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CR 55 of 2019

JFL 14/6/19.

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

19/06/19

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BETWEEN : REX

Prosecution

AND : POLIKAPI MOTULIKI

Accused

Counsel: Miss S H Aleamotu'a for the Prosecution
The Accused in person

Hearing: 13 June 2019
Date of Ruling: 13 June 2019

SENTENCING REMARKS

The conviction

[1] Mr Motuliki pleaded guilty on arraignment to one count of indecent assault on a child under the age of 12 years, contrary to s. 125(1) of the Criminal Offences Act. The maximum penalty for this offence is 7 years imprisonment.

The facts

[2] Mr Motuliki is 56 years-old and his victim, who I shall refer to as PN, was aged 5 years-old. On 26 November 2018, Mr Motuliki was at a neighbour's

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property. PN, who has been customarily adopted by the daughter of Mr Motuliki's neighbour, was also at the property. She played cards with Mr Motuliki inside the house. Mr Motuliki pulled down PN's pants and fingered and licked her vagina. Another visitor saw what was happening and put a stop to it. Mr Motuliki was arrested, admitted to what he had done and, fully cooperated with the Police. He has no previous convictions.

The material before me

- [3] I have before me:
- (a) A pre-sentence report; and
 - (b) Submissions from the Prosecution.
- [4] I heard oral submissions from Counsel and also heard from Mr Motuliki.
- [5] I did call for a victim impact report but this was not provided. From the Bar, Miss Aleamotu'a advises me that she has spoken to PN's mother. PN was greatly upset at what occurred and still recalls the events. However, she is said to be a lively and happy child notwithstanding what occurred. PN's mother noted the close relationship between her family and Mr Motuliki's family and that Mr Motuliki would often play with PN. She regards what he did as great breach of trust but has forgiven him and wishes to move on.
- [6] The pre-sentence report advises that Mr Motuliki was married twice: the first time in 1979. His first wife died in the early 2000s. In 2007, he remarried and lived overseas. In 2013, he had a stroke and this caused difficulties in his marriage. He returned to Tonga in 2017. Upon his return, he lived with his eldest daughter at Nautoka (where this offence occurred). His daughter has moved to New Zealand and Mr Motuliki now lives with an older brother at Longolongo.
- [7] Mr Motuliki has not worked since his stroke and relies upon his brother for financial support. He does not enjoy good health. He says that he has heart disease, high blood pressure and diabetes and requires ongoing medical treatment and medications. A medical report has been provided, and it states

that Mr Motuliki has ischemic heart disease (narrowed arteries), that he is not well and that he attends the outpatient cardiac-clinic on a regular basis. My own observations are that Mr Motuliki is a frail person who appears to be suffering still the effects of his stroke and he looks much older than his years.

- [8] Importantly, a risk assessment carried out by the Probation Service finds that Mr Motuliki is at low risk of re-offending.
- [9] The Prosecution has submitted that given the nature of the offending a custodial sentence is appropriate, albeit, that Mr Motuliki is entitled to have some part of the sentence suspended. Counsel emphasised as aggravating features of the offending, the age of PN and Mr Motuliki's breach of the trust PN's family placed in him.
- [10] At the last hearing, Mr Motuliki had advised me that he accepted the summary of facts. After hearing Counsel today, he said he did not lick PN's vagina. He acknowledged kissing PN on the lips, pulling down her pants and fingering her vagina. Having previously accepted the summary of facts I do not accept Mr Motuliki's late challenge to them. He was able to tell me what occurred but had no meaningful explanation for his actions. He said he regretted what he did. He accepts that a custodial sentence is likely.

Discussion

- [11] Of primary importance is the abhorrence that the community has for sexual offending against children, which may have long-term