IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION AC 2 of 2018

NUKU'ALOFA REGISTRY [CR71 of 2017]

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BETWEEN: SUNIA MAILAU

- Appellant

AND : R E X

- Respondent

Coram : Handley J
Blanchard J
Hansen J

Counsel : Mr. S. Fili for the Appellant
Mr. 'A. Kefu SC for the Respondent

Date of Hearing : 19 March 2018

Date of Judgment : 26 March 2018

## JUDGMENT OF THE COURT

### Introduction

[1] After trial before Justice Cato the appellant was convicted of five counts of serious indecent assault, four counts of incest and six counts of domestic violence. He pleaded guilty to a single charge of common assault. The victim in each case was his daughter, then aged seventeen. He was sentenced to a total of nine years and nine months imprisonment. He appeals against conviction and sentence.

### Facts

[2] The offences were committed on six separate occasions in December 2016 and January 2017 at the house in which the appellant lived with the victim and his second wife, the victim's step-mother. On the first occasion the appellant forced his daughter to smoke methamphetamine with him before subjecting her to oral sex and other indignities. On the second occasion he attempted to strangle her with wire and threatened to cut her vagina with scissors. On the remaining four occasions he raped her. She was a virgin and suffered physical pain and bleeding when he first penetrated her. Each time intercourse was accompanied by indecent assaults including sucking the victim's breasts.

### Appeal against conviction

[3] In support of the appeal against conviction Mr. Fili pointed to three aspects of the evidence which he said cast doubt on the evidence of the victim. The judge found her to be a witness of truth,

preferring her evidence to that of her father and his wife who gave evidence for the defence at trial.

[4] Mr. Fili first referred to the evidence of a friend of the victim who said the victim contacted her through Facebook and told her that "stories about something between" her and her father that were circulating were not true. In his decision the Judge carefully reviewed the evidence of the witness and the victim and concluded that their exchanges did not provide any reliable basis to suggest that the victim was fabricating her allegations against her father. We find no reason to question his conclusion.

[5] Next Mr. Fili referred to the evidence of a doctor who had examined the victim in January 2017 after the last of the six incidents. She said the victim's hymen had been ruptured. She said this had not occurred within the 72 hours preceding her examination but otherwise could not say when the victim lost her virginity. We are unable to see how this evidence assists the appellant. It is, of course, consistent with the victim's account though of limited value in that respect.

[6] With understandable diffidence Mr. Fili introduced another matter that had been raised with the medical witness though it was not in the notice of appeal or his written submissions. The appellant (who represented himself at trial) asked the doctor whether penetration of a virgin by a 'big penis' would leave evidence of injury to the hymen. We were told that the Judge declined an invitation to verify that the appellant qualified for that description. We were asked to receive a report on the subject on appeal. We declined to do so. As questioning by the judge of the medical

witness quickly established, no assistance could be derived from such an enquiry. The witness confirmed she could not offer any opinion on whether, in this case, the perpetrator had 'a big penis or small penis or anything else'. Her evidence disposes of the issue.

[7] The final matter raised in relation to the conviction was the appellant's claim that he was not at his home on the day of the first assault. Both the appellant and his wife gave evidence to that effect. The Judge disbelieved them. He preferred the evidence of the victim and another witness who corroborated her evidence. We find no reason to doubt the Judge's conclusion.

[8] The appeal against conviction must fail.

Appeal against sentence

[9] Justice Cato identified a starting point of eight years imprisonment which he imposed for the first count of incest with concurrent sentences for the other counts of incest and associated sexual assaults. He imposed a sentence of three years imprisonment for the first sexual assault, the first year of which was to be cumulative on the lead sentence. He sentenced the appellant to nine months imprisonment on the common assault charge, also to be cumulative, making a total sentence of nine years and nine month imprisonment. Justice Cato backdated the sentences to the date the appellant was first remanded in custody.

[10] In support of his submission that the sentence was excessive Mr. Fili referred us to a number of sentencing decisions. Most are first instance sentencing decisions which are readily distinguishable

on the facts although Justice Cato's decision in *R v Lomu* CR 92/14 has some parallels with the present. He imposed a sentence of nine years imprisonment for offending against three teenage girls which included six counts of rape.

[11] The decision of this Court in *R v Vake* [2012] TOCA 7 was also referred to. It was a Crown appeal against a decision to fully suspend a sentence of five years imprisonment on one charge of incest and one of indecent assault. The victims, aged 21 and 19, were the biological daughter and adopted daughter of the appellant. The cumulative sentences of three and two years were not challenged and were confirmed but the period of suspension reduced from five to two years.

[12] In his sentencing decision Justice Cato referred to three sentences which supported a starting point of eight years imprisonment on the counts of incest. They were *R v Tu'ifua* [2010] TLR 80 where Ford CJ imposed a sentence of seven years imprisonment following pleas of guilty to five counts of incest; *R v X* [2012] TOSC 81, where a sentence of eight years six months was reduced to seven years by mitigating factors; and Justice Cato's own decision in *R v Pahulu* (13 December 2016) where, following guilty pleas, he imposed a sentence of eight years six months for multiple offences of incest against two girls.

[13] All decisions are consistent with our view that the starting point of eight years adopted by Justice Cato was not out of line with prevailing sentences for incest and entirely appropriate to the offending. It was brutal, callous and premeditated. It involved a gross breach of trust. The appellant cynically took advantage of

his daughter's presence in the home; she had come to live with him and his wife after experiencing troubles in her personal life and at school. She was subjected to a terrifying and traumatising period of abuse.

[14] As Justice Cato said in his sentencing decision, sentencing for this sort of offending must be set at a level that is effective to denounce the conduct, deter like offending and offer protection to vulnerable family members.

[15] The appeal against sentence must also fail.

**Result**

[16] The appeals against conviction and sentence are dismissed.

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**Handley J**

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**Blanchard J**

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**Hansen J**