

IN THE COURT OF APPEAL OF TONGA  
CRIMINAL JURISDICTION  
NUKU'ALOFA REGISTRY

ATTORNEY GENERAL'S OFFICE	
INITIALS: <u>J.L.</u>	DATE: <u>1/10/21</u>
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AC 15 of 2021  
(CR 113 of 2020)

BETWEEN                      LEIMONI TITO SIASAU  
   Appellant

AND                              REX  
   Respondent

Court:                      Whitten P  
   Hansen J  
   Randerson J  
   White J

Counsel:                      ✓ Mr V. Latu for the Appellant  
   Mr J. Lutui and Mr Finau for the Respondent

Hearing:                      21 September 2021

Judgment:

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JUDGMENT OF THE COURT

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## JUDGMENT OF THE COURT

### Introduction

- [1] The appellant, Mr Siasau, was convicted on a count of serious indecent assault contrary to s124(1) and (2) of the Criminal Offences Act after trial before Justice Niu. He was sentenced to four years imprisonment, the final year suspended for a period of three years conditional upon his not committing an offence punishable by imprisonment within the period of suspension.
- [2] Mr Siasau appeals against his sentence as manifestly excessive.

### Facts

- [3] Mr Siasau and the complainant were both employed by a company which operated a yacht yard. Mr Siasau was the manager. The complainant, a 33 year old married woman, was one of several employees who worked under him. On the day the offence took place, he directed the complainant's two co-workers to undertake tasks elsewhere while he gave the complainant directions to work on one of the yachts in the yard. The Judge accepted the complainant's evidence that, having taken her to a cabin he wanted her to clean, Mr Siasau pushed her on to the bed, lifted her legs and pressed his finger into her vagina. She was wearing calf-length pants and underwear. However, the pressure applied resulted in penetration albeit impeded by the two layers of clothing.
- [4] The complainant objected and pushed the appellant off. She said she wanted him to think she was not afraid and told him that she was not clean but if he rang her she would make sure she was ready for him. He then went to the stairs, exposed his penis and invited her to suck him. She declined. He then placed her hand on his penis and asked her to masturbate him. Displeased with what she did, he pushed her hand away, masturbated himself and ejaculated on the floor. He left after asking her to clean the floor and lock up the yacht.

### Sentencing

- [5] In sentencing, Mr Siasau, Justice Niu noted that, at 49 years of age, he had not previously offended. He is married with six grown-up children though three are still studying at tertiary level. Mr Siasau also has responsibility for the care of his elderly parents. He was unemployed as his employer had had to close because of the Covid epidemic.

- [6] The Judge referred to the impact on the complainant. Her relationship with her husband had been adversely affected. Her reputation had suffered as a result of rumours in the community that she was having an affair with Mr Siasau. The Judge also referred to the complainant having to endure allegations in cross-examination, repeated to the probation officer, that she was the instigator and a willing participant in sexual activity. The Judge said that by maintaining these false allegations Mr Siasau had further aggravated his offending.
- [7] In considering sentence, Justice Niu referred to the emphasis placed on deterrence in sentencing for sexual offending. He referred to two cases cited by the Crown in support a submission that a sentence of three years imprisonment be imposed. One was *R v PF*<sup>1</sup> where a sentence of three years imprisonment was imposed on two counts of serious indecent assault by the accused on his seventeen-year old stepdaughter. In separate incidents the offender had fondled the girl's breast outside her clothing and, later, fondled her genitalia underneath her clothing. The second case, *R v Kakau*,<sup>2</sup> arose out of a home invasion in which the offender touched the vagina of the 21-year-old victim while she was sleeping. A starting point of three years imprisonment was adopted leading to a final sentence of two years, six months.
- [8] In response to a submission that a sentence of imprisonment should be fully suspended, having referred to Mr Siasau's clean record and responsibilities for the care of his family, Justice Niu acknowledged that families invariably suffer when a responsible member is imprisoned but said that could rarely be a sufficient reason to fully suspend a sentence.
- [9] The Judge concluded that the appropriate sentence was four years imprisonment. He did not identify a starting point or the application of any discount but, in deciding to suspend the final year of the prison sentence, he acknowledged Mr Siasau's previous clean record.

