Solicitor General 10/12/18

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IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY CR 118 of 2018

BETWEEN: REX

- Prosecution

AND: V

- Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

Counsel: Crown Law for the Prosecution
Mrs L Kuli for the Defendant

Date of Hearing: 14, 21 November and 5 December 2018
Date of Ruling: 5 December 2018

SENTENCING REMARKS

[1] Following a trial before me (sitting alone without a jury) the offender was acquitted on two counts of rape but convicted on two counts of indecent assault under s. 124 Criminal Offences Act (Cap 18) Vol 1, 1988 Revised Edition. He appears for sentence on the indecent assault charges. The maximum penalty for these offences is 5 years imprisonment (see *Kolo v R* [2006] TOCA 5).

The facts

[2] The case is unusual in Tonga in that the offences occurred in 1993 but were not reported to the Police until earlier this year. I understand it is the first case in Tonga

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where charges have been laid for offences that were alleged to have occurred over 20 years ago.

[3] The offender was in 1993 married to the eldest sister of the victim. I shall refer to the victim as A. The offender was 26 years old and A was 13 years old. The offender and his wife lived with the wife's family including A.

[4] On a Saturday morning A was asleep in her bedroom. Other family members were at the market or elsewhere. She was awakened by the offender fondling her vagina. She chased him from the room. He returned a short time later and awoke her again when he licked her vagina. A fled the house and only returned when summoned by her parents that evening. She immediately made a complaint to her parents that the offender had entered her bedroom and tried to do things to her. The nature of what had happened was clearly apparent to A's parents as the offender and his wife were told to move out of the house, which they did some time later. The matter was not reported to the Police. The evidence suggests that this may have been because A's father favoured the offender's wife and pitied her. Even when the offender and his wife moved to a new house they regularly visited the family home and there were no further incidents.

[5] It is likely that the matter would never have been raised again had it not been that at Christmas 2017 the offender, who is now divorced from his first wife, disclosed that he had fathered a son with another sister, who I refer to as S. He had sexual intercourse with S some time in 1993 when she was 15 years old but she hid this from the family saying the father of her child was another man. Once the paternity of her child became known, S laid a complaint with the Police that the offender had raped her in 1991 and again in 1993. A, who was now aware of what her sister S said had occurred, laid her complaint with the Police at the same time.

[6] At his trial the offender acknowledged having sexual intercourse with S on one occasion but he said it was consensual. He denied ever raping S. He also denied indecently assaulting A. I found that S's evidence was unsatisfactory and that the allegations of rape were not proven. I found however that the offender had indecently assaulted A on that morning in 1993 and that those charges were proven.

The material before me

[7] I have a pre-sentence report and submissions from the Prosecution and Mr. Vaipulu for the offender. Each Counsel provided two sets of submissions in response to a request from me for further information. I have also been provided with medical reports relating to the offender from New Zealand as well as references from his local parish priest, a town officer, his employer and his wife which speak positively of him.

[8] The offender is now 52 years old. He and his first wife (the sister of S and A) migrated to New Zealand in 2009 and they still both live there. They have now divorced and their relationship is unhealthily hostile, which the offender said at trial was why A and S made false complaints against him. The offender has land, a house and family in Tonga and it appears he regularly visits. Although the evidence established that when A's complaint was first made he acknowledged he had done wrong and apologised for it, he now maintains that he did not indecently assault A. He has recently remarried and has no children with his second wife but she is supportive of him and is very concerned for reasons of his health that he be able to return to New Zealand.

[9] The pre-sentence report raised the possibility that a sentence of imprisonment might affect the offender's right to reside in New Zealand and that he has some unverified health issues. As the offender maintains his innocence and lives in New Zealand the pre-sentence report suggests that there is little scope for rehabilitation options and makes no specific sentencing recommendation.

[10] Mr. Vaipulu has advised that the offender's status as a permanent resident in New Zealand will be unaffected by his conviction or the sentence that is imposed. In relation to the offender's health, the information before me shows that he suffers from diabetes, sleep apnoea, gout and was recently found to have what I understand to be a cancerous mass in this abdomen. He is on a range of long term medications, his sleep apnoea requires daily therapy and his abdominal condition requires regular monitoring. Whilst awaiting trial he has been given permission to go to New Zealand and return to Tonga for medical treatment between Court appearances.

[11] The Crown has referred me to a number of comparable cases for sentencing purposes. It is argued that this was serious offending of its kind and that there were

significant aggravating factors. Of particular relevance are the young age of A when the offences occurred, the significant age difference between A and the offender, that the offender was in a position of trust in relation to A and that he has shown no remorse. The Crown submits that the starting point for sentencing purpose is 3 years imprisonment of which the last 12 months should be suspended.

