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

CR 137 of 2018

BETWEEN: REX

- Prosecution

AND: VILIAMI SIMONI

- Offender

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Mr. T 'Aho for the prosecution
Mr S Tu'utafaiva for the offender

Date of Hearing: 7 December 2018

Date of Ruling: 7 December 2018

SENTENCING REMARKS

[1] Upon arraignment the offender pleaded guilty to the following offences:

- (a) Simple Housebreaking, contrary to section 173(1)(b) and (4) of the Criminal Offences Act. The maximum penalty for simple housebreaking is imprisonment for any period not exceeding 3 years, pursuant to section 172(6)(a) of the Criminal Offences Act.
- (b) Two counts of theft, contrary to section 143(a) of the Criminal Offences Act. The maximum penalty for theft if the value of the thing stolen does not exceed \$10,000 is imprisonment for any period not exceeding 3 years, pursuant to section 145(a) of the Criminal Offences Act.

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- (c) Carnal Knowledge of a Child, contrary to section 121(1) of the Criminal Offences Act. The maximum penalty for carnal knowledge of a child under the age of 12 years is imprisonment for any period not exceeding life, pursuant to section 121(1) of the Criminal Offences Act.
- (d) Serious Indecent Assault on a Child, contrary to section 125 of the Criminal Offences Act. The maximum penalty for indecent assault on a child under the age of 12 years is imprisonment for any term not exceeding 7 years, pursuant to section 125(1) of the Criminal Offences Act.
- (e) Abduction of a Girl, contrary to section 129(1) of the Criminal Offences Act. The maximum penalty for abduction of girls under the age of 14 years is imprisonment for any term not exceeding 5 years, pursuant to section 129(1) of the Criminal Offences Act.
- (f) Serious Housebreaking, contrary to section 173(1)(b) and (4) of the Criminal Offences Act. The maximum penalty for serious housebreaking is imprisonment for any period not exceeding 10 years, pursuant to section 173(5)(a) of the Criminal Offences Act.

[2] In response to the offender's guilty pleas the Prosecution decided not to offer any evidence on additional charges of sodomy and serious indecent assault.

[3] The offender appears today for sentence on the charges to which he has pleaded guilty.

The facts

[4] The offender is Viliami Simoni, a 20 year old male and kafa maker who resides at Navutoka, Tongatapu. During the early morning of 17 June 2018 the offender broke into an unoccupied house at Navutoka and took a mattress. When he was arrested he stated that he had removed two louvers, climbed inside and took the mattress. He tried to take the mattress out of the front door but he could not and so he broke the door. He said he was intoxicated at the time. The value of the mattress and the cost to repair damage to the front door was \$650.

[5] Later that same morning at around 4am the offender, who had continued drinking alcohol, entered another house at Navutoka. In this house was a 3 year old girl

(who I shall refer to as A) who was sleeping on a mattress beside her mother (who I shall refer to as M). The father of the child had just returned from drinking kava but the front door could not be locked after it was damaged by Cyclone Gita. The offender entered through the door. M felt someone walking around but she thought it was her husband. The offender stole two black Alcatel Pixi mobile phones and one charger. The total value for the two black mobile phones and the charger is \$425.00.

[6] Most seriously the offender also removed A from her bed and took her with him. She was removed to an abandoned house where serious indecencies were performed upon her by the offender. When M and her husband awoke they realised that A was missing and the Police were informed and a search was undertaken. Whilst looking for A the husband's brother came across the offender on the road and noticed that A was standing beside the window of the abandoned house. The matter was reported to the Police and the offender was arrested.

[7] A was presented to the hospital at around 2pm that day and a limited examination of her genitalia was performed as she was distressed. On 18 June 2018, a full physical genital examination of A was conducted under anaesthesia. It was concluded that there was evidence of vaginal penetration and she tested positive for the sexually transmitted disease gonorrhoea. The offender was interviewed on 19 and 22 June 2018 and admitted house breaking and theft and indecent assault of A.

The material before me

[8] I have before me submissions from the Prosecution and have heard from Mr. Tu'utafaiva for the offender. I also have a pre-sentence report and a victim impact report. I also have a medical report which was amongst the documents transferred from the Magistrate's Court.

[9] The pre-sentence report tells a distressingly common story of a young man from a broken home with little education, few prospects in life and an alcohol problem.