### **Case for Appellant**

- [10] For Mr Siasau, it is submitted the sentence is excessive having regard to the circumstances of the offending and of Mr Siasau himself. The assault is said to have been at the lower end of the scale of sexual offending. Mr Latu submits a sentence of two years would be appropriate with the final one year, eight months of the sentence suspended for two years.

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<sup>1</sup> [2020] TOSC 30.

<sup>2</sup> [2020] TOSC 86.

### **Crown's position**

- [11] The Crown defends the sentence. Mr Lutui accepts that the offending was at the lower end of the spectrum of indecent assaults but says it was within the Judge's discretion to impose the sentence he did. He argues that the offending was no less serious than the assaults in the authorities relied on by the Crown at sentence.
- [12] Mr Lutui submits that aggravating features also support the sentence imposed. He relied on the breach of trust arising from the employer/employee relationship and the humiliation and injury to reputation suffered by the complainant by virtue of the appellant maintaining during the trial itself and when being sentenced that he and the complainant had a consensual sexual relationship.
- [13] Ultimately, however, Mr Lutui acknowledged that the starting point of three years imprisonment advocated by the Crown at sentencing would have been appropriate, reduced by six months to take account of the appellant's previous good character. He allowed that a period of suspension is available but contended it should be no more than six months.

### **Discussion**

- [14] The maximum sentence for serious indecent assault is five years imprisonment. In fixing an end sentence of four years imprisonment without making any further allowance for Mr Siasau's previous good character, it must be inferred that Justice Niu had in mind a starting point close to the maximum. In that he plainly erred as the Crown implicitly acknowledged. The offending could by no means be regarded as among the most serious of its kind.
- [15] We acknowledge the serious aggravating features associated with the offending of Mr Siasau. Although the touching was through two layers of clothing and Mr Siasau desisted when the victim challenged him, the Judge found there was pressure that led to some degree of penetration. There was a gross abuse of trust; Mr Siasau used his position as manager to set up a situation in which he could take advantage of the victim. He exacerbated the harm to her by allegations that besmirched her good character and standing in the community. There was a suggestion that the sexual activity undertaken by Mr Siasau after the initial touching was a further aggravating factor. It was not included in the indictment, no doubt because, as a result of what the complainant had said in order to placate Mr Siasau, he could have had reasonable grounds to believe she would not object to further sexual activity. In the circumstances we do not think significant weight should attach to this aspect of Mr Siasau's conduct.

[16] However, the offending was not as serious as the offending in the two cases relied on by the Crown at sentencing, *R v PF and R v Kakao*<sup>3</sup>. In both cases, the starting point of three years was reached after a careful review of relevant sentencing authorities. As the Judge in *Kakao* observed, touching through clothing is not as serious as direct contact with the genitalia and there are of course further aggravating features – two separate assaults against a teenage girl by a parent in *R v PF* and the home invasion element of *Kakao* – that justified the starting point adopted in both cases.

[17] Having regard to these considerations, we conclude that a starting point of two and half years imprisonment appropriately reflects the seriousness of the offending. A discount of six months to reflect Mr Siasau's previous good character is reasonable resulting in a sentence of two years imprisonment. We see no reason to disturb the one-year period of suspension ordered by the Judge.

### Result

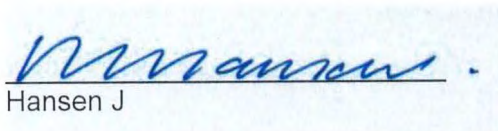
[18] The appeal is allowed.

[19] The Judge's decision is quashed.

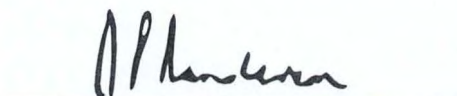
[20] In its place we sentence Mr Siasau to two years imprisonment, the final year to be suspended conditional on his not committing an offence punishable by imprisonment during the period of suspension.



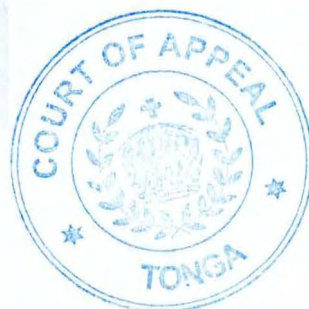
Whitten P



Hansen J



Randerson J



White J

<sup>3</sup> Above at [7].