

Solicitor General
14/07/17
Scan, email,
Upload + File

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

CR 33 of 2017

BETWEEN: R E X - Prosecution

AND: 'ELEVISI MO'UNGA - Defendant

BEFORE THE HON. JUSTICE CATO

SENTENCE

[1] The accused was charged with two counts of carnal knowledge of a child contrary to section 121(1) of the Criminal Offences Act, two counts of rape contrary to section 118(1) (a) of the Criminal Offences Act, incest by male contrary to section 132 of the Criminal Offences Act, indecent assault of a child under the age of 12 contrary to section 125 of the Criminal Offences Act, 2 counts of carnal knowledge of a young person contrary to section 121(2) of the Criminal Offences Act, and 5 counts of serious indecent assault contrary to section 124 of the Criminal Offences Act, and one of indecent assault

[2] The prisoner pleaded guilty to these counts. The probation report states that he was from a medium size Tongan family living on 'Eua. He is aged 46 and has no previous convictions. He had left school at a young age and helped his family with fishing and on a plantation. He moved to Tongatapu after his parents died and earned a reasonable living as a construction worker. He formed

12/07/17
HL

a relationship in 2009 with a woman who had several children, three being female and married her in August 2016. In October, 2016, he was arrested for this offending and remanded in custody.

[3] The offending is serious. The summary of facts to which the prisoner gave his consent refers to the second victim as being the victim of counts 1, 2, 6, 7, 8 and 14 of the counts in the indictment. She was born on 6th November 1999. At the time of the start of offending, she was 10 years old. Her mother was at this time of the offending the prisoner's defacto wife. Victim 2 had returned home in or about October 2010 from school. She was alone with the prisoner who took off her clothes and then proceeded to lick her vagina. He told her not to tell anyone. The next morning, she was asleep in the living room when he carried her to one of the bedrooms, took off her clothes, licked her vagina, sucked her breasts, digitally penetrated her and had sexual intercourse with her. He told her not to tell or they would both go to prison. In or about March 2011, he had sexual intercourse with her again when she was still under the age of 12. In November 2011, she turned 12 and he continued to have unlawful sexual intercourse with her, in July 2013 and October 2014. In November 2014, the second victim turned 15 years old. She reported the matter to police in October 2016. He was arrested and admitted his offending in a record of interview dated 12th October 2016.

[4] A victim impact report suggests that the victim failed to report the matter because she was afraid to do so. She also doubted her mother would believe her. She told the police after another friend of hers had told her about what the prisoner had done to her. She said she considered the prisoner as a stepfather and trusted him. She stated she was very hurt because he had taken her virginity. She had formerly achieved well at school, but her

results dropped to the point where she fell to the bottom of the class and eventually left school, in Form 6. Later, she went to live with her father because she did not want to remain in the same household and this led to a breakdown in the relationship with her mother. She developed high blood pressure and has been hospitalized for this. The prisoner had apologized and she said she had forgiven him but only to please her mother. She has formed a stable relationship which has helped her and she plans to marry.

- [5] The prisoner also pleaded guilty to two rapes on different victims. Victim 3 was aged 13 at the time of the offending, in March 2012. She was acquainted with the accused. The prisoner entered the house where she was alone, and forced himself upon her, removing her clothes and raped her (Count 3). Tragically, although the third victim reported the matter to police and the accused admitted to his offending, the complaint was never dealt with until it was referred to the Attorney-Generals' Office in 15th November, 2016. An inquiry made by this Court of the Police Commissioner revealed that the matter had not been handled properly due it seems to an officer leaving the force and then an incompetent lack of action by another who has since resigned from the force. As a consequence, the prisoner was not charged until another series of sexual offences had been committed. These would have been avoided had action been taken promptly. A victim impact report has not been obtained for this victim but a 2012 report was produced from the Women's Crisis Centre indicating that the incident had seriously affected her mentally, sexually and emotionally. She spent at least 5 months at this safe house. Nothing more is known about her.
- [6] Victim 5 (count 4 rape and count 5 incest) was 23 at the time of the offending. She was the prisoner's niece. She resided with the prisoner and his defacto partner in Popua. She had come to

Tonga to work and, on a day off, was raped in her bedroom by the prisoner. She did not report this incident although she moved her accommodation eventually due to the emotional effect the offending had upon her. She did not report the incident until the 11th October 2016. The prisoner admitted this offending. This victim in her impact statement indicated the prisoner had not apologized to her, and reading the report it is plain that the offending has understandably had a significant impact upon her.

