

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

CR 79 of 2018

27/11/18  
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BETWEEN: REX

- Prosecution

AND: FILIPO 'AMANAKI LELEI TU'IFUA

- Offender

Counsel: Ms L Macomber for the prosecution  
Mr S Tu'utafaiva for the offender

Date of Hearing: 26 November 2018  
Date of Ruling: 26 November 2018

SENTENCING REMARKS

[1] Following a trial before me (sitting alone without a jury) the offender was convicted on one count of rape contrary to s. 118(1)(b) of the Criminal Offences Act for which the maximum penalty is 15 years imprisonment. He appears today for sentencing.

**The facts**

[2] The offender, the victim and the victim's boyfriend had spent many hours over the course of Saturday/Sunday, 11/12 November 2017 drinking together at various locations. The three returned to the boyfriend's hut where they continued drinking. At some point the victim passed out through intoxication. At around midday on the Sunday the victim's mother, who was concerned that the victim had not returned home, went in search of her. The mother went to the boyfriend's hut and

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found the boyfriend passed out in the offender's car. Upon looking through the window of the hut she observed the offender having sexual intercourse with the victim on a bed in the room. Upon being let into the room by the offender the mother found the victim to be unconscious. The offender helped her to put the victim in the car to be taken home. The victim did not wake until later that evening. She had no recollection of having sexual intercourse with the offender and had not consented to it. A complaint was made to the Police on the Monday.

- [3] At trial the accused did not call or give evidence. The defence advanced was that it had not been proven that the offender had sexual intercourse with the victim. For the reasons set out in my verdict I rejected that defence and found the charge proven.

#### **The material before me**

- [4] I have a pre-sentence report, a victim impact report, and submissions of Counsel. I also have a reference from the Town Officer of the offender's village and from a retired pastor from his Church both of whom speak very highly of him.
- [5] The offender is a single 20 year old man who lives with this mother, stepfather and siblings. His natural father left home when the offender was young and his parents divorced and his mother remarried. He did not do well at school and was educated only to Form 4. He has been employed in a tyre repair shop and doing panel beating. He shares his income to support the family. He attends Church and has only one previous conviction, which is relevant only because it was for drunkenness. It appears that the offender abuses alcohol and the consumption of alcohol contributed to this offending.
- [6] The accused maintains that he is innocent of the offence with which he is convicted but says he is guilty of attempting to rape the victim. The accused claims to be remorseful and says that the victim has accepted an apology and had wanted the charge to be struck out.
- [7] The victim is a 26 year old single woman who lives in the same village as the offender. She says that she and her family have been shamed and hurt by what happened. She said that the offender's family have sought to have the charges withdrawn and apologised and offered money but she refused to withdraw the

charge or accept any money so that the truth could be told. The victim also reports that the offender's mother has become aggressive and demanding that the charge be withdrawn even though she has refused to do this. She said there have been rumours that she was lying about the whole ordeal which has been upsetting but that the verdict of the Court has relieved her of a huge burden as the village has come to realize she was telling the truth. This has given her and the family some peace. She now feels she can move on with her life.

- [8] In his submissions, the offender's Counsel recognises that a period of imprisonment is inevitable but submits that it should be suspended at least in part. He argues that the accused and his family have been shamed by what he has done and that this is in itself a significant punishment. He noted the involvement of alcohol as a cause of the offending but says the offender is of good character and that he has even changed for the better since being in custody. He argues that upon completion of his sentence the offender will be a useful member of the community.

#### **Discussion**

- [9] The starting point for the offence of rape after a defended hearing in Tonga has been said by the Court of Appeal to be 5 years imprisonment (*R v Fa'asoso* [1996] Tonga LR 42 and *R v Holani* [2016] Tonga LR 63). However there is an aggravating feature in this case which is that the offender took advantage of the victim when she was highly vulnerable and unable to take any steps to protect herself. The vulnerability of the victim increases the seriousness of offending (*R v AM* [2010] NZLR750, 764-765). It is clear from the pre-sentence report that the offender knew that the victim was unconscious and the decision to take advantage of her was a deliberate one. Whilst the consumption of alcohol goes some way to explaining why the offender behaved as he did, it provides no excuse. I consider the starting point in this case is five years and six months imprisonment.

- [10] By way of mitigation, the offender is young, he has no previous convictions for any serious or similar offending and has previously been of good character and a support to his family. The references provided demonstrate he was a useful member of his community. I allow him a discount of 12 months on his sentence for these factors.

[11] I am not prepared to discount the offender's sentence because he and his family suffered shame as a result of his offending as this is entirely of his own making. I am not prepared to give any discount for his assertion of remorse or for cooperating with the authorities. I have no doubt that the offender regrets his predicament but I find it difficult to accept that he feels real contrition for what he did. Whilst the offender did initially cooperate with the Police, he then pleaded not guilty to the charge putting the victim and her mother through the trauma of the trial. Any credit that might have been due to him for cooperation was lost when he adopted that course. Furthermore, he now admits only to intending to rape the victim and not the more serious offence of which he is convicted. I do not give the accused any credit either for the apology and offer of money made by the offender's parents which was rejected and not made in the spirit of penitence but in the hope that the charge would be withdrawn.

[12] The result then is that the offender is sentenced to four years and six months imprisonment.

[13] The offender is young and has no relevant previous connections and I believe he has good prospects of rehabilitating himself and in due course becoming a productive member of the community (*R v Mo'unga* (1998) Tonga LR 154). For these reasons I accept the submission that his sentence should be suspended in part.

#### **Result**

[14] Mr. Tu'ifua you are sentenced to four years and six months imprisonment. The final 18 months of your sentence shall be suspended subject to conditions that:

- (a) You do not commit any further offences punishable by imprisonment during the period of your suspension;
- (b) You are placed on probation for the period of your suspension;
- (c) You are not to consume alcohol or drugs during the period of your suspension;
- (d) You are to attend courses on alcohol and drug abuse and violence and sexual abuse against women under the direction of the Salvation Army and Probation within 12 months of release from Prison.

[15] You are warned that any failure to abide by these conditions may mean that you must serve the remainder of your prison sentence.

[16] Your sentence shall take effect from the date that you were remanded in custody which was 29 October 2018.



NUKU'ALOFA: 26 November 2018.★

A handwritten signature in black ink, appearing to read "O.G. Paulsen".

O.G. Paulsen  
**LORD CHIEF JUSTICE**