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**IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY**

CR 96 of 2014

BETWEEN: REX

Prosecutor

AND : KEFU KALAVI

Accused

BEFORE LORD CHIEF JUSTICE PAULSEN

**Hearing : 18 August 2016.
Date of Ruling: 18 August 2016.**

**Counsel : Mrs L. Fakatou for the Crown
Mr. K. Kalavi unrepresented and in person**

RULING ON SENTENCE

[1] Mr. Kalavi appears before me today for sentence on charges of attempted rape (section 120 Criminal Offences Act (Cap 18)), serious housebreaking (section 173(1)(b) and 5(a)(b) of the Criminal Offences Act (Cap 18)) and common assault (section 112a Criminal Offences Act (Cap 18)). I found him guilty on those charges following a defended hearing and entered convictions in a ruling delivered in writing on 25 July 2016.

- [2] Both attempted rape and serious housebreaking carry maximum penalties of 10 years imprisonment (sections 173(1)(b) and (5)(a) and 120 Criminal Offences Act). Common assault carries a maximum penalty of a fine of \$5,000 or imprisonment for any period not exceeding 1 year or both (section 112(a) Criminal Offences Act).
- [3] The facts that were proven are that at around 2am on Tuesday, 26 May 2014 the complainant, a young mother alone with a baby son, was at home and had just fed her son when she heard someone outside her house. She went to see who it was and saw that someone was trying to enter the house by ripping off its tin cladding. That person was Mr. Kalavi. The complainant called the Police on her cellphone and asked for help. Mr. Kalavi then entered the house and took the cellphone and threw it, strangled the complainant and asked for sex. He then dragged her by the hair and throat outside the house to a nearby mango tree at the rear of the property where he removed her pants and underwear. Mr. Kalavi then took off his pants and told the complainant he was going to have sex with her and kill her before the Police arrived. Fortunately the Police did then arrive. When the complainant tried to call out, Mr. Kalavi punched her around the face and then ran off in the direction of the neighbours' pig sty. Mr. Kalavi was known to the complainant and he was arrested on 27 May 2014 after he had returned to the neighbouring property to retrieve his pants.

- [4] Until today Mr. Kalavi has denied he had any involvement in the events I have described and he ran his defence on the basis that the charges were a set up or that the identification of him as the attacker was mistaken. Today for the first time he expressed remorse for his actions but then suggested that his behaviour towards the complainant was consensual. He also said that she had exaggerated events as he had not hit her. I cannot in those circumstances accept that his expression of remorse is genuine.
- [5] Mr. Kalavi is already serving a lengthy period of imprisonment. He has a history of serious offending which appears to be escalating. His record shows that he was convicted on two counts of housebreaking on 15 March 2010 and sentenced to a term of imprisonment but the sentences were totally suspended on the condition that he did not commit any further offences. On 17 October 2011 he was convicted of a series of housebreakings and thefts and sentenced to five years imprisonment with the final two years suspended for three years. In July 2014 he appeared before Cato J and was sentenced to four years and nine months imprisonment for armed robbery cumulative upon a partially reactivated sentence of 12 months for re-offending within a previous period of suspension. He was also sentenced to two years imprisonment for housebreaking and two years imprisonment for causing simple bodily harm, which sentences were to be served concurrently with the armed robbery. His overall sentence was one of five years and nine months imprisonment. Then on 25 November 2015 Mr. Kalavi appeared before Cato J again for sentence having been earlier convicted of manslaughter when he killed a Chinese

shopkeeper after striking blows to his head with a piece of wood during a robbery of his store on 20 February 2014. Cato J sentenced Mr. Kalavi to 12 years imprisonment after taking account of his youth but also said as follows:

I now consider the sentence in light of the previous offending for which he is serving effectively a 5 years and nine months total sentence for an earlier robbery and breach of a suspension on CR 82/2014. The fact he has been involved in two robberies in such a short space of time with the second arising within three months of this offending is significant. The combined sentence I now impose must reflect his recidivism and propensity for violent criminal offending, however, accepting this, it must also be one that is not disproportionate to his overall offending or crushing in its length, considering his youth. I consider that in addition to or cumulative upon the sentence he received from me on the 25th July 2014, of five years and 9 months, he should be required to serve a further 8 years and 3 months of the 12 years imposed for this manslaughter conviction on CR 8/2015. In all, the overall combined sentence (CR 82/2014 and CR 8/2015) will be 14 years imprisonment.

I consider that the final year of the accused's combined sentence of 14 years imprisonment should be suspended on the following conditions...

- [6] I have received a probation pre-sentencing report which I have considered. Mr. Kalavi is 21 years old. The report notes that he was sentenced to his first term of imprisonment when he was just 14 years old, that he continues (as at the date the report was prepared at least) to deny any involvement in the attack, that he shows no signs of

remorse and that whilst he is a young offender his offending is getting more serious as time progresses.