[7] There were other victims. Victim one was 15 years old and she awoke in the prisoner's home to find that he was holding her hand stroking his penis. count 13, serious indecent assault) She had been sleeping over with victim 2 who was a friend. She did not make a complaint until October 2016. The prisoner admitted this offending.

[8] Victim 4 (Counts 9 and 10 of serious indecent assault) was 16 years old and a friend of victim 2. She was invited to dinner by the accused's defacto partner. The prisoner during the evening in 2013 did various acts of indecency including touching her vagina outside her pants and used his toes to touch her vagina outside her pants.

[9] Victim six (count 11, serious indecent assault) was 16 and friends with the second victim. She also was sleeping over in March 2016 and when sleeping awoke to find the prisoner was licking her vagina. She did not report this until the 11th October, 2016 but the prisoner admitted the offending in his record of interview.

[10] Victim 7 (count 12, serious indecent assault) was 18 at the time of the offending and a sister of the fourth victim. She also went to the residence to play cards with the second victim and others in July 2016. They were sleeping in the living room when the

prisoner placed her hand on his penis. As a consequence, she told his defacto wife and reported the matter to the police on the 12 October, 2016. He admitted his part in the offending.

[11] Plainly, this is very serious offending. Carnal knowledge of a child under the age of 12 carries a maximum sentence of life imprisonment. Recently, I have had to deal with a number of cases of this kind. Whilst the starting point for rape is five years in Tonga which could be considered a modest starting point judged by overseas experience, although usually there are I have found aggravating features present that uplift this starting point, the sentences of this court have involved starting points of 10-11 years for carnal knowledge. Plainly, a significant starting point is required in cases where young children are involved (consistently with Parliament's intention by the provision of a maximum sentence of life imprisonment) to deter and denounce predatory sexual conduct, and to protect children. The starting point I adopt here on count one which I will regard as the head sentence is 10 years imprisonment. I adopt an overall starting point of 15 years, however, to take into account also the carnal knowledge offending on count 2, and also that the prisoner was in a position of trust as the child's defacto parent. This also covers his later intercourse with her after she turned 12, (counts 7 and 8) being offences of carnal knowledge of a young person contrary to section 121(12) of the Criminal Offences Act, and two counts of indecent assault, one of which occurred when she was a child under the age of 12 (count 6) and involved licking her vagina.

[12] From this, by way of mitigation I deduct for his timely guilty plea, lack of previous convictions, and his expression of remorse in the witness box in which he said that he had found god, and quoted scripture, a total of four years imprisonment. I convict and sentence him on count one to 11 years imprisonment, this

sentence to be backdated to the date of his remand in custody on this offending.

[13] On count 2, the second count of carnal knowledge of a child under the age of 12, I convict and sentence him to 9 years imprisonment to be served concurrently with count one.

[14] On counts 7, and 8, carnal knowledge of a young person where he was the victim's stepfather, I convict and sentence him to three and a half years imprisonment on each count to be served concurrently with count one.

[15] On count 6, serious indecent assault (licking vagina) of a child under the age of 12, I convict and sentence him to 2 years imprisonment to be concurrent with count one.

[16] On count 14, indecent assault for which no sensible particular of offending was provided, he is convicted and discharged.

[17] I have also considered his convictions for the counts of rape. In relation to count 3, victim 3 was only 13 years old at the time of the offending and he entered her bedroom in the house where she was staying by climbing up and in through the windows. I consider a starting point is 7 years imprisonment because of her age and after discount of his guilty plea and lack of previous convictions, I convict and sentence him to 5 years imprisonment on this count. In relation to this count, after applying the totality principle, I order that four years of this sentence be served cumulatively upon the term of imprisonment on count one of 11 years imprisonment making an overall term of imprisonment of 15 years backdated to the time of his remand in custody. I consider that this overall period, represents the seriousness of the totality of his offending on more than one victim. On the count of incest, count 4, he is convicted and sentenced to three

years imprisonment to be served concurrently with the sentence on counts 1.

