

IN THE SUPREME COURT OF TONGA
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

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AM 19 & 22 of 2016

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11/11/16

AM 19 of 2016

BETWEEN: POLICE - Appellant

AND: PITA KOLO - Respondent

AM 22 of 2016

BETWEEN: PITA KOLO - Appellant

AND: POLICE - Respondent

BEFORE THE HON. JUSTICE CATO

J U D G M E N T

Mr Aho for the Appellant

Mr Kolo was unrepresented

[1] These two appeals are interrelated. The first was an appeal brought by the police against the sentence passed on the Respondent Pita Kolo by Principal Magistrate Mafi on the 14th June 2016. The second was an appeal by Mr Kolo against a subsequent sentence imposed by Magistrate Kaufusi in which he ordered Mr Kola to serve a sentence of imprisonment of two years and six months which had been imposed on him by Principal Magistrate Mafi for his earlier offending, but had been

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fully suspended. Magistrate Kaufusi did not impose any sentence on Mr Kola for the offending that was involved in that case.

- [2] In the case before Principal Magistrate Mafi the appellant had pleaded guilty to one count of serious indecent assault and one count of common assault under sections 124(1) and (3)(a), and section 112 (f) respectively of the Criminal Offences Act. The maximum sentences for this offending are in the case of serious indecent assault 5 years imprisonment and in the case of common assault, one year imprisonment. The facts relating to the first offending were briefly set out in a summary attached to the Appeal. These read;

“On or about 15th January 2014, the complainant had accompanied an aunt one Monalisa Vai to a Chinese store by their house in Houmakelikao. Upon arriving at the store, Monalisa told the complainant to go make their purchase whilst she stood there talking to the accused. Whilst the complainant was making the purchases, Monalisa and the accused began to walk back to their house leaving the complainant to catch up from behind.

As they were walking, Monalisa’s mobile phone rang so she walked on ahead to answer it leaving the accused and complainant. It is alleged that as soon as Monalisa was out of view, the accused pulled the complainant and carried her into the nearby bush. In doing so, the accused lost his balance causing them both to fall to the ground. The complainant’s head landed on a hard object which caused her to become unconscious. The accused then ran to Monalisa at their house nearby and told her that the complainant had fainted. They then rushed her to the hospital where she was able to gain consciousness a little while after.

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Furthermore, in January 2014 on an unknown date, it is alleged that the complainant was asleep in her room when she awoke because she felt she was naked. She got up to see the accused who then held her mouth. He then sucked on her breasts. She then lied to him that someone was approaching which caused him to stop and leave.

The accused is 37 years old and is not a first time offender. He chose to remain silent in his record of interview to the police."

[3] This prosecution had by consent been transferred from the Supreme Court to the enhanced jurisdiction of the Principal Magistrate for trial. The Respondent had been represented by counsel. The Respondent had pleaded guilty but this was later set aside and his counsel withdrew. He later changed his plea once again to guilty. The Principal Magistrate had received a probation report which principally referred to a plea from his wife for mercy because he was the family's breadwinner and they could not survive without him. He expressed remorse for his offending.

[4] Principal Magistrate Mafi gave no reasons for the sentence he passed on Mr Kolo. The notes record;

"Accused, listen to the verdict. Assault- convicted and discharge

Indecent assault imprisonment for two years and 6 months but fully suspended for three years. A probation visit once very month by this family in the report and if he reoffends those penalties will apply."

[5] This Court has emphasised on several occasions in appeals from Magistrates judgments, that reasons must be given for decisions

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made in that Court. All too frequently, this Court has been asked to intervene in cases where there is little or no reasoning to support a sentence. It would seem in suspending the sentence of imprisonment of two years and six months, Magistrate Mafi acceded to the wife's plea for mercy.

