

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

CR 77 of 2016

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BETWEEN: R E X - Prosecution

AND: FAKA'ANAU NIUTUPIVAHA - Defendant

BEFORE THE HON. JUSTICE CATO

Mr 'Aho' for the Prosecution

Mr Tu'utafaiva for the Defendant

SENTENCE

1. The prisoner had been found guilty after a trial before me sitting as a Judge without a jury of 3 counts of rape of A contrary to section 118(1) (a) of the Criminal Offences Act; one count of attempted rape of B (A's sister) contrary to sections 4 (118(a) and 120 of the Criminal Offences Act, and one count of serious indecent assault on A contrary to section 124(1) and (3) of the Criminal Offences Act.
2. I have set out the facts of the offending in a verdict delivered on the 25th August, 2017. The factors which I identify as making the offending particularly serious are these;
 - a. As a consequence of the first rape (count 1) when she was 13, A lost her virginity. She had been at his home because the prisoner's father was the Bishop in their church ward

and also was her grand uncle. The complainant's mother is also related to the accused. She was sleeping over with her friends who were the prisoner's sisters for a church activity. The prisoner was not living at his family home at the time but had been ordered out by his father. He used physical force including strangulation to overpower A and have intercourse.

- b. The serious indecent assault (count 2) occurred when A was in the sixth form. He duped her into coming to his home by representing in a text from his mother's phone that his mother wanted to see A. She left school and when she got to the house he had sexual intercourse without her consent. The Crown did not seek to amend the charge.
- c. The second rape (count 3) arose when she was again duped into coming to his house by a text message from his sister's phone saying she had money in the house and could A get it. He again strangled her and his callous indifference is demonstrated in his comment this is what he would call rape. This offending arose in April 2011.
- d. On the final occasion in September 2015, count 5 she was living next door to the accused with her family. He entered into her home pulled her out the back door and into a room at the rear of the house where he again raped her. On this occasion, he was found having intercourse by B, a younger sister, whom he had attempted to rape in 2011, and a cousin. B hit him on the head with a stick.
- e. B was in her bedroom in 2011 when the prisoner attempted to rape her (count 4), using force such as squeezing her throat and strangling her. Her mother interrupted and intervened to prevent a rape. The prisoner

had been living by invitation of B's mother, who felt sorry for him after his father had ordered him out of their family home. B's mother later reported this to his parents. No complaint was made to the police but an apology was made.

3. I consider that the prisoner's actions were callous, cunning and predatory and led to a most humiliating experience for both victims, more particularly so since they were related to him and both victims were close to his family. Particularly serious, is the fact that on several occasions he used force to subdue and control his victims that included strangulation which must have been a terrifying experience for them. On two occasions, he had duped A into coming to his family residence by using other family members' phones to deliver false messages. Like Mr Aho, I find particularly concerning that, in the second rape, he said this is what "he would call rape", and in the final incident he entered her house when she was sleeping and used force to overcome her.

4. Despite what was a strong Crown case in relation to both victims he put them through the ordeal of trial and continues to maintain his denial in his probation report. Although there was a long period when A admitted there had been consensual sexual relations between them this was not the case in relation to the indicted counts. I very much doubt , in any event, that there was any true relationship between A and the prisoner. A said that, during this period which lasted for a couple of years when she was still very young and when so she admitted consensual sexual intercourse had taken place it seemed quite regularly, he would humiliate her, saying that she was useless and worthless, and she had felt trapped. She eventually terminated the "relationship" and the incident involving serious indecent assault took place several months later. The victim impact report on A,

who is now 26, records that the offending has had, understandably, adverse psychological consequences for her over a long period.

5. I have read his probation report. The prisoner is aged 26. He is the ninth in a family of 13 siblings from two relationships. His father says of all the children the prisoner was the one who disobeyed him and has rejected the Mormon church and religion. He was educated to form 6. He entered the University of the South Pacific but did not continue his education. He worked for his father and was a driver for a long period before his arrest. His father suggested to his probation officer that his drinking might account for some of his offending, but if so, it did not feature in the evidence. I have read references attached to his probation report that suggests he is well thought of and has contributed to his community (Town Clerk, a ward Bishop, and others). The view is conveyed that others were surprised to find that he has offended, in this way. I observe that is not an uncommon sentiment because sexual offending generally takes place in private.

6. I discussed with counsel the starting point that was appropriate, in this case. Mr Tu'utafaiva submitted 8 years imprisonment would be appropriate. Mr Aho seemed to suggest a much higher starting point of 9 years for the first rape because the complainant was a minor and strangulation was involved, 10 years for the second count of rape where he had said this is "what you would call rape", and where a ruse was involved to get her into his residence, and 8 years for the final rape which had involved a trespass into the victim's home from a neighbouring property when she was asleep. He submitted that I should take into account further the totality of the rape offending meaning an overall starting point of 12 years from which he suggested a reduction of one year was appropriate because the prisoner was

a first offender. He submitted 6 years was appropriate for the attempted rape with a discount of 12 months because the prisoner was a first offender. He would not accumulate any part of the offending on B on the offending with A.

