

IN THE COURT OF APPEAL OF TONGA

CRIMINAL JURISDICTION

NUKU'ALOFA REGISTRY

APPEAL NO. AC 33 of 2009

BETWEEN : SIAOSI KOFUTU'A

Appellant

AND : REX

Respondent

Coram : Ford CJ
Salmon J
Moore J

Counsel : Mr Tu'utafaiva for the Appellant
Mr Sisifa for the Respondent

Date of Hearing : 9 July 2010.

Date of Judgment: 14 July 2010.

JUDGMENT OF THE COURT

The appellant was convicted of manslaughter after a trial before judge and jury in the Supreme Court. On 1 October 2009 he was sentenced to 15 years imprisonment. He appeals against that sentence.

Brief facts

The victim was a 32-year-old woman who it is said was mentally slow. Over a period of three or four years prior to the events that led to her death she had sexual intercourse on about five occasions with the appellant. On the night of the offence the appellant and his friends were drinking vodka when the victim arrived and sat with them. She did not drink. The appellant and his friends ran out of cigarettes and the victim said she had some at home. The appellant and the deceased left to get the cigarettes. When they were outside, it now being after 11 PM and dark, they had sexual intercourse. After this and on their way to get the cigarettes the victim told the appellant that she was lying and in fact had no cigarettes. The appellant then punched her on the chest and the chin causing her to fall to the ground. She stood up and the appellant punched her again on her chest and again she fell down. Again the victim stood up and the appellant punched her again on her stomach and repeatedly on her chin. While he was doing this he held her up and told her not to lie to him again and not to follow him or come to his home. The above account of the attack is taken from the submissions made by counsel for the appellant however in his sentencing remarks the judge said that the appellant also bashed the victim against the bathroom door or wall on six occasions. Counsel acknowledged that there was evidence to that effect from a witness in the case. Apparently the victim was able to walk home but was later taken to hospital where she died. A post-mortem showed that the cause of death was a subdural haematoma in the brain. The doctor described seeing bruises on the chin, shoulders thigh and sternum. The judge referred to photographs which showed bruising all over the top half of her body. The appellant was 19 years of age at the time of his attack on the victim.

The judge's sentencing remarks

The judge noted that the appellant was fully cooperative in his interview with the police and admitted assaulting the victim on more than one occasion. The judge described it as a vicious assault. He recorded the appellant's apology to the family made before him and that the appellant now accepted that he had caused the victim's death. He took a

starting point for a person of the appellant's age on a not guilty plea of 15 years imprisonment. He considered whether a portion of such a term should be suspended. He decided against suspension because of what he saw as the importance of a deterrent sentence and the need to protect women and particularly a woman with mental problems. He therefore imposed a sentence of 15 years imprisonment.

The submissions in this court

Counsel for the appellant and the respondent both submitted that the sentence was excessive and that a portion of it should have been suspended. Counsel for the respondent made reference to the case of *Tu'itavake v R* [2005] TLR 348 and suggested that the term of imprisonment should be not more than 12 years. Counsel for the appellant submitted that there was no predetermination on the part of the appellant to assault the victim and that there was no great brutality involved. He noted that the appellant's mother was drowned in the Ashika tragedy while travelling to be present at the appellant's trial. In his submissions to the sentencing judge counsel submitted that the appellant had to look after his father and brother. Counsel also told us that the appellant's family had apologised to the victim's family in the traditional Tongan custom and that they contributed to the funeral by offering Tongan mats and tapa plus food.

Discussion

We agree with the sentencing judge that this was a brutal and prolonged attack. There was no provocation although we accept that there also seems to have been no premeditation. The maximum penalty for manslaughter in Tonga is 25 years imprisonment. There can be no fixed penalty for manslaughter because the circumstances vary enormously from those cases where what occurred was little more than an accident to those that are close to murder. The wide variance of types of manslaughter is well recognised by the courts see for example Lord Simon in *DPP v Newbury* [1976] 2 All ER 365(HL) at 367. As mentioned above Crown counsel referred us to the decision of this Court in *Tu'itavake*. That judgment noted at page 352 that the judge in that case did not mention one factor which this court considered was relevant in mitigation of sentence. The pre-sentence report referred to a considerable degree of restitution having been made by the appellant to the deceased's family. Counsel referred to the sentencing range set out in that judgement at paragraph 19. It must be borne in mind that the sentencing range referred to applies to cases where a jury had returned

convictions for manslaughter on the ground of provocation. Here it is admitted that there was no provocation. We agree with Crown counsel that the category closest to this case is category [2] where it is suggested that 10-12 year sentence is appropriate in a case where great brutality was used on the victim.

Because there was no provocation in this case a starting point higher than 12 years is appropriate. There are however a number of mitigating factors which must be taken into account. First there is the youth of the appellant. There is his remorse and apology. There is also the degree of restitution made by the appellant's family to the victim's family which appears not to have been referred to in the court below. There is also the acknowledgement that the appellant cooperated with the police in his statement in terms of admitting the attack on the victim. Bearing in mind that an appeal court must always respect the exercise of discretion by a trial judge we conclude that the judge's starting point of 15 years was not inappropriate but we consider that he did not take sufficient account of the mitigating factors which are outlined above. Taking those factors into account we consider the appropriate sentence to be 13 years imprisonment. We also conclude that this is a proper case for suspension of part of the sentence. As mentioned in another judgment of this Court, released at the same time as this one, suspension has the twin aims of rehabilitation and deterrence. In *Mo'unga v R* [1998] Tonga LR154 this court set out at page 157 a number of situations, not intended to be either exhaustive or comprehensive, in which suspension of the sentence may be appropriate. That case listed the following examples:

- (i) *Where the offender is young, has a previous good record, or has a long period free of criminal activity.*
- (ii) *Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.*
- (iii) *Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.*
- (iv) *Where there has been co-operation with the authorities.*

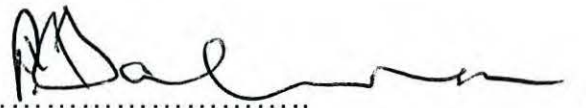
A number of the above factors are present in this case. Some of them have been taken into account in mitigation of the term of imprisonment. We believe it is appropriate to take them into account again in considering suspension because suspension does not involve a reduction in the term of imprisonment but merely a suspension of part which can be activated should the prisoner reoffend.

Determination

For all the above reasons we have concluded that the sentence imposed by the judge must be set aside. In its place we impose a sentence of 13 years imprisonment. The final three years of that term is suspended for a period of three years.



Ford CJ



Salmon J



Moore J