[12] Mr. Vaipulu argues for a fully suspended sentence of imprisonment noting that the offences occurred 25 years ago, that the offender has no criminal record and that he needs to work to support his family. Relying on the references he submitted that the offender is of good character and that if given a suspended sentence he will agree not to return to Tonga for an extended period.

Discussion

[13] I take full account of the abhorrence that the community has for sexual offending against children, particularly when the offender has abused a position of trust. Sexual offending may have long term tragic effects on victims that they can carry with them for their entire lives. It is necessary that the Courts respond to this and that sentences serve as a deterrent to future offending; not only by a particular offender but more generally to others who might otherwise be inclined to offend in this way.

[14] The Court recently recognised this in R *v Hu'akau* (CR 107 and 108 of 2017) and in R *v Mahe* [2016] (CR 145 of 2015, 8 March 2016) where the offender, a school teacher, was convicted of five counts of indecent assault on male child under 12 years old Cato J said:

> The Court has an ongoing obligation to protect children against conduct of this kind .... the sentence imposed must be one which protects young and vulnerable people from any kind of sexual exploitation, and deter others minded to use their authority, such as being a school teacher for such a purpose.

[15] In my view in cases of sexual offending against children offenders will receive terms of imprisonment unless exceptional circumstances exist.

[16] As I have noted above it is an unusual aspect of this case that the offender is being sentenced for offences that occurred 25 years ago. As far as possible the Court

must take into account the sentencing practices as at the date of the commission of the offences when sentencing practice has moved adversely to an offender.

[17] There has been a substantial delay in bringing these charges. The general principle is that delay between the commission of an offence and sentence is not a matter that will be considered in mitigation unless it results in some unfairness to the offender. One situation where such unfairness may occur was recognised in *R v Law; Ex parte Attorney General (Qld)* [1996] 2 Qd R 63, 66 and described in this way:

> The second is where the time between the commission of the offence and sentence is sufficient to enable the court to see that the offender has become rehabilitated or that the rehabilitation process has made good progress.

[18] I note also that in *R v Todd* [1982] 2 NSWLR 517 Street CJ said that sentencing for a stale crime, committed long before sentence, calls for a considerable measure of understanding and flexibility of approach and that the lengthy passage of time will often lead to considerations of fairness playing a dominant role in sentencing, requiring 'what might otherwise be a quite undue degree of leniency being extended to the prisoner'.

[19] The Prosecution helpfully referred me to *R v Fonokalafi* [1997] Tonga LR 138 where the offender had pleaded guilty to dishonesty offences. Lewis J fully suspended a sentence of imprisonment because of a delay of seven years in bringing the charges and because since he committed the offences the offender had made restitution, made changes to his personal circumstances, he had pleaded guilty and he was unlikely to reoffend.

[20] An impulse to leniency must be tempered by the nature of the offence and facts of the case. In sexual offending against children it is often only the child and the offender who are aware of what has been done and it comes to light only years later when the child has acquired the maturity and the power to confront his/her abuser. Delay in disclosure is therefore inherently likely given the nature of this particular kind of offending and the mere passage of time will not be a significant factor in mitigation.

[21] In this case I must recognise that A's allegation against the offender was not hidden only to emerge years later. A did make her allegation against the offender on the

day that he abused her and the offender was confronted and the matter was addressed (albeit in an unsatisfactory manner) within the family. Charges could have been brought at the time but were not. That was not A's decision of course, as she was only a teenager at the time but it appears that relationships within the family healed and there was evidence that for some time as an adult A and her family lived in the offender's house when he and his first wife moved to New Zealand. Upon reaching maturity A did not take the matter any further. Her complaint to the Police followed the offender's disclosure in 2017 and S's allegation of rape (which were not proven) and it is fair to assume A would never have made her complaint had it not been for those matters.

[22] It is relevant in my view in a sentencing context and creates unfairness for this offender that the complaints were raised and dealt with in a family setting in 1993 and are now raised again 25 years later, particularly as the offender has changed his circumstances, moved to and established himself in New Zealand and, importantly, not reoffended. It is also the case that given his age and health difficulties a custodial sentence imposed will now be greatly more onerous for the offender than would have been the case had the allegations been taken to the Police 25 years ago when they were first made. He is entitled, in fairness, to credit for the delay in bringing the matter before the Court which I address below.

[23] In assessing the starting point for sentencing purposes I have had regard to a large number of cases with particular care to examine those cases that were decided more closely in point of time to this offending.

