

The State v. Kaudik

National Court

Amet J.

11 June 1987

Criminal law - sentence - rape - guidelines - application of principles - multiple rape - use of a knife - premeditation - young victim.

10 The defendant was a nineteen-year-old member of a gang of eight who kidnapped a seventeen-year-old out of a car at a home on a university campus. The victim was threatened with a knife, raped many times, and subjected to other indecencies for nearly four hours. The defendant pleaded guilty.

HELD: The defendant was sentenced to twelve years' gaol. The Court gave extensive reasons for the sentence:

- 20 (1) Rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances. *R. v. Roberts* [1982] 1 W.L.R. 133; [1982] 1 All E.R. 609; 74 Cr. App. R. 242 (C.A.) applied.
- (2) The base line, or starting point, for a multiple rape and abduction is eight years. *R. v. Billam* [1986] 1 W.L.R. 349; [1986] 1 All E.R. 985; 82 Cr. App. R. 347 (C.A.) applied.
- (3) There were extensive aggravating circumstances:
 - (a) a weapon, a bush knife, was used to frighten the victim;
 - (b) the rape had been planned;
 - (c) the victim was subjected to further sexual indignities and perversions;
 - (d) the victim was young;
 - 30 (e) there was and will continue to be some physical and mental effect upon the victim;
 - (f) the defendant had a previous conviction for a serious crime. *R. v. Billam* applied.
- (4) There were mitigating circumstances:
 - (a) the defendant pleaded guilty;
 - (b) the defendant was young;
 - (c) the defendant was a lookout, not a leading principal;
 - (d) no additional harm, other than the rape itself, was done to the victim. *R. v. Billam* applied.

40 **OBSERVATION:** The remarks of the Supreme Court in *Aubuku v. The State* supra at p. 183 should be consulted. See also *The State v. Koupa*, infra at p. 259.

I. Langford for the State

J. Everingham for the accused

AMET J.**Judgment:**

The prisoner Peter Kaudik of Bafor village on KarKar Island in the Madang Province had pleaded guilty that he on or about 29 October 1986, at Lae, committed rape upon one F.L.

50 Facts

The facts in the case, as pleaded to and which I accepted were these. The victim, a seventeen-year-old student, lived on the University of Technology campus in Lae, with her parents. They were from Ireland. On the evening of Wednesday 29 October 1986, the victim went to the home of a Mr and Mrs Hennessy, also at the University of Technology campus, at about 7.15 p.m. to babysit for them while they went out. The Hennessys returned home just after 11 p.m. Mr Hennessy remained in the motor vehicle to take the victim to her home. As the victim was about to get into the motor vehicle, she and Mr Hennessy were held up. Mr Hennessy who was still in his motor vehicle was held up by a man pointing a shot gun at him, whilst the victim was
60 grabbed from behind by someone holding a bush knife. As Mr Hennessy was told to get out of the motor vehicle two or three men surrounded him. Two others grabbed the victim and took her to a clump of bushes in the Hennessy's garden where they forced her to lie down, forcibly took off her trousers, shoes and panties and tried to have sexual intercourse with her against her will. They were stopped by one of the others. The group then took her to the boundary fence where others were waiting. They pushed her through a hole in the fence. I quote excerpts from the victim's affidavit on parts of the subsequent events.

At this time, I was naked from the waist down and barefooted. They ran with
70 me across the road and into the long grass and while we were running, I tried to call out but they quickly covered my mouth and stuck a knife to my throat to make me shut up. Because it made them so agitated I decided it was better for me to keep quiet. If I coughed or started to even speak to them they'd point a knife at me and threaten to kill me . . . Then we started running into the bush away from the University and the road. We ran fast, somebody always holding onto my arm. I tried to stumble to slow them down because the thing I wanted was not to be taken further away from the University. Then they decided to carry me. Some of the time, I was just carried on somebody's back (like being given a piggy back) other times one of them put me [sic] legs on their
80 shoulders, one on either side of his head and another carried my head and shoulders so that I was carried between the two of them. As I was being carried and when I was walking, one or other of them would come up behind me and finger my buttocks and genital area. I stopped this by clamping my legs together and stopped them from kissing me on the mouth by moving my head away . . . They carried me through vines and over fallen tree trunks . . . Then we stopped beside the fence and one of them said to me: "You know what we're going to do to you?" and I answered "Yes". Then he said we'll just do it to you and let you go . . . They told me if I told the Police anything about them, they would come and kill me and my mother and father . . . While we were walking along the fence I was not carried but allowed to walk on my own with a
90 few in front of me and a few behind . . . At this time I estimated six or seven.