[6] Mr Aho does not challenge the sentence of imprisonment of two years and six months, but submits this was not a case where there should have been suspension. Mr 'Aho, who had filed a comprehensive submission for the Magistrate submitted in this Court that the circumstances of the offender's background and indeed his ambivalent approach to the guilty plea with only belated remorse reflected an overall lack of co-operation with the police or prosecution, and this coupled with the seriousness of his offending involving a serious sexual assault on a child meant that he should serve his sentence of imprisonment. He also drew to my attention that the Respondent had a list of convictions, 54 for theft, housebreaking assault and other offences. I examined the record and pointed out that whilst he had an unenviable record he had not appeared to have offended since 2006, and not in any sexual way.

[7] I agree with Mr Aho that it was, straining Mo'unga [1998] TLR 154 principles to assert that there was any great degree of cooperation by the Respondent in his belated and repeated changes of plea, and that had the matter appeared before me I may well not have suspended any part of his sentence of imprisonment. First, both offences involving assaults on a child of 11 were serious. As to the sexual assault, it occurred at night when she was sleeping. He was related to the child who was a

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cousin and lived in proximity to the victim's residence on common ground. Furthermore, this incident had occurred after the first offending when he had taken her into bushes and he had lost his balance and both had fallen to the ground, she striking her head and losing consciousness. I see no good reason why he would have forced her into bushes unless at that point, he intended to pursue some kind of sexual activity with her.

- [8] The seriousness of his offending must also be taken into account when it comes to deciding whether or to what degree the sentence of imprisonment for the serious indecent should have been suspended, or else the underlying rationale for stern sentences namely the protection of women and children in Tonga will be undermined. The maximum period for which a sentence of imprisonment can be suspended under section 24 of the Criminal Offences Act is three years during the course of which the offender must not commit any offence punishable by imprisonment or he can be recalled to serve his sentence. The Principal Magistrate must have been unduly influenced by the Respondent's family situation in suspending the sentence fully. Whilst I accept that a Court may take an offender's family situation into account, in considering whether suspension is appropriate, because the acceptance and performance of family responsibilities may in fact promote rehabilitation, this must be balanced against the seriousness of the offending.

- [10] In this case, there were in my view two factors which could legitimately have been taken into account by Principal Magistrate Mafi in determining that some part of the sentence should be suspended. The first is that, albeit late, there were pleas of guilty

and an expression of remorse, the second is that whilst his offending had been extensive, he had no earlier history of sexual offending and no record of offending after 2006. The final factor of importance, as I have stated, was his family's dependence on him for support. Against these considerations, however, was the countervailing factor that he had pleaded guilty to quite serious sexual offending against the child victim. Had the appeal arrived before me more quickly than the three to four months it took for it to arrive in this Court after filing, I might have ordered him to serve at least some part of the sentence of imprisonment. Because of the delay, I decline now to interfere with Principal Magistrates Mafi's decision to fully suspend the sentence. However, as I explained to the Respondent at the hearing I intend to impose further conditions and to that extent I vary the sentence.

[11] First, I consider this offending required some counselling of the Respondent in relation to sexual abuse, and violence against women rather than probation visits to the family every month as the Magistrate ordered. I am strengthened in this view because it appears that earlier the Respondent had been involved in other sexual offending for which he later appeared for sentence before Magistrate Kaufusi after Principal Magistrate Mafi had dealt with him. This later offending is considered below in AM 22/2016.

[12] In my view, fully suspending the two and half years imprisonment does not adequately emphasise the seriousness of his offending, and is an inadequate judicial response. Whilst declining to interfere with suspension, I consider the Respondent should perform 100 hours community work with the

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recommendation that he join the group cleaning the Vuna Road as retribution or punishment for his offending. I increase this to 130 hours to reflect my approach to the additional offending considered in AM 22/2016.