[24] In *Rex v Kaloni* (CR 100 of 2001) the offender was convicted of two counts of indecent assault against sisters aged 9 and 7 years. The offender had groomed the children and the offending occurred on a number of occasions involving the offender touching and licking the girls' vaginas. He had defended the charges and had a record of similar and even more serious offending for which he had served periods of imprisonment. He was sentenced to three years imprisonment on each count to be served concurrently *i.e.* three years in jail in all.

[25] *Kolo v* R (AC 4 of 2006) was an appeal to the Court of Appeal from sentence on two counts of indecent assault on a 12 year old girl. The offender had groomed the girl with money. The offending included removing the victim's clothes, sucking her

breast and the rubbing of the offender's erect penis on the victim's genitalia. The offender pleaded guilty and on each count was sentenced to one year in prison to be served cumulatively with the final six months suspended on conditions. The Court of Appeal did not interfere with the sentence. I consider the sentence was very lenient because it was a Crown appeal against sentence.

[26] The offender's conduct in this case was serious and made worse because A was a family member and he was in a position of trust and because he took advantage of her whilst she slept. However, I do not accept the Prosecution's position that the offending was premeditated (it appears to me to have been opportunistic) or that this is the 'worst case of indecent assault'. Deplorable as A's conduct was, I do not regard his criminality to be as great as was the case in either *Kaloni* or *Kolo.* In this case there was no grooming of A, the offending was not protracted, there was no attempt to restrain A (or acts of violence additional to the offending itself) and whilst there were two incidents they occurred on the same day within a short period and were never repeated. Furthermore, the offending did not involve the offender exposing himself or the touching of A with his genitalia. In addition to those matters, it is accepted by the Prosecution that A has not suffered any lasting psychological or emotional damage as a result of this offending and I was advised that it was not necessary for me to obtain a victim impact report for that reason.

[27] In my view the appropriate starting point for sentencing purposes for these offences is 2 years imprisonment and that given the circumstances under which the offending occurred and the totality of the criminality involved that these sentences should be served concurrently.

[28] In terms of mitigation, the offender is entitled to credit for the fact that he has no previous convictions and he has not reoffended for many years. I give the offender a discount of six months on his sentence for these matters, making a total sentence of 18 months imprisonment.

[29] The next issue is whether it is appropriate to suspend all or 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.

[30] The issue whether the sentence should be fully or only partially suspended is the one that has caused me greatest difficulty. As I have noted above, offenders in these sort of cases must expect to serve prison sentences. However there have been cases of similar offending (some referred to by the Prosecution) where fully suspended sentences have been handed down. I have also gone beyond Tonga and looked at cases in New Zealand and other Commonwealth jurisdictions and it is the same overseas. In the New Zealand Court of Appeal decision in *The Queen v Westway* (CA 127/98, 23 June 1998) the accused appealed against a sentence of six months imprisonment for indecent assault of an 11 year old girl. The Court allowed the appeal imposing a fully suspended sentence despite the fact that the accused maintained his innocence and, relevantly in the present context, said:

> In the present case the appellant was guilty of a single offence which was very much at the lower end of the range of such offending. He was a first offender of mature age, with excellent references and a record of work in and for the community. There was nothing before the Court to indicate a likelihood of reoffending.

[31] After a great deal of reflection and giving full weight to the Prosecution's submissions to the contrary, I have decided to fully suspend the offender's sentence. Like the defendant in *Westway* this offender has no other convictions and has good references and whilst I am concerned that he now does not acknowledge his offending there is nothing to suggest he has reoffended since 1993 or is likely to do so again. I consider it most unlikely he will do so. Most important however is the unfairness to him that has resulted from the delay in bringing A's complaint before the Court sooner for the reasons set out above.

[32] I have considered also whether it would be appropriate to combine the suspension with some community based sentence but have decided against that for this reason. Although whilst on bail the offender has been given permission to travel to New Zealand and has done so, Tonga is not now his home and I have no doubt that there has already been a significant degree of disruption to his life and to his employment as well as financial hardship above what would be the case for other offenders. I consider therefore that the proper outcome is that the offender be given a fully suspended term of imprisonment without additional sentence.

Result

[33] On each charge the offender is sentenced to 18 months imprisonment. The sentences are to be served concurrently, i.e. a total of 18 months. The sentence is suspended for three years on the condition that the offender commits no offences punishable by imprisonment during the period of suspension.

[34] What this means is that if the offender is convicted of any offence punishable by imprisonment here in Tonga within three years he is liable to undergo the sentence of 18 months imprisonment in addition to any other sentence that is imposed and I have warned him accordingly.

O.G. Paulsen

NUKU'ALOFA: 5 December 2018. **LORD CHIEF JUSTICE**