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24/03/17

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

CR 112 of 2016

24/03/17

**BETWEEN:** R E X - Prosecution

**AND:** HEMALOTO MAKAFILIA - Defendant

**BEFORE THE HON. JUSTICE CATO**

**SENTENCE**

- [1] The prisoner, Hemaloto Makafilia, pleaded guilty to one count of attempted rape, serious housebreaking, common assault, and theft.
- [2] On the 21<sup>st</sup> May 2016, the prisoner had entered the classroom where the complainant, who was a volunteer primary school teacher from New Zealand at a school in Nuku'alofa, was cleaning up her classroom on a Saturday. The prisoner stood outside her classroom and then stepped into and asked her for sex to which she replied no please go outside. The prisoner persisted and spoke to her aggressively demanding sex. The complainant was frightened and tried to push him out the door and lock it. The prisoner pushed back inside.
- [3] He then hit her with a long steel pole on the left side of her head causing her to fall to the concrete floor. He then kept her on the floor as she tried to get up, her head hitting the concrete a number of times. She became unconscious.

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- [4] When she awoke, he had removed her tights and panties. He was on top of her on his knees and touching his penis. She attempted to kick him away. She heard a female voice saying why are you doing that? This woman then told the complainant to go. She ran towards the Principal of the school to complain and subsequently the police were located. The young woman, who had entered the classroom, was the prisoner's defacto partner. Later, he was arrested, did not co-operate with the police and was in possession of the complainant's phone.
- [5] The prisoner has previous convictions commencing in 2009 for theft (3), housebreaking (2) unlawful possession of drugs, and escaping from lawful custody. He has had the benefit of sentences of imprisonment that for the most part have been suspended either fully or partly. His last conviction for unlawful possession of drugs was in 2016. He was sentenced to one year imprisonment which was not suspended. He has no convictions for sexual offending which his counsel, Mrs Vaihu, emphasised.
- [6] A victim impact report had been sought. It established that, after the incident, the complainant returned to New Zealand for medical treatment. A statement taken from her in February 2017, reveals that she has lost half her hearing in her left ear, and the attack has affected her balance. She fatigues easily. She still experiences pain and she has lost two of her bottom teeth from the blow to the left side of her head with the metal pole. She suffers from vertigo and dizziness. She has short term memory loss and suffers from flashback and nightmares.
- [7] She said, at the time of the attack, she was a volunteer teacher and afterwards had to return to New Zealand for treatment. Her class was without a teacher for several months and she had no income and this incident has caused her to have to take on debt to pay for treatments and expenses.

- [8] She is afraid to go anywhere alone, and she says she lives life constantly looking over her shoulder.
- [9] Plainly, this attack has caused the complainant both physical and understandably psychological trauma. It is hoped that in time she will be able to put this appalling incident behind her, and progress to live a normal life.
- [10] I have no doubt that but for the timely intervention of the prisoner's girlfriend, the complainant would have suffered the complete humiliation of rape. This was a case of attempted rape which was, in my view, at the upper level, the main aggravating feature being the use of the metal pole to hit the complainant and overcome her resistance as she was rendered unconscious on the floor before her clothes were removed.
- [11] The starting point for attempted rape in Tonga was said by the Court of Appeal to be four years in Langi v Rex [2014] Tonga LR 100. In my view, the starting point here must be considerably increased to reflect the viscous nature of the attack. I have reflected on the level of increase since hearing submissions and consider an aggravated starting point of seven years and nine months is justified to address the use of the pole as a weapon to the head and the actions of the prisoner in rendering the complainant unconscious.
- [12] The prisoner is aged 23. He has had a dysfunctional family background, limited schooling and seems to have commenced offending about 7 years ago. The only mitigation in this case is his guilty plea which seemed inevitable because he was found in the action of attempting to rape by his girlfriend. I have considerable reservation despite Mrs Vaihu suggesting that by his guilty plea he is remorseful, that this is in fact the case. However, I acknowledge that by his guilty plea he has at least

saved the complainant from the ordeal of having to give evidence, and for this I allow him one year and nine months by way of mitigation. The sentence I impose upon him for attempted rape is 6 years imprisonment.

[13] I have considered the case of R v Soafa CR 05/16 in which I had imposed a sentence of four years imprisonment on an 18 year old who had entered the house of a Japanese volunteer and had attempted to rape her. He had been also disturbed by people passing by and had desisted from the attack. There, I had increased the starting point to 6 years imprisonment to take into account the violence which consisted of punching the victim and attempting to force her to submit in her own home. I deducted two years also by way of his guilty plea, he being a young offender, aged only 18, and a first offender. The sentence of imprisonment of four years was suspended by one year on conditions that he attended a course on alcohol and drugs and one on sexual abuse.

[14] it is disturbing in such a comparatively short time since Soafa to learn that another volunteer has encountered a savage sexual attack. Here, I consider the conduct of the prisoner is worse. To hit a woman in the head with a metal pole and then to subdue her and render her unconscious by causing her head to hit the concrete on several occasions in her own classroom requires a more severe response than that in Soafa. In my view, the sentence must be one which reflects the wanton callousness of the attack and serves to protect women in Tonga, volunteers as well as Tongan women, from this kind of predatory conduct, and serves also as a firm deterrent.

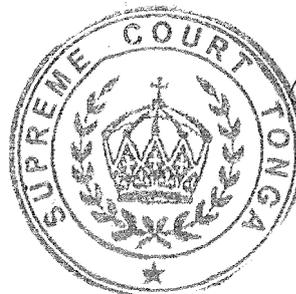
[15] I also pause to say that Langi was a different case. There, the sentence imposed by the Court of Appeal was seven and half years after a guilty plea for attempted rape. The appeal was against a sentence of 10 years imprisonment for attempted rape.

There, the prisoner attacked the victim on a beach when she was separate from her friends. It seems to have been a prolonged and vicious assault, although not with a weapon, but it did have the consequence that the victim submitted to oral intercourse in order to escape being raped. Once the offender ejaculated, the victim was able to escape. He had previous convictions that included violence and was in breach of an order of suspension for assault when he committed the offending.

[16] Unlike Soafa, the prisoner is not a first offender, and he is older. He has several previous convictions and has been given the benefit of suspended sentences in the past. I see no reason to suspend any part of his sentence. I do not consider he is likely to be rehabilitated. He did not co-operate with police and his guilty plea in all the circumstances was inevitable. Indeed, the very nature of his offending which has escalated to serious sexual violence leads me to conclude that he represents a grave danger to Society and is a person from whom Society requires the protection of a lengthy sentence of imprisonment.

[17] On the offending for serious housebreaking that is entry into the classroom in order to commit a sexual offence, I sentence him to four years imprisonment; common assault, 10 months' imprisonment, and theft of a mobile phone 3 months imprisonment to be served concurrently with the attempted rape. The sentence of attempted rape is backdated to the time when the prisoner was remanded in custody for this offending.

**DATED: 10 MARCH 2017**



*CB Cato*  
**JUDGE**