



c. He was to undergo a course under the direction of probation on alcohol and drug abuse

- [3] He also pleaded guilty to conspiracy to housebreak and was convicted and sentenced to two years imprisonment to be served concurrently with the robbery charge.
- [4] He was also convicted of serious housebreaking to three and half years imprisonment to be served concurrently with the robbery sentence.
- [5] On a charge of conspiracy to theft he was convicted and sentenced to two years imprisonment to be served concurrently also.
- [6] These sentences were all ordered to be backdated to the date of his remand in custody on these charges.
- [7] On the 1<sup>st</sup> February, 2016, his trial for rape, which also arose out of this incident and to which he had pleaded not guilty on the 5<sup>th</sup> February 2015 and had elected trial by Judge alone, was due to commence. Shortly before the trial commenced, Mr Niu SC informed the Court that he had instructions from his client to change his plea. The prisoner was re-arraigned and pleaded guilty. His sentence was adjourned until today's date.
- [8] The circumstances of his offending are serious. On the 10<sup>th</sup> June, 2014, Mr Pale, together with five other young men, were driving around the Sopus area at about 11:00pm in a truck belonging to the prisoner. During this period, one of the men had pointed out a house where he was sure goods could be located and said the residents were elderly. The man, who had provided this information, was dropped off at his residence whilst the others returned at about 3:00pm and entered the house. The prisoner

climbed up a pipe and entered the house on the first floor. He then opened the entrance door to allow the others in. Four others entered and went upstairs. The victim was still asleep in her bedroom. She was the only person in the house. Three men including the prisoner entered with their faces covered. Two of the men tied her up and Pale threatened her not to make noise. She was tied to the bed whilst they proceeded to remove goods from the house. A large amount of property was removed from the house and placed in Mr Pale's truck. He then returned alone into the house and told the victim that he wanted to have sex with her. He proceeded then to digitally abuse her. She found this painful and asked the accused to stop doing this as it was painful but to have sex with her if he wanted it. He then untied her bonds on her feet, removed her pants and had sexual intercourse. He had, when he came into the room, been carrying a screw driver but the Crown advised that he put this down and had not threatened her with its use. After the rape, the prisoner left the house with the complainant still having bound hands. She managed to free herself and seek assistance. The prisoner admitted his offending to the police.

- [9] Ordinarily, a starting point of 5 years has been said to be appropriate for rape in Tonga, after a defended hearing. That starting point was fixed in 1996, and might seem to be rather low for such a serious crime in recent times. However, Parliament has not seen fit to increase the maximum penalty for rape in Tonga which is still 15 years whereas in other jurisdictions such as New Zealand, the starting point is significantly higher, the maximum sentence there being 20 years. See the discussion in Fa'aoso v R [1996] TLR 42, at 44. In my view, however, there are present here circumstances of aggravation which justify a higher starting point than 5 years, as Mr Lutui submitted. These are the fact it occurred at night following a break in by a number of young men in disguise into

the victims' residence, her being tied up at the insistence of Pale and then threatened by him, and then, after the robbery, was nearing completion, Pale returned alone into the house and raped her whilst she was still tied up. This must have been a terrifying ordeal for the complainant who was a woman alone in the house, at the time. The facts tend to suggest that whilst she may have submitted to intercourse as a consequence of what had gone before, the fact she was bound and had found the digital abuse painful, her submission was not consent. Mr Niu SC candidly stated that the prisoner's delay in pleading was on legal advice, but the plea was altered after Mr Niu appreciated that the victim's submission could not in law be regarded as consent.

[10] It is offending which must be marked with a higher than usual starting point to condemn the callous, and violent nature of the offending, to deter others from doing similar acts and to protect woman from predatory behaviour. Mr Lutui submitted that the aggravating features would justify a starting point between 6 and 8 years. Mr Niu cited to me Latu v R AC 3 of 2014, where the Court of Appeal had reduced a sentence of 14 years for the rapes to one of 8 years with the last two years suspended where there had been multiple rapes and assaults and effective detention of the victim for about 24 hours and the use of a knife to threaten her. The victim had been a virgin and the appellant continued to maintain his innocence after he was convicted. Latu had no previous convictions of relevance. I agree with Mr Niu that the present case does not involve a series of rapes and nor was a weapon used to intimidate the victim and for that reason objectively may be less serious than Latu. However, the fact that it was proceeded by a home invasion with the victim being disabled by a number of men including Pale means that it was still very serious. I fix a starting point of 7 years.

[11] I have had resort again to consider the probation report filed earlier in relation to Mr Pale when considering mitigation. He is now aged 34. He was, however, older than the other offenders. He is married with 8 children. He lived at Lapaha with his wife and was a leader for a daily labour work group and also hired out a truck and tractor to earn income. Unlike many offenders, he was in gainful employment earning about \$300.00 per week. He was also a first offender. The rape appears to have been an opportunistic attempt by him to take advantage of the victim, in the absence of the others. His offending that night had, Mr Niu submitted, been the product of a large amount of alcohol being consumed by the group. That might explain his aberrant conduct which was out of character for Pale but the fact that his behaviour may have been induced by excessive alcohol consumption is not a factor that can mitigate his offending.

[12] In my view, the most significant factor in mitigation is his guilty plea late though it was for reasons which Mr Niu has explained. By pleading guilty he has at least saved the victim from having to relive the ordeal although the lateness of his plea diminishes the discount because she has had to live with the prospect of having to give evidence for a very long time, an ordeal in itself. Mr Lutui informed me that the victim had resigned herself to what had occurred and was pleased not to have had to give evidence. She and her husband had left these premises, after the incident. It is implied at least that he is remorseful for his conduct, and he has assumed responsibility for his actions. I take into account also that at the time of his offending he was a first offender. I also take into account, although to a lesser extent, that he is married with a large family. They are also, in a sense, victims of his criminality, they being deprived of his income and support for what will be a considerable time. I was informed by Mr Niu that they now live on charity and are still supportive of the prisoner visiting him in prison. I allow him a discount by way

of mitigation of 2 years imprisonment. In my view, an appropriate sentence for rape is 5 years imprisonment.

[13] I now reflect on what should be the overall sentence in the light of his previous sentence for robbery of 6 years with the last 18 months suspended as above imposed by me on the 28<sup>th</sup> April, 2015. In doing so, I apply the totality principle that the overall sentence should not be crushing despite the accumulation of the sentences to reflect the combined effect and seriousness of the offending. In my view, it is appropriate to accumulate in part the sentence for rape with that of robbery arising as they do out of the same criminal enterprise, yet being discrete offences. I consider that additional to the sentence for robbery of six years imprisonment with the final 18 months being suspended, a further period of two years of the 5 years imprisonment imposed now for the rape should be served before Mr Pale is released on suspension. This means that he will have to serve a combined prison sentence of six and a half years (less any remission) for both offences and only then will the 18 months suspension of the robbery portion of his sentence operate to allow for his release. I have considered in fixing the additional period, the serious nature of the sexual offending which, in my view, requires a meaningful accumulation in the public interest, but refrain from imposing any longer period because he has pleaded guilty, is a first offender and to assist further with his rehabilitation, it is in my view advantageous that he be reunited with his family when this additional period has been served, and he will be then be able to released under suspension on the terms set out in paragraph 2.

[14] I am grateful to both counsel for their submissions.

**DATED: 5 FEBRUARY 2016**