[10] The offender comes from a large family of nine children of which he is the third child. His parents are divorced and his father has left Tonga to find a life in New Zealand and never returned. The family survives by making kafa. The offender left school in Form 1 to assist making kafa. Despite his relative youth he admits to

having been twice in Hu'atolitoli for theft and housebreaking offences and the report writer suggests that as a result of this he came under bad influences. He has a problem with alcohol and the report writer suggests that it was the drinking of alcohol that lead him to make 'very wrong decisions' in this case.

- [11] The pre-sentence report also records that the offender recounts that he entered the house to steal and when he saw the child he decided to take her from her parents. His actions appear to have been opportunistic. He admits to having indecently assaulted A by rubbing her vagina through her clothes but despite his guilty pleas, entered with the benefit of legal advice, he now says he did nothing else. It is said he regrets what he did and is remorseful and whilst a custodial sentence is inevitable some part of it should be suspended on conditions.
- [12] The victim impact report indicates that despite her age A recalls what happened to her and was deeply traumatized by it. She spent almost a week in hospital and complained of pain. She went from being a carefree child to one who is withdrawn, fearful and angry. She does not interact with other children as she had once done and is unresponsive and spends long periods idle or in reflection. She exhibits fear of unfamiliar men.
- [13] The Prosecution submits that this was offending of the most serious kind and there a many aggravating features including that:
- (a) The offending was at the higher level of seriousness – raping and indecently assaulting a child of a very young age;
 - (b) The offender abducted the child at night whilst A was sleeping with her mother where she was entitled to be safe;
 - (c) He committed other offences when abducting the child;
 - (d) A was in considerable fear;
 - (e) A was left by the offender in an abandoned house after he had raped and abused her and there is no knowing what could have happened to her had she not been found;
 - (f) A contracted gonorrhoea as a result of the offender's conduct; and

(g) A will live with this for the rest of her life.

[14] The Prosecution accepts that there are some mitigating factors namely that the offender was co-operative with the Police and pleaded guilty at the first available opportunity, he has no previous convictions for this type of offending, he has expressed remorse and apologized to M, although she has not accepted the apology.

[15] The Prosecution's submission is that the appropriate starting point for sentencing purposes is 15 years imprisonment with appropriate discount for the offender's guilty plea and other mitigating factors resulting in a final sentence of around 11 years imprisonment. This was broadly in line with my view of the matter.

[16] For his part Mr. Tu'utafaiva accepted that such a sentence was appropriate but stressed the need for the offender to be given some assistance on this release to rehabilitate him.

Discussion

[17] This offending is truly abhorrent. In the case of *R v Hu'akau* [2008] Tonga LR 64 the offender was a 27 year old who had carnal knowledge of a five year old child to satisfy his lust. In sentencing the offender Ford CJ noted that outside of murder and treason the offence of having carnal knowledge of a girl under 12 is the most serious offence on the statute books and of the offender's conduct said:

So to satisfy your own lust that day you, in a short space of time, carried out indecencies on this little five year old girl that will affect her for the rest of her life. You stole her childhood innocence. Nothing I now say can sum up the total disgust which everyone associated with your disgraceful conduct must feel. I can safely say that those same feelings will be shared by all right-thinking members of Tonga Society.

[18] Those words apply equally to the offender in this case.

[19] This Court has recognised many times that sexual offending against children is taken particularly seriously and that the Court will respond by imposing appropriate sentences, the object of which is the protection of children from being exposed to those who would prey upon them and to deter future offending; not only by a

particular offender but more generally by others who might otherwise be inclined to offend in this way. As Cato J said in *R v Lave* (CR 31 of 2017) at [7]

The paramount sentencing consideration is plainly protection of children...It is the Court's duty to protect children from this kind of conduct.