[18] In relation to count 5, rape of an older victim aged 23 who was, however, his niece I sentence him to a starting point of 7 years imprisonment, and after mitigation of his guilty plea, previous character and some remorse, he is convicted and his sentence on this count is also five years imprisonment. This sentence is to be served concurrently with the sentence imposed on count one.

[19] In relation to the other counts, on counts 9 and 10, on the fourth victim which involved serious indecent assault, count 9 touching her vagina on two occasions outside her pants, he is convicted and sentenced to 12 months imprisonment, and for placing her hand on his penis (count 10) he is convicted and sentenced to 15 months imprisonment both to be served concurrently with the sentence imposed on count 1.

[20] In relation to count 11, serious indecent assault on the sixth victim (licking vagina), he is convicted and sentenced to 18 months imprisonment; count 12, serious indecent assault on the seventh victim (placing her hand on penis), to 15 months imprisonment; count 13, serious indecent assault (holding her hand on penis), to 15 month imprisonment. These sentences are to be served concurrently with the sentence on count 1.

[21] I have considered the issue of suspension and I consider that the prisoner is entitled to a period of suspension because he has pleaded guilty, is a first offender has been co-operative, and has shown some remorse for his actions. I accordingly suspend the final two years of the combined sentence on counts one and three of 15 years on the following conditions;

- a. He is not to commit any offences punishable by way of imprisonment for the period of his suspension;
- b. He is on probation to live where directed by his probation officer and is not to reside with girls or women during the period of his suspension;
- c. He is to undergo at the direction of probation appropriate course and counselling for sexual abuse with the appropriate agency.

[22] He has been warned that any failure to perform these conditions may see him returned to prison to serve the balance of his term of imprisonment.

[23] He has been warned also that any repeat of his offending as it relates to carnal knowledge of females under the age of 12 might well mean he is sentenced to life imprisonment.

[24] I summarise the sentences imposed;

Count one – carnal knowledge of a child, 11 years imprisonment;

Count 2 - carnal knowledge of a child, 9 years imprisonment to be served concurrent with the sentence imposed on count one;

Count 3 - rape, 5 years imprisonment, the first 4 years to be served cumulatively upon the sentence imposed on count 1.

The final two years of this combined sentence of 15 years imprisonment is to be suspended on the following terms;

- a. He is not to commit any offences punishable by way of imprisonment for the period of his suspension;
- b. He is on probation to live where directed by his probation officer and is not to reside with girls or women during the period of his suspension;
- c. He is to undergo at the direction of probation appropriate course and counselling for sexual abuse with the appropriate agency.

He has been warned that any failure to perform these conditions may see him returned to prison to serve the balance of his term of imprisonment.

Count 4 - incest, three years imprisonment to be served concurrent with the sentence imposed on count 1.

Count 5 - rape, five years imprisonment. This sentence is to be served concurrently with the sentence imposed on count one.

Count 6 - serious indecent assault (licking vagina) of a child under the age of 12, 2 years imprisonment to be concurrent with count one.

Count 7 - carnal knowledge of a young person three and a half years imprisonment to be served concurrently with count one.

Count 8 - carnal knowledge of a young person three and a half years imprisonment to be served concurrently with count one.

Count 9 - serious indecent assault touching vagina outside pants, 12 months imprisonment, to be served concurrently with the sentence imposed on count 1;

Count 10 - serious indecent assault, (placing her hand on his penis), 15 months imprisonment to be served concurrently with sentence imposed on count 1;

Count 11 - serious indecent assault (licking vagina), 18 months imprisonment to be served concurrently with sentence imposed with count 1;

Count 12 - serious indecent assault (placing her hand on penis), 15 months imprisonment to be served concurrently with sentence imposed count 1;

Count 13 - serious indecent assault (holding her hand on penis), 15 months imprisonment to be served concurrently with the sentence imposed on count 1;

Count 14 - count 14, indecent assault, convicted and discharged.



A handwritten signature in black ink, appearing to read "C. B. Cato".

C. B. Cato

J U D G E

DATED: 13 JULY 2017