Solicitor General

There is to be no publication of this judgment which directly or indirectly identifies either of the complainants in these proceedings.

13/04/16

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IN THE SUPREME COURT OF TONGA **CR 174 of 2014**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

BETWEEN: **R E X** **- Prosecution**

AND: **LANGA'EKU'OFA TULAKINA FOTOFILI** **- Defendant**

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Lutui for the Crown

Mr Fili for the Defendant

SENTENCE

[1] The prisoner was charged with two counts of carnal knowledge of a child under the age of 12 in relation to one victim and one count of carnal knowledge of a child under the age of 12 in relation to the other, the girls being sisters contrary to section 121 (1) of the Criminal Offences Act and 12 counts of Indecent Assault on a child contrary to section 125 (1) of the Criminal Offences Act. These assaults were perpetrated against both victims.

[2] He had pleaded not guilty on all counts and had maintained his pleas on arraignment before the trial commenced on the 29th February 2016. After the first complainant, the younger girl had given her evidence that she had been the victim of carnal

knowledge in the home when her mother was absent and in a bush area which she was taken to by the prisoner, and had been cross-examined by Mr Fili on the first day of the trial, the prisoner changed his plea on the second day to one of guilty on all counts. This was shortly before the second complainant, the older girl, was to give her evidence. Mr Fili had only recently been instructed to represent the prisoner after an earlier counsel had withdrawn. I am grateful to him for taking the case on at short notice and in his submissions on sentence.

[3] The sisters were the children of the prisoner's defacto partner whom he had lived with since about 2012. There were also two very young infants in the household from his relationship with the victims' mother, both girls. The prisoner and his wife had lived with the victims in various locations in Tongatapu before the offending took place. The victims were aged 11 and 10 years respectively, at the time of the offending. The prisoner is aged 39. Plainly, he was in a position of a trust with the victims.

[4] The present offending took place in Lapaha where they had accommodation in a tax allotment.

[5] During this period, in January 2014, the prisoner had carnal knowledge of the older girl once; and twice with the younger girl. These offences took place without the knowledge of the children's mother at the home and in the bush area of the allotment. The prisoner admitted to his probation officer that the offending had in fact been extensive over a two week period. He admitted he caused pain to the victims, especially when trying to insert his fingers or penis into their vagina. He saw he had blood on his fingers. He admitted he did not stop on any occasion until he was sexually satisfied. Some of the offending took place in the day and at times at night. He told the girls not to tell anyone. He admitted to it happening almost every day for two weeks,

and said he did not expect the children to tell anyone because of their age. I gave Mr Fili the opportunity of discussing the report with his client and after he had done so he did not seek to dispute anything that had been said in the report about the offending.

[6] The offending is very serious. Carnal knowledge of a child under the age of 12 is an offence for which the maximum sentence is life imprisonment. In *Sosefo Kolo* CR 52 of 2012, I considered a suitable starting point for this offending and determined that 8 years imprisonment was appropriate taking into account that in *Fa'aoso* VR [1996] Tonga LR 42 the Court of Appeal decided that a starting point of 5 years was appropriate for rape where the maximum penalty is 15 years imprisonment. In the case of Kolo the offending had occurred several times with a ten year old girl, she having been taken in a car to isolated area in Sopu, and on one occasion threatened with a gun. Kolo was aged 63. There was also evidence that she had been given small sums of money. Kolo had a previous conviction for indecent assault on girls in 2006 and had been given a sentence of two years imprisonment with six months suspended. Although there was no trust relationship, as there is here, the evidence indicated that Kolo had been involved with the victim over a period of time and may have groomed her to participate. Kolo had pleaded not guilty and the complainant gave evidence for more than a day I considered that the circumstances of the offending in *Kolo* justified a sentence of 12 years imprisonment. I considered that this was in keeping with an earlier level of sentence in *R v Hu'akau* [2008] TOSC 5 where the prisoner had been sentenced after a guilty plea to eight years for carnal knowledge of a child. There, the Chief Justice had indicated that had it not been for the guilty plea he would have imposed a sentence of between 10 and 11 years. In my view *Kolo* was a worse case of repeated offending by a much older man who had been involved in

grooming the child with payments of money and serious threats. He also had a previous conviction for indecent offending with children.

