

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

**AC 3 of 2013
[CR 300/2011]**

BETWEEN: Filimone Hefa

- Appellant

AND : Crown

- Respondent

Coram : Salmon J

Handley J

Blanchard J

Counsel : Mrs. F. Vaihu for the Appellant

Mr. A. Kefu SG for the Respondent

Date of hearing : 12 April 2013

Date of judgment : 17 April 2013

JUDGMENT OF THE COURT

- [1] This is an appeal against a sentence of 13 years imprisonment imposed by Shuster J after the appellant was found guilty of rape.
- [2] The appellant was convicted on 6 March 2012 after a trial before a judge alone. He was sentenced on 16 March. The final three years of the 13 year sentence was suspended.
- [3] The appeal was lodged out of time but leave to appeal was granted by the President of this Court on 18 March 2013.

Brief facts

- [4] The victim of the rape was the 17 year old sister of the appellant's wife. The appellant, who was 27, was found to have held a knife at the victim's throat and raped her. Afterwards he told her he would kill her if she told anyone what had happened. The offence occurred in the home of his wife's family.

The submission on behalf of the appellant

- [5] Mrs. Vaihu placed very helpful material before us as to the condition of the 2 year old son of the appellant and his wife. This included a letter from Dr. 'Aho a pediatrician specialist with the Ministry of Health. He reports that the child suffers from a very severe condition which makes him totally dependant on his mother for daily living as he is immobile and needs to be bathed, fed and clothed as well as receiving twice daily medications. He is unable to communicate and his long term prognosis is poor.

The 23 year old mother in a statement says the child requires 24 hour care and that her husband's family is only able to provide limited help. She says she cannot handle this alone.

On the basis of this and other material Mrs. Vaihu submits that the starting point of 5 years should be reduced to 3 years with the final 2 years suspended.

The submission on behalf of the respondent

- [6] Mr. Kefu for the respondent said that in Tonga the starting point for sentencing for rape is 5 years imprisonment (see *Teisina v R* [1999] Tonga LR 145 and *'Uha'one Aisea v R*, AC 20/11 (unreported Court of Appeal 27 April 2012)).
- [7] He acknowledged that the sentence imposed was manifestly excessive and we note that the sentencing judge made no reference to the starting point referred to above. We accept that Mr. Kefu's acknowledgment is properly made so the question is as to the appropriate sentence in this case.
- [8] In his circulated written submissions Mr. Kefu submitted that the proper range for the offence in this case was 6 to 8 years with the final 2 years being suspended for 2 years. After considering the material provided by Mrs. Vaihu he said this should be reduced to a range of 3 to 5 years with part suspended.

Consideration

- [9] As the sentencing judge observed and as Mr. Kefu submitted there are serious aggravating factors in this case. They are the use of the knife, the threat to kill, the relationship of the victim to the appellant and the impact of the offending in a cultural sense. Mr. Kefu told us that it is prohibited for relatives of opposite sex to view or talk of sex in the same room or proximity. It seems that this incident caused a rift between the sisters.
- [10] The only real mitigating factor so far as the appellant is concerned is that he is a first offender. Leaving aside the question of his child's condition, we consider that the appropriate sentence is at the higher end of the range originally suggested by Mr. Kefu. As to the question of suspension of the

last part of the sentence, the pre-sentence report suggests that the appellant is at a low risk of re-offending. Mr. Kefu submits that a suspended sentence will assist in rehabilitating the appellant and that a suspension of part of the sentence would accord with the principles enunciated in *Mo'unga v R* [1998] Tonga LR 154. We accept that submission.

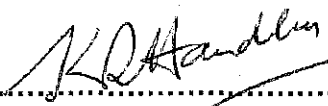
[11] Having considered the material supplied by Mrs. Vaihu, we are prepared to treat this as a special case. However, the seriousness of the offence itself must be reflected in the sentence. The generous suspension proposed reflects the matters raised by Mrs. Vaihu.

Result

[12] The appeal is allowed, the sentence imposed in the Supreme Court is quashed and is replaced with a sentence of 6 years imprisonment, the last 3 years to be suspended for 3 years. This will leave the appellant with approximately 2 years to serve.



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Salmon J



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Handley J



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Blanchard J