8. I intend to approach the matter somewhat differently from Mr Aho. As I indicated to Mr Tu'utafaiva, I consider the starting point of 8 years is too low and does not adequately reflect the overall seriousness of the prisoner's offending. I have reflected on this matter over the weekend having heard submissions on Friday. In my view, the offending is predatory, and worthy of a starting point well above the five year starting point for a single rape in Fa'aoso [1996] Tonga LR 42. I have decided that count one should be the head sentence for the rape offending on A. For the three rapes, the serious indecency and taking into account all the aggravating circumstances, including the fact A was only 13 when the first rape occurred, in my view, an appropriate starting point is 9 years imprisonment.
9. From this, I will deduct 9 months for his being a first offender. There are no other mitigating factors. The sentence I impose on him for rape in relation to count one is 8 years and 3 months imprisonment.
10. On the count of serious indecent assault, this is plainly at the upper end of the five year maximum sentence for this offending. I consider that a starting point of 4 years imprisonment is appropriate. After allowing 9 months for his being a first offender, I convict and sentence him to three years and three months imprisonment to be served concurrently with count one.
11. In relation to count three; rape, I sentence him after mitigation of nine months imprisonment for being a first offender, and upon conviction to five years and three months imprisonment to be

served concurrently with count one. I consider that for this offending and the rape in count 5 starting points of 6 years are appropriate to reflect aggravating circumstances that I have mentioned that were present.

12. In relation to count 5 (the third charge of rape) I also sentence the prisoner upon conviction to five years and three months imprisonment after mitigation of 9 months imprisonment to be served concurrently with count one.

13. As to count 4, the attempted rape on B, taking into account that the starting point for attempted rape in Langi [2014] Tonga LR 100 is 4 years imprisonment, the maximum being 10 years imprisonment, (for rape, 15 years imprisonment) I consider that the fact he used force to subdue B including strangulation, and that she also was only 13, a starting point of 5 years is appropriate. Plainly, but for timely intervention, rape would have occurred. Again, I allow him 9 months mitigation for his previous good character meaning that his sentence on conviction for the attempted rape of B is 4 years and three months imprisonment. In relation to this offending, I order, however, that one year of this offending be served cumulatively upon the 8 years and three months imprisonment for his offending with A making a total combined sentence of 9 years and 3 months imprisonment. Although the prisoner is only 26 and this is his first time before a court, the totality of his offending is such that the sentence in my view cannot be said to reflect a "crushing" or overwhelming judicial response. The paramount sentencing approach adopted here is the protection of girls and young women, deterrence and denunciation of this kind of offending so that others in the Tongan community minded to commit such offences know that condign punishment will follow.

14. I also observe that the prisoner persisted in offending with A even after members of his family were aware that he had offended against B and an apology had been forthcoming.
15. Mr Tu'utafaiva urged me to suspend part of this sentence, which Mr Aho opposed. Mr Aho cited the Court of Appeal in Tevita Vaka v R AC4 /12, a case involving incest, where it was said ;

"The glowing testimonials are entitled to little weight and cannot justify the suspension of these sentences because regrettably offences involving sexual abuse within the family are all too frequently committed by people of otherwise good character."

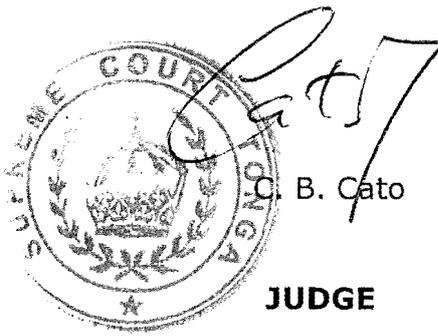
16. The attitude he has displayed towards his victims is appalling, and I am not at all sure he is likely with his attitude to be rehabilitated. In my view, the prisoner's attitude suggests he is likely to represent a continuing danger to young women in the future unless and until he develops some insight into his offending and takes steps to arrest this. His apology in 2011 to B and the family's apparent decision not to complain to the police then, did not inhibit him from later raping A after he had entered her house when she had been sleeping and using violence to subdue her.

Despite my initial reluctance to suspend his sentence, I think also after consideration over the weekend, that part of his sentence should be suspended on conditions requiring his supervision for the balance of his sentence. I consider it worthwhile that he be given the opportunity to attend courses on sexual abuse and alcohol abuse, a matter mentioned by his father in the helpful probation report that I read, to assist in his possible rehabilitation. Mounga [1998] Tonga LR 154 states that the criteria for suspension mentioned there are not exhaustive nor comprehensive. I believe that it is in Society's interest, that

he, being a young man, with no previous experience of the courts, be afforded the opportunity to participate in programmes aimed at his rehabilitation whilst under supervision on his release from prison. I suspend the final 15 months of his combined sentence of 9 years and three months imprisonment on the following conditions;

1. He is not to commit any offences punishable by imprisonment for the period of his suspension;
2. He is placed on probation for the period of his suspension to live where directed;
3. He is not to drink alcohol during the period of his suspension;
4. He is to attend the following courses under the direction of his probation officer;
 - a. A course on alcohol and drug abuse under the direction of the Salvation Army or such other agency as Probation considers is appropriate, at the time of his release on suspension.
 - b. A course on sexual abuse under the direction of the Womans' Crisis Centre or such other agency as Probation considers is appropriate, at the time of his release on suspension.

17. He is warned that a failure to perform any of these conditions may result in his return to prison to complete the suspended part of his sentence of imprisonment. He is also warned that should he appear again before this Court on such offending, he is likely to be very severely dealt with.



C. B. Cato

JUDGE

DATED: 25 OCTOBER 2017