- [20] The lead offence for sentencing purposes is the offence of carnal knowledge of a child under the age of twelve (count 3). I have considered a number of cases to determine the appropriate starting point for sentencing purposes namely *R v Hu'akanu* (CR 31 of 2017), *R v Niutupivaha* (CR 77 of 2016), *R v Mo'unga* (CR 22 of 2017), *R v Fotofili* (CR 174 of 2014), *Polutele v R* (AC 13 of 2003), *R v Kolo* (CR 52 of 2012) and *R v Hu'akanu* (CR 107 and 108 of 2017) and I have also looked at overseas cases including *R v AM* [2010] NZLR 750.
- [21] A case that bears some similarity to this case is *R v Ha'akanu* (CR 31 of 2017) where Ford CJ imposed a sentence of 8 years imprisonment but noted that had it not been for the offenders' guilty plea he would have imposed a sentence of 10 to 11 years imprisonment. In my view however this offending is more serious than in *Ha'akanu* given the extreme youth of A (two years younger, than in *Ha'akanu*) the circumstances under which she was stolen from her home the middle of the night and then abandoned, she was infected with a disease and had to spend time in hospital. In these circumstances of extreme criminality I consider that a starting point of 11-13 years is appropriate but have decided on the lower figure of 11 years imprisonment.
- [22] In relation to the other counts in the indictment I sentence the offender as follows:
- (a) Count 1 is simple housebreaking and relates to the breaking into the unoccupied house where the mattress was taken and the door damaged. On this charge he is sentenced to 1 year's imprisonment.
 - (b) Count 2 is the theft of the mattress worth \$500 from the unoccupied house. On this charge he is sentenced to 6 months imprisonment.
 - (c) Count 5 is serious indecent assault on a child. This charge relates to the touching of the vagina of A. I sentence the offender to three years imprisonment on this charge.

- (d) Count 7 is abduction of a girl when the offender did remove A in the middle of the night from the bed of her mother. This is at the higher end of offending of its type in light of the circumstances under which it occurred, the offender's intentions in respect of A and that A was taken to an abandoned property and left there. I impose a sentence of three years imprisonment on this charge.
- (e) Count 8 is serious housebreaking where the mobile phones, charger and also A were taken. On this charge he is sentenced to 3 years imprisonment.
- (f) Count 9 is theft of the mobile phones and charger worth \$425. On this charge he is sentenced to 6 months imprisonment.

[23] Having given my consideration to the sentence to be imposed on each charge I must now consider the question of totality and to what extent the sentences for different offences should be made concurrent or cumulative. I must determine an overall sentence before determining whether any of the sentences should be suspended. In this regard I note that the aggregate or overall sentence must be "just and appropriate" to the totality of the offending behaviour but should not be crushing upon the offender in the sense that it will induce a feeling of hopelessness and destroy any expectation of a useful life after release.

[24] In my assessment the appropriate sentence is that cumulative on the 11 year sentence imposed on count 3 (carnal knowledge of child) is to be served the three years I have imposed on count 7 (abduction of a girl). The sentences imposed on counts 1, 2, 5, 8 and 9 shall be served concurrently with count 3. The overall sentence then is 14 years imprisonment which in my view is both just and appropriate given the nature of this offending, its depravity and injurious emotional, physical and inevitably psychological effects on A and also the effects on her parents and the quality of their family life.

[25] In terms of mitigation, the offender is entitled to credit for the fact that he has no previous convictions for this kind of offending and that he pleaded guilty at the first opportunity. I give him a 3 year discount for these factors. I do not see any reason to further discount the sentence because of remorse as the offender has not demonstrated remorse by now minimising what he did, nor for the apology to the

family which was not accepted. The result is that the final sentence is 11 year imprisonment.

[26] The next issue is whether it is appropriate to suspend any part of the sentence. The Prosecution accepts that it is appropriate to suspend some portion of the sentence (*R v Mo'unga* [1998] Tonga LR 154). I agree a suspended sentence is warranted having regard to the offender's age and record and the desirability of imposing conditions that will aid in his rehabilitation upon his release from prison. I have decided to suspend the final 1 year of the sentence for three years on conditions that:

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

Result

[27] The offender is sentenced to 11 years imprisonment which shall be backdated to the date he was remanded in custody which was 26 October 2018. The final 1 year of his sentence shall be suspended for three years subject to the following conditions

- (a) The accused is not to commit any offences punishable by imprisonment during the period of suspension;
- (b) He is placed on probation for the period of suspension and is to live where directed by his probation officer;

- (c) He is not to reside in any residence near the victim A and he is not to reside in any accommodation where girls or young women are present during his suspension.
- (d) He is to attend the following courses at the direction of probation:
 - (i) A course on sexual abuse; and
 - (ii) A course on drug and alcohol abuse.

[28] I consider that this is the least restrictive sentence of imprisonment that I can possibly impose whilst still reflecting the serious nature of the offending and the Court's commitment to protect children and deter such offending.

[29] I have warned the offender that should he breach any of the conditions of the suspension he may be required to serve the full balance of his sentence.



NUKU'ALOFA: 7 December 2018.

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

O.G. Paulsen
LORD CHIEF JUSTICE