[7] I take the offence of attempted rape as the lead offence for the purposes of sentencing. In *Langi v Rex* [2014] Tonga LR 100 the Court of Appeal considered that an appropriate starting point in a case of attempted rape was four years imprisonment whilst noting that this was for guidance only and that a sentencing judge has a discretion to take a different course where it is clear that the circumstances of a particular case or the prevalence of such offences merits it. I am satisfied that a starting point of four years imprisonment is appropriate in this case.

[8] I must now look at adjusting the starting point to take account of the aggravating features of the offending and the mitigating factors relevant to Mr Kalavi to arrive at an appropriate sentence. The Crown has submitted that there are a number of aggravating features in this case which include that the crimes were committed in close proximity to the complainant's baby (which I accept as relevant in so far as the attack must have been all the more traumatic for the complainant due to the possible risk of harm to her small child), Mr. Kalavi did not cooperate with the Police and the crimes were pre-meditated as the evidence established that Mr. Kalavi knew that the complainant's husband was in Police custody and that she would therefore not have his protection. In addition, I would add as aggravating features that the attack was occasioned with a threat to kill the complainant and Mr. Kalavi both strangled and struck blows to the complainant's face to

subdue her. I do note however, and take into account, that there is no evidence that the complainant suffered any injuries in the attack. This attack must have been both terrifying and humiliating for the complainant. These aggravating features in my view justify increasing the starting point to one of 6 years imprisonment.

[9] In terms of mitigating factors personal to Mr. Kalavi little can be said in his favour. He is a recidivist offender and I do not believe he has shown any genuine remorse or that he feels any remorse for what he did. He committed these offences three months after he had killed the Chinese shopkeeper for which he had to that stage avoided detection. The Crown says that the Court might take into account Mr. Kalavi's age. He is now 21 but more relevantly he was 19 when he committed these offences. Age may be a relevant factor in mitigation but the age of the offender must be relevant in some respect to the offending. Mr. Kalavi had already committed a series of serious offences over a period of years and in one case caused the death of a shopkeeper in a brutal robbery. His offending is repeated and serious and cannot be explained on the grounds of his relative youth. He has in the past been given credit for his age but continues to offend. I see no basis for giving any further credit to him on this ground.

[10] Taking all matters into account I sentence Mr. Kalavi to six years imprisonment on the offence of attempted rape. On the offence of serious housebreaking I sentence Mr. Kalavi to two years imprisonment. On the charge of assault he is sentenced to 6 months imprisonment. I can see no grounds for suspending any part of these

sentences having regard to the principles in *Mo'unga v R* [1998] Tonga LR 158.

[11] I must now consider these sentences in light of Mr. Kalavi's previous offending for which he is now effectively serving 14 years imprisonment with the final year of that 14 years suspended upon conditions. I must decide whether these sentences I have imposed today are to run concurrently or cumulatively with each other and the sentences to which Mr. Kalavi is already subject. The Crown has submitted that it would be appropriate that some part of Mr. Kalavi's sentence be served cumulatively with the sentences imposed in CR 82/2014 and CR 8/2015. I agree with the submission. Cumulative sentences may be appropriate in circumstances where offences for which an offender is or has been sentenced are different in kind or are not a connected series of offences. The offences with which Mr. Kalavi is being sentenced today are similar in kind but unrelated in time, place or other circumstances with the offences with which he was convicted in CR 82/2014 and CR 8/2015. In addition denunciation, deterrence, recognition of the complainant's suffering and the protection of society require the imposition of a fitting sentence.

[12] However, applicable to this case and my assessment are the comments of Cato J when sentencing Mr. Kalavi in CR8/2015 when he said the words I quoted earlier as follows:

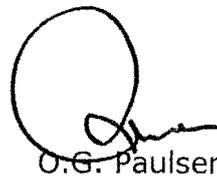
The combined sentence I now impose must reflect his recidivism and propensity for violent criminal offending, however accepting this, it

must also be one that is not crushing in its length considering his youth.

[13] The sentences I have imposed on Mr. Kalavi on the offences of serious housebreaking and common assault will be served concurrently with each other and the sentences in CR82/2014 and CR 8/2014 that he is presently subject to. However, Mr. Kalavi's sentence on the offence of attempted rape will be served concurrently with those sentences that he is presently subject to only in part. In addition to and cumulative upon the combined sentences in CR82/2014 and CR 8/2014 Mr. Kalavi is required to serve a further two years (of the six years for which he has been sentenced) of imprisonment for his conviction on the offence of attempted rape. That will mean that his overall combined sentence will now be 16 years imprisonment. The suspension of the final year of Mr. Kalavi's sentence in CR 8/2015 will take effect only upon his release from custody.

[14] A copy of this judgment (and as previously ordered by Cato. J the judgment in CR 8/2015) is to be retained on Mr. Kalavi's file with the Commissioner of Prisons so that the requirements of his release on suspension under supervision are put in place before his release.

NUKU'ALOFA: 18 August 2016.



O.G. Paulsen
LORD CHIEF JUSTICE

