

S. Sisifa



2/10/14

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

AC 8 of 2014
[CR 8 of 2014]

BETWEEN : RAY HU'AHULU

- Appellant

AND : REX

- Respondent

Coram : Salmon J

Handley J

Hansen J

Tupou J

Counsel : Mr V. Fa'otusia for the Appellant

Mr S. Sisifa for the Respondent

Date of Hearing : 20 October, 2014

Date of Judgment: October, 2014

JUDGMENT OF THE COURT

- [1] The appellant was convicted after trial before a Jury on the 25th August, 2011 of the rape of a 23 year old feeble minded woman. He was sentenced on the 9th September, 2011 to 13 years imprisonment, the last 3 years to be suspended.
- [2] On the 4th February, 2014 the appellant sought to appeal out of time, and leave to appeal, against conviction and sentence. Leave to appeal against the sentence was granted by the President of the Court of Appeal on 12th March 2014 but leave to appeal the conviction was not granted.
- [3] Initially Mr Fa'otusia for the appellant maintained that the full court should grant leave to appeal the conviction but later abandoned this position and proceeded just with the appeal against sentence.
- [4] The Judge took as his starting point for anyone charged with the rape of a feeble minded person on a not guilty plea, a sentence of 13 – 14 years imprisonment because such people deserve protection. While not disagreeing with this sentiment the Judge provided no precedent for a sentence of this length. We note that

the starting point for rape set by this Court in *Fa'aoso v R* [1996] TLR 42 is 5 years and the maximum sentence is 15 years. The Judge made a reduction to 13 years and suspended the last 3 years because the defendant had apologized and had accepted the Jury's verdict.

[5] Mr Fa'otusia submitted that the sentence was excessive in comparison with similar cases and referred to two cases where more serious rapes had attracted much lighter sentences. He submitted that the sentence should be reduced to 6 years with 3 years suspended.

[6] For the Crown Mr Sisifa acknowledged that the sentence was manifestly excessive. He referred to 2 cases involving feeble minded complainants. Both involved guilty pleas. In *R v Fonua* CR 73/2012 a 62 year old accused was sentenced to 4 years imprisonment with 2 years suspended for the rape of a 45 year old woman. The Judge in that case noted that protection of a vulnerable person was a major sentencing consideration and rape of a feeble minded person justified a starting point of 6 years. He made a reduction of 2 years for the guilty plea, previous good character and contrition. In *R v Langi* CR41/2013 the same Judge

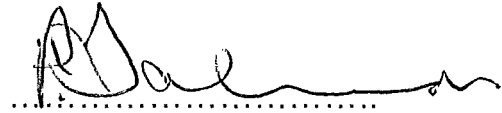
sentenced an 18 year old accused to 3 years imprisonment with a 15 months suspension for the rape of a 44 year old feeble minded woman. The youth of the prisoner was an important factor in the sentence imposed.

[7] Mr Sisifa suggested that the sentence should be in the range of 4 – 6 years and that suspension of part was appropriate.

[8] The appellant was 27 years old at the time of the offending. He maintained that the sex was consensual. However the Jury was obviously satisfied that the complainant was feeble minded and that the appellant knew or should have known this was so. We agree that there is a need for protection of such complainants.

[9] We agree that the sentence imposed was manifestly excessive. The appellant's only previous conviction was for drunkenness. He co-operated in the preparation of a pre-sentence report and apologized to the complainant's mother for his action. It seems that at least at the time of his conviction he accepted the Jury's verdict. We think given his age and lack of serious prior offending that part of his sentence should be suspended. We take 6 years as the starting point in this case and reduce this by one year to

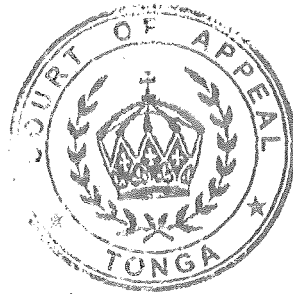
recognize his contrition. The sentence imposed in the Supreme Court is vacated and replaced with a sentence of 5 years imprisonment the last year to be suspended for period of 2 years.



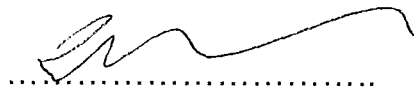
Salmon J



Handley J



Hansen J



Tupou J