[13] I consider the sentence of conviction and discharge for the assault involving taking the child into the bushes to be manifestly inadequate. This was a serious assault on an unsuspecting child which resulted in her injury, and merited a sentence of 9 months imprisonment which I order should be served concurrently with the sentence imposed by the Magistrate of two years and six months for the serious sexual assault, and suspended also. Women and children in Tonga will be protected against sexual or other assaults, and sentences must reflect this.

[14] The appeal is allowed. The sentence of the Principal Magistrate is varied to this extent;

- a. The sentence of two and a half years imprisonment for serious sexual assault is fully suspended on the following conditions;
 - i. The Respondent is not to commit any offences punishable by imprisonment during the period of his suspension.
 - ii. The Respondent is placed on probation for 12 months from the date of this judgment with the following conditions;

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1. He is to live where directed;
2. He is to attend a course of sexual abuse and violence under the direction of probation with the appropriate agency
3. He is, under the direction of probation, to perform 100 hours community work with the recommendation this be cleaning the Vuna road between Sopu and Popua
4. The Respondent is to attend Probation within 48 hours of the date of the judgment.

- b. On the charge of common assault, he is convicted and sentenced to 9 months imprisonment fully suspended and concurrent with the charge of serious sexual assault.

[15] In relation to the matter which Mr Kalo appeals namely the sentence of Magistrate Kaufusi on the 16th September 2016 which committed him to serve the period of 2 years and 6 months sentence previously imposed by Principal Magistrate Mafi on the 24th June, 2016, because he had appeared before Magistrate Kaufusi on a further charge of common assault and a charge of simple indecent assault. He was not sentenced by Magistrate Kaufusi on either of these charges but simply committed to serve the period of imprisonment that had been earlier suspended by Principal Magistrate Mafi. Mr Aho rightly (because the file is very limited in the supply of information)

drew my attention to the fact that both offences were charged on dates earlier than the date on which Principal Magistrate Mafi had sentenced the appellant to a fully suspended prison sentence of 2 and half years. Accordingly, the Appellant was not in breach of Principal Magistrate's Mafi's order and should not have been ordered to serve that sentence under section 24 (3)(c) of the Criminal Offences Act. His order committing Mr Kola to serve the sentence of 2 and half years imprisonment is quashed.

[16] Because I had limited information, I initially ordered the Appellant to appear before Magistrate Kaufusi for sentencing however, I indicated at yesterdays' hearing I would deliver a written judgment. I consider the best interest of justice and finality would be achieved by imposing on each of the two charges which the appellant pleaded guilty to, before Magistrate Kaufusi and is now convicted to additional short periods of community work to be served cumulatively with the 100 hours imposed by me in relation to the earlier appeal. The sentence on the assault count 295/16 which was a punch to a male is 10 hours community work to be served cumulatively on the 100 hours imposed by me in relation to Appeal AM 19/2016. The second offence of simple indecent assault involves touching of woman on the breast and he is convicted on this charge (296/16) and sentenced to 20 hours community work to be served cumulatively also on the 100 hours imposed by me in relation to Appeal AM 19/2016. The overall sentences of community work of 30 hours is to be served cumulatively upon the 100 hours referred to in para 14. Should Mr Kolo not serve this additional period of 30 hours in default he is to serve one month imprisonment.

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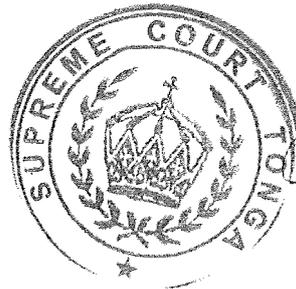
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[17] Mr Kolo is warned that if he does not perform any of the conditions imposed, he may well find himself recalled under section 24 of the Criminal Offences Act to serve a period of imprisonment. He should ensure that he takes this opportunity to remain out of any further offending.

[18] A copy of this judgment is to be sent to Probation. Mr Kolo is to attend Probation within 48 hours of the delivery of this judgment to him.

[19] He is released from bail.

DATED: 10 NOVEMBER 2016



C. B. Cato
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JUDGE