Once when we were walking through the bush, me and two of them got left behind and they made me lie down on some twigs and tried to rape me.

When we reached the river I was made to stand to one side while the men had a conference. It was then that I counted them and discovered there were eight of them . . . We walked down the river in it in the direction it was flowing. Then we came to another sandy bank. Then I was asked how old I was and I said 13. The guy said let me check and felt my bust and I think he believed me.

100 On the sandy bank the guy who had been asking how old I was told me to "sleep". I sat down on the sand not understanding what he meant. He repeated the word "sleep" and I lay down. He undid his trousers and lay down on top of me. He took my legs and put them over his shoulders and proceeded to rape me. I just lay there and pretended it was not happening. I did not participate in any way. When he had finished, he got up and said, "thank you" and then another came. After that they took it in turns, one after the other. They would ask me to wipe my genital area with my shirt after the other one before they would start raping me. Then one came over and put his penis in my mouth and forced me to keep it there while one of his companions was simultaneously raping me. He wanted me to "kaikai" his "cok" (those were his words). This happened a few times with different members of the gang, they all took turns. I bit one of them and he said he felt pain. Other than being raped, I was not physically beaten or harmed in any way. Scratches and etc. that I received were from walking through the bushes with bare feet and legs. Some of the guys were gentlier [sic] and more considerate than others one or two were rough and thrust deeply into me hurting me because my legs were over their shoulders. Some of them asked me to put their testicles into me, meaning their penis. Others asked me to hold onto their genitals and if I refused they got agitated and annoyed.

110 I lost count of how many actually raped me when they started pushing their penises into my mouth. I'm sure though each one did it one at least.

120 We walked along the track for a short while and then down a steep bank . . . Again I was taken aside by one of them while the others had a conference. The guy with me told me to hold onto his penis and I refused and he forced me and got me to move my hand up and down on it . . . At this time a couple of them were naked. Then two of the gang walked over and we started walking away . . . We walked a short way down the road and then one of them forced me to lie down again and I protested and pushed down. He raped me and I hurt my back and head because I was forced to lie down where it was rocky and they dug into my back. His companion also raped me. Then we got up and started walking again.

130 Then they brought her back onto the main road and told her if she kept walking in a certain direction she would come to the University of Technology. She walked along the road for about twenty five minutes before a University security vehicle which had been out in search for her picked her up. The victim was still naked from the waist down.

The University Medical Officer examined the victim at 3 a.m. on 30 October 1986 and found her

not in any apparent distress, was mentally alert and conscious. She had bruises all over her body especially on her lower limbs and abdomen. Pelvic examination revealed bruises around the groins. In the vaginal orifice, the labias were bruised red and raw suggestive of numerous penetration, hymen absent, no bleeding, no broken tissues . . . She was not physically harmed or injured except she acquired minor injuries or bruises as a result of sexual activity around the genital area and on the lower limbs as a result of being walked through bushes in the night.

I accept from the prisoner's confessional statement that at about 9 p.m. he was at his home at East Taraka when one John Geno from Simbu went with five others and called him to go with them to the University of Technology. When they arrived at the University, the prisoner and three others remained on the side of the road near the fence keeping a lookout. John Geno and three others cut the security fence and went into the University campus and brought out the "white lady", the victim. The group then took her to the headwaters of the Bumbu river, where they raped her. The prisoner was the sixth person to rape her. When they took her from the University, they took off all her clothes and they carried her naked with only a yellow shirt.

I have set out these facts in some detail as they become relevant in the discussion of some guidelines on appropriate sentences for rape taking into account the aggravating as well as the mitigating features.

Some Guidelines

The National Courts have on numerous occasions in the past dealt with rape cases of varying circumstances and have endeavoured to classify or categorize them in one degree of seriousness or another. It is, however, useful to restate some of these as guidelines. As I deliver this judgment I know that the Supreme Court is considering in a reserved judgment these very issues of sentencing guidelines and the general range of sentences in rape cases. I do not pre-empt that judgment. [See *Aubuku v. The State* supra, p. 183; [1987] P.N.G.L.R. 267.]

