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

CR 31 of 2017

BETWEEN: R E X - Prosecution

AND: PETULIKI LAVE - Defendant

BEFORE THE HON. JUSTICE CATO

Counsel: Mr Aho for the Prosecution

The Defendant is unrepresented

SENTENCE

[1] The prisoner, Mr Petuliki Lave, appeared before me for sentence on one count of carnal knowledge of a child under the age of 12 years contrary to section 121(1) of the Criminal Offences Act. The maximum sentence for this offence is life imprisonment.

[2] The accused pleaded guilty before me on the 13th April 2011. He was remanded in custody and a probation and victim impact report was ordered.

[3] The accepted facts were that, on the morning of the 17th November 2016, the victim, aged 7, and her younger sister were playing on the swings with friends. The victim's mother was nearby doing some washing outside their house. The prisoner approached the victim and told her to come with him and look

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for another rope to make a swing. She declined to go with him but the prisoner grabbed her and led her to a nearby bush area. He took off her pants and forced her to lie on the grass. He then lay on top of her and inserted his penis into her vagina. She cried out in pain and the prisoner got off her and told her to put on her clothes. He then proceeded to lead her back into the house. The victim's mother noticed her missing and her younger child pointed to the bush area. A third party located the victim, with the accused, walking towards the house. The victim was crying, visibly distressed and reported what the prisoner had done to her. The prisoner was arrested by the police and made a voluntary admission. He has no previous convictions.

- [4] The prisoner is single, aged 22. His parents separated when he was about three. He was adopted by his maternal aunt and lived in New Zealand. He missed his adopted mother back in New Zealand. At about 15, he had been placed on a plane for Tonga by his adopted father who lived in Tonga; he and his wife separating about ten years earlier. He had his primary education in New Zealand and left Tupou College in Form 6 without a formal education. He told his probation officer that he did not speak Tongan and found it difficult to adapt to the life style. He was reported to have run away from school, and his social activities involve mingling with friends, drinking alcohol and listening to music. He is unemployed and has no income. He was watching pornographic films the night before the incident and he informed the Court, when asked, that he had been drinking, as well. He woke up and saw the victim playing with her sister on the swing. He was sexually aroused. He admitted deceiving the child and taking her into the bush area to have sex with her. He admitted ejaculating to his probation officer. He said the victim was crying wanting to go home but he told her to wait until he was finished. He expressed deep remorse for his actions. The probation officer reported that he expressed a suicidal ideation

and struggled with depression. He took responsibility for his actions.

[5] Mr Aho mentioned a number of cases dealing with carnal knowledge of a child. In R v Hu'akau [2008] Tonga LR 64, the prisoner had pleaded guilty to carnal knowledge of a 5 year old child, he being 27. The child was walking home when she was lured into the prisoner's house where the carnal knowledge took place, and the prisoner ejaculated. He also pleaded guilty and was said to be remorseful. Ford CJ, having emphasised the seriousness of the offending, said that, but for the guilty plea, he would be looking at imposing a sentence of 10-11 years imprisonment. He imposed a sentence of 8 years imprisonment declining to suspend any part of the sentence because of the serious nature of it. In Rex v Pasimi Latu 162/08, where the accused aged 17 had carnal knowledge of a 10 year old girl, the Court considered a starting point of 12 years was appropriate. The Court reduced this sentence to one of 7 years without any suspension because of the defendant's youth and guilty plea. More at the top end of sentencing for this kind of offending was R v Malu Kolo 52/12 where the prisoner aged 63 had carnal knowledge of a child aged 10 on several occasions. He threatened her with a gun if she reported him. He had a previous sentence of imprisonment for indecency with a child of two years with six month suspended. He denied the charges and defended the hearing. I sentenced him to 12 years imprisonment there being no mitigating considerations.

[6] I adjourned the sentence to today's date from the 11th May 2017 because I wanted to consider the matter further in the light of Mr Aho's submissions and the seriousness of the offending. Taking into consideration that the maximum sentence for this offending is life imprisonment I consider that, as did Ford CJ in Hu'akau, a high starting point is required to reflect Parliament's concern to

protect girls under the age of 12 from predatory behaviour of this kind. I consider that in this case, I should adopt a starting point of 11 years imprisonment taking into account that the victim was only 7 and that the Victim impact report plainly and understandably asserts that the child had been distressed and seems to be very adversely affected in her academic performance at school. She seems to have distanced herself from others and become reclusive.

[7] The paramount sentencing consideration is plainly the protection of children. An 11 year starting point was rather higher than I initially had mooted as being appropriate, at the hearing but on reflection I consider this is required in order to adequately reflect Parliament's concern for children with the maximum sentence being life imprisonment, the age of the victim and the injurious effect this conduct has had which may last indefinitely. It is the Court's duty to protect children from this kind of conduct.

[7] I acknowledge that the prisoner was co-operative and pleaded guilty to the offending on an early occasion. I accept that he is remorseful. He is a first offender and has had a dislocated and difficult family life. Pleading guilty in cases of this kind merits a significant reduction, as the Courts have often said. I consider an appropriate discount to be one of three years imprisonment meaning the sentence I impose upon conviction is one of eight years imprisonment for carnal knowledge of a child under the age of 12 backdated to the date of his remand in custody.

[8] Unlike Ford CJ, however, I consider that part of the sentence should be suspended. The prisoner is a first offender and has been co-operative and had pleaded guilty. He is remorseful. I accordingly suspend the final year of his sentence on the following conditions;

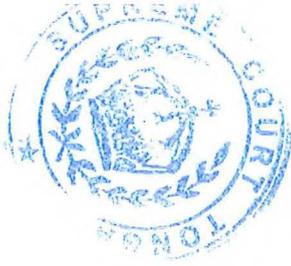
- a. He is not to commit any offences punishable by imprisonment during the period of his suspension;
- b. He is placed on probation for the period of his suspension to live where directed by his probation officer.
- c. He is not to reside in any residence near the victim and he is not to reside in any accommodation where girls or young woman are present during his suspension.
- d. He is to attend the following courses under the direction of probation;
 - i. A course on sexual abuse
 - ii. A course on drugs and alcohol abuse
- e. He is not to consume alcohol during his suspension.

[9] He is warned that should he breach any of these conditions he may have to serve the balance of his suspended term of imprisonment.

[10] Finally, I request the Crown takes steps to ensure that the victim receives ongoing counseling which may be required for some time.

[11] I also direct the Commissioner of Prisons to ensure that the Prisoner is monitored for any suicidal tendencies and to forthwith arrange appropriate medical (including possible psychiatric assistance and treatment) if considered necessary.

DATED: 17 MAY 2017



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JUDGE