. This was the action and reasoning of a very matured mind in the body of a 16-year-old boy. Therefore whilst I am minded to treat this young man as a child under the *Juvenile Act* and the *Child Welfare Act*, his crime and the deliberate manner in which he perpetrated the act rightly deserve that he be treated like an adult. Counsel for the prisoner strongly submitted that I must give due weight to the age of the prisoner and impose a lenient sentence. His submission is based on the principle expounded in the case of *Paulus Mandatitip and Anor v The* ***State*** [1978] PNGLR 128 that youth is a mitigating factor. If I might add also that in *Kuri Willie v The* ***State*** [1987] PNGLR 298 Hinchliffe, J also discussed the need for courts to investigate alternatives to imprisonment when dealing with youthful first offenders and imprisonment must be used as the last resort. In another earlier case of *Acting Public Prosecutor v Joe Kovea Mailai* [1981] PNGLR 258 Narokobi, A J (as he then was) in sentencing a 16 or 17 year old youth said that 'ít is part of the Court's duty to protect the young person'. His Honour went on to examine other options to imprisonment such as counselling, good behaviour bond and in the end he decided to sentence the prisoner to the rising of the Court as he had already spent sufficient time in custody while awaiting trial. His Honour noted that a young boy of 15 or 16 is already too old to be accepted into Boys Town according to appropriate advice he received from the Office of the Director of Child Welfare. And from my personal knowledge having being associated with Community corrections in the Department of Attorney General prior to coming to the bench, this policy has not changed. Therefore young offenders in the age group of 15, 16 and 17 cannot expect the guided supervision and regular counselling in the presently church run institutions (Erap Boys Town in Lae and Wewak Boys Town run by the Catholic Church and the one run by the Salvation Army in Sogeri) catering for juvenile offenders. They are considered to be near adults and bad influence on the much younger ones when they come into contact with them. So, how do I keep a young boy like this prisoner out of jail, away from those hardened criminals so that he is saved from being indoctrinated by their bad influence sometimes taught in the most bizarre and sadistic ways that happen inside the prison compounds?

The only options available now are good behaviour bond, suspended sentence or probation. In view of the seriousness of both offences he has pleaded guilty to, I don't envisage good behaviour bond and suspended sentence as appropriate options. As I have found that drug had much to play in his crimes, I think this young man has taken a path in crime in company of marijuana, a very addictive substance that does all kinds of things to the mind for those who use the substance. It is like cigarette smoking. Once you become addicted to it, it is hard to get rid of it. If this young man has started early on drug, that is the cause that must be addressed early. While we do not have appropriate drug rehabilitation programs available in the country to my knowledge, I do not think prison is the best alternative to cure him of his affliction. However without having to overburden the **State** with the prisoner's self-induced ailment, the only best option available

is to have the prisoner released on probation to serve his sentence under supervision so that he can take care of his own vices. But he must qualify for probation. This is the purpose for pre-sentence report which I requested and have been furnished with by the Provincial Probation Officer or Community Corrections Officer. I note from his means assessment report that the prisoner's family has already paid K1,000 in cash to the victim's parents which in itself was quite a laborious and difficult task for them to raise that money. He does not consider any further imposition of cash compensation can be met by the family. He however suggested that the prisoner is a suitable candidate for a long term probation. Of course the Court is not obliged to impose a sentence according to the recommendation in the pre-sentence report. But I do give due weight to the recommendations made and the report generally whilst I also bear in mind the seriousness of the crimes committed and the need for both personal and general deterrence. This must reflect the prisoner's attitude to his offending behaviour. He had not demonstrated any remorse. I do not think that a wholly non-custodial sentence is appropriate, as it is not in the best interest of the public.

Having considered all the circumstances in this case, I believe the most appropriate sentence for rape would be four (4) years imprisonment; and for grievous bodily harm under s 319 *Criminal Code Act* is three (3) years imprisonment. Both sentences are to be served concurrently because the two incidents are related and connected with each other as to time and place. Sentenced to four years.

I order that he serve two (2) years of that term in prison and the balance he must serve on probation under supervision. I deduct the period spent in custody awaiting trial, which is approximately eight months. That time is taken off. He will have to serve one (1) year, four (4) months in the Juvenile Section of the prison at Barawagi and the remaining two (2) years shall be served on probation.

Lawyer for the **State**: *Public Prosecutor.*
Lawyer for the prisoner: *Public Solicitor.*