The English Court of Appeal in *R. v. Billam* [1986] 1 W.L.R. 349; [1986] 1 All E.R. 985; 82 Cr. App. R. 347 laid down some guidelines which I find quite useful. The Court cited with approval (p. 350 (W.L.R.); p. 987 (All E.R.); p. 349 (Cr. App. R.)) a passage from the Criminal Law Revision Committee's 15th Report on Sexual Offences (1984 Cmnd. 9213) paragraph 2.2. It is as follows:

Rape is generally regarded as the most grave of all the sexual offences. In a paper put before us for our consideration by the Policy Advisory Committee on Sexual Offences the reasons for this are set out as follows: Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe; the actual physical harm occasioned by the act of intercourse, associated violence or force and in some cases degradation, after the event, quite apart from the woman's continuing insecurity, the fear of venereal disease or pregnancy. We do not believe this latter fear should be under-estimated because abortion would usually be available. This is not a choice open to all women and it is not a welcome consequence for any. Rape is also particularly unpleasant because it involves such intimate proximity

between the offender and victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value.

190 The Court also said it had emphasized in *R. v. Roberts* [1982] 1 W.L.R. 133; [1982] 1 All E.R. 609; 74 Cr. App. R. 242, that rape is always a serious crime which calls for an immediate custodial sentence other than in wholly exceptional circumstances. I would adopt that statement as being applicable to the circumstances of this offence in Papua New Guinea today, which in my view calls for stern punitive custodial sentence in the first instance.

The court continued (at p. 351 (W.L.R.); 987 (All E.R.), 350 (Cr. App. R.))

200 The variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years. . . . There are, however, many reported decisions of the court which give an indication of what current practice ought to be and it may be useful to summarize their general effect.

For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

210 At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

220 The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapons is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

230 The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances,

including the likelihood of a finding of not guilty had the matter been contested.

I have cited a good deal of the judgment because I consider all of what I have quoted to be quite applicable to our consideration of rape cases and the range of sentences we should have to determine. The only qualification of course is the starting point in the sentences for the various categories. We have to determine that for ourselves in the circumstances of each case.

Application to this Case

240 The offence in this case was committed by eight men acting together, who abducted the victim and held her captive. In the circumstances of the offences in this case earlier set out, I would not consider the starting point of eight year to be inappropriate.

I consider also that the offences were aggravated by a multiplicity of factors:

- (1) A weapon, a bush knife, was used to frighten the victim;
- (2) The rape had been planned;
- (3) The victim was subjected to further sexual indignities and perversions;
- (4) The victim is young;
- 250 (5) There is and will be some physical and mental effect upon the victim;
- (6) The prisoner has a prior conviction for a serious offence of break, enter and stealing for which he was and still is serving a sentence of five years in hard labour. The rape was committed in the period after his escape from lawful custody. Though not a sexual offence, it is an offence which had the potential of becoming a violent one.

I adopt as applicable also the Court of Appeal's view that "where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point."

260 In mitigation I take into account the following factors:

- (1) The prisoner pleaded guilty - this has saved the victim extra distress which giving evidence would have caused her.
- (2) Youth of the prisoner, he is nineteen-years-old.
- (3) He was called to join the group.
- (4) He and three others kept watch on road when others effected the hold up and abduction of the victim.
- (5) No physical harm to the private parts of the victim.
- 270 (6) No physical harm generally to the person of the victim.

Several other factors which are often submitted and relied upon as mitigating factors, really ought not to be treated as mitigating factors, and I agree with the Court of Appeal's view on this.

The fact that the victim may be considered to have exposed herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous

280 good character is of only minor relevance.

I consider that in all these circumstances, this case is in the most serious category of rape offences. There were a large number of you, eight in all, and you all behaved in an utterly animalistic way treating this young woman like an animal, causing sexual perversions and indignity upon her.

The sentence of this Court I believe should reflect the society's utter revulsion at this kind of violation of females, however old and of whatever race or nationality. They have the same right to be respected as do men, in their private persons.

290 I sentence you to twelve years in hard labour, to be served concurrently with the sentence of five for break, enter and stealing.

Reported by: L.K.