[7] Mr Photofili also has a previous conviction but, in his case, it is more serious being the rape of a victim aged 12 in 2007. He was sentenced in that case to six years imprisonment after a defended hearing. In that case, the victim was staying in the house with an elderly sister of her foster mother where the prisoner, who was her grandson, was also staying, at the time. The victim complained he had raped her, which he had denied. The prisoner raised an alibi and said he had been elsewhere at the time. The grandmother gave evidence for the defence. This was rejected by the trial Judge who sentenced the prisoner to 6 years imprisonment. It is to be noted that the prisoner was released in 2012, and met the victims' mother and commenced this relationship it seems shortly after. He had, according to the probation report, been married at the time of committing this offence and had one child. His former wife reported to probation an unhappy union accompanied by violence. This had ceased when he went to prison. The prisoner, the probation report records was born in Tongatapu but had lived with his maternal grandmother and had been brought up in Ha'apai, until they moved to live in Tongatapu where the rape offending had taken place.

[8] The girls, in the present case, were also disbelieved by their mother, the prisoner suggesting the allegations were made up because of pressure placed upon them by their father who allegedly, according to the probation report, resented the prisoner's involvement with his wife. A recent guardian ad litem report indicates that the children have been placed with family caregivers in Ha'apai and that their progress appears to have been satisfactory receiving counseling from the Woman's refuge.

The girls' father has filed an application for custody and a custody hearing is anticipated. It is too soon to know what the outcome of this offending will be in so far as long term effect on the victims is concerned, but the report suggests both are putting the offending behind them. Plainly, the offending has been both injurious mentally and physically, as well as dislocating of the children's lives and living conditions. Sadly, it has also meant that their relationship with their mother has been damaged.

[9] I have heard both counsel. I was grateful to Mr Lutui for appearing on this application because I viewed this sentencing as one that was very serious and had the potential for a sentence of life imprisonment. I took the view that the offending was worse here than in Kolo and with a previous serious offence of rape of a young person, the prisoner now aged 39 was a serious candidate for an indeterminate sentence of life imprisonment. I consider that he represents a serious threat to girls and there is no certainty that, even when released after a long period of time in custody, he will not still represent a serious threat. It is for this reason that I thought an indeterminate life sentence might be appropriate. There is no sentence of preventive detention in Tonga. Mr Lutui, however, for the Crown did not support a life sentence in this case. He submitted that it would be manifestly excessive tending to suggest that offending of this kind was not in the same category as murder. Parliament has determined, however, that the life sentence is available for carnal knowledge offending against young children. It may, I consider , sensibly be imposed where the offender demonstrates a propensity for this kind of offending, and presents a continuing future danger to children. Those who chose to offend in this way must appreciate that they risk being imprisoned for life. The Courts will protect young children from this kind of offending. Their security is the paramount sentencing consideration, here.

[10] I have reflected on the matter at the hearing and further over the weekend. The prisoner, through his counsel Mr Fili and in the probation report, has indicated some remorse and perhaps come to an appreciation of the enormity of his offending. He has pleaded guilty, although only very belatedly. I consider the matter can be disposed of by way of lengthy finite sentence appropriate to the serious nature of the offending in regard to two victims.

[11] I do not see any mitigating factors of any consequence here aside, however, from the belated plea and perhaps some remorse. I consider that teach of the three counts of carnal knowledge for which the prisoner is convicted should carry sentences of 10 years imprisonment reflecting the serious breach of trust and emphasizing the need to both deter and denounce this kind of offending against vulnerable victims and protect children. I consider that counts 1 and three should be in a significant part served cumulatively. Applying the totaling principle, I order that six years of the sentence of ten years imprisonment on count 3 in relation to the second victim be served cumulatively on the sentence of 10 years imprisonment imposed on count one in relation to the first victim. The overall sentence will be one of 16 years. The sentence of 10 years imprisonment on count 5 is to be served concurrently with count one.

[12] In relation to the indecency counts charged in relation to the older victim, attempting to insert his penis (counts 7, 13) he is convicted and sentenced to 2 and half years imprisonment on both counts. For digital penetration (counts 8, 11), he is convicted and sentenced to two and a half years imprisonment on both counts. For licking her vagina (counts 9, 12) he is convicted and sentenced to two and half years imprisonment on

both counts. For taking her clothes off (count 10) he is convicted and sentenced to 12 months imprisonment.

[13] In relation to the younger victim, licking vagina (count 14) he is convicted and sentenced to two and half years imprisonment; for digital penetration (count 15) he is convicted and sentenced to two and half years imprisonment, for kissing her mouth and sucking her tongue (count 16) he is convicted and sentenced to 18 months imprisonment; for massaging penis around vagina, (count 17) he is convicted and sentenced to two and a half years imprisonment; for taking off her clothes (count 18) he is convicted and sentenced to 12 months imprisonment. All sentences on counts 7-18 are to be served concurrently with count one and with one another. All sentences are to be backdated to the date the prisoner was remanded in custody on these charges.

[14] Finally, in relation to the overall sentence of 16 years, I suspend the final 18 months. The fact that the prisoner has expressed some remorse and pleaded guilty suggests he may rehabilitate. However, more important, in my view, is that when he is released it should be with restrictions and supervision to better ensure the risk of further offending is reduced. The final 18 months is suspended of the overall sentence of 16 years (counts 1 and 3) on the following conditions;

a. He is not to commit any offences punishable by imprisonment for a period of three years;

b. He is placed on probation for the period of his suspension;

c. He is not live in any residence where other girls or young women reside;

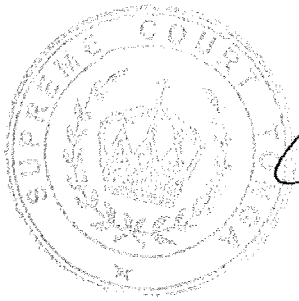
d. The probation officer is to arrange suitable counseling for him from the appropriate authority relating to sexual abuse during the period of his suspension.

[15] I record that I have not had resort to the approach in Veen v The Queen [1987-88] 164 CLR 465 at 477 (applied in R v Patrick Unga Cr 84/2014) which recognizes the court's power to order an extended period of imprisonment in the case of a recidivist prisoner for the protection of society. Nor have I adopted that line of New Zealand authority which allows for longer finite sentences for the protection of society where the courts have decided not to impose indeterminate sentences such as a life sentence or preventive detention. R v K (1990) 6 CRNZ 210 (CA) R v Leitch [1998] 1 NZLR 421 (CA). However, these approaches to what can be a very difficult aspect of sentencing (namely better ensuring the protection of society where offenders have demonstrated they have recidivist tendencies) may be important in future cases of this kind. In this case, the fact that there were two victims allowed me to impose a partly cumulative sentence which adequately reflected the seriousness of his overall offending and protected society.

[16] Finally, I accept the submission and request of the Crown that under section 11 of the Family Protection Act, the prisoner should have no contact whatsoever with the victims in this case, and nor with the girls that are the children of his present relationship. They will still be teenagers when he is released.

[17] A copy of this judgment is to be sent to the Commissioner of Prisons and also to the Victims' mother so that she is fully aware of the orders made by this Court in relation to her children. I also direct the Crown to provide the mother, the Victim's father, and the Commissioner of Prisons with a copy of this judgment.

The Guardian ad litem is to arrange with the Court a suitable time for the father's custody application to be determined.



C. B. Cato

DATED: 7 APRIL 2016 **J U D G E**