

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

AC 6 of 2012
[CR1/2010]

BETWEEN: SIONE MALAKAI UHI

- Appellant

AND : THE CROWN

- Respondent

Coram : Salmon J
Handley J
Blanchard J

Counsel : Mr. S.T. Fifita 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 appeal is against the conviction and sentence of the appellant on a charge of rape. The appeal was out of time, but leave was granted by the Chief Justice on the 18 April 2012.
- [2] Shuster J found the 67 year old appellant guilty of rape of a 12 year old girl after a judge alone trial. He later sentenced the appellant to 6 years imprisonment.
- [3] Although the appeal includes an appeal against conviction the appellant has not sought to provide this Court with a transcript of the evidence given at trial. In a memorandum counsel for the appellant advised that no transcript was required and that the judgment appealed against was sufficient for the purposes of the appeal.
- [4] In summary the grounds of appeal are:
1. The judge should not have allowed the police to give evidence contrary to pre-circulated briefs;
 2. The verdict was inconsistent with the evidence;
 3. The judge should not have relied on personal experience or knowledge;
 4. The judge misapplied the law as to corroboration;
 5. The judge should not have advised the appellant of his legal rights when he had counsel representing him; and
 6. The prosecution did not prove that the appellant (a 67 year old man) was not impotent.
- [5] In his submissions Mr. Fifita for the appellant enlarged on the grounds of appeal. We deal below with the issues raised. He submitted the sentence should be reduced to 3 years or less.
- [6] The Crown contends that no issue has been raised by the appellant sufficient to overturn the conviction, or to disturb the sentence.

Consideration

The appeal against conviction

- [7] The complaint relating to disclosure concerns an apparent mistake in a pre-prepared police brief as to the date of the offence. The indictment

contained the correct date and the police officer corrected his mistake in his sworn evidence. The judge referred to other evidence which supported the indictment date. There was no improper practice on the part of the police in this respect.

- [8] The personal experience and knowledge which the judge relied upon was no more than the knowledge that any judge or policeman acquires. It was not improperly used as was the case in *Hurrell v Naufahu* [2009] Tonga L.R. 319. It was knowledge of life which all judges use in considering issues of credibility.
- [9] As to corroboration the judge was wrong in saying corroboration was required in rape cases, but otherwise correct in emphasizing the care needed before convicting on uncorroborated allegations. Section 116 of the *Evidence Act* does not apply as the complainant gave sworn evidence. Mr. Fifita submitted that the judge did not adequately direct himself in this respect. We do not agree. He was clear as to his duty.
- [10] The appellant complains that the judge was wrong to advise the appellant of his legal rights when he had counsel acting for him. We reject this contention. It was an entirely proper action on the judge's part. After having given the advice the judge adjourned for ½ hour to give the appellant an opportunity to discuss the advice with his counsel. After this the appellant elected to make an unsworn statement rather than give evidence on oath. The procedure followed by the judge was entirely fair.
- [11] A ground of appeal claiming that a 67 year old man should be regarded as impotent until proved otherwise by the Crown was sensibly not pursued in oral submissions.
- [12] There were general grounds claiming that the finding of guilt was inconsistent with the evidence and that justice was not done. We agree with the Crown that there was ample evidence on which the judge could convict, including statements (but not admissions) made by the appellant himself. The judge considered the complainant and another witness, who recounted a confession made by the appellant, to be truthful and reliable witnesses. He did not regard the appellant as truthful in relation to his account of what occurred. The appellant

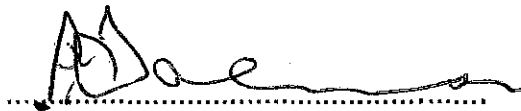
complains of reliance on medical evidence. This was just a part of the total evidence relied on by the judge.

[13] We are satisfied that the appellant was rightly convicted and the appeal against conviction is dismissed.

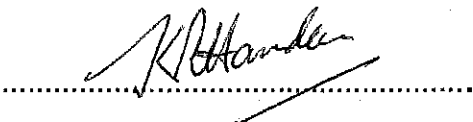
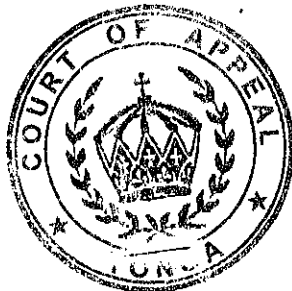
The appeal against sentence

[14] In our view the rape of the 12 year old girl could have justified a longer sentence than that imposed. While the judge's approach to sentencing may be properly criticized, in that he took an inappropriate starting point, the ultimate outcome was a merciful sentence which took into account the appellant's age.

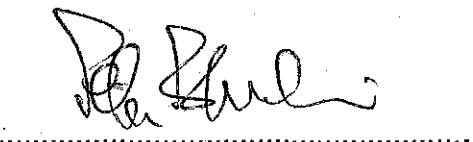
[15] The appeal against sentence is also dismissed.



Salmon J



Handley J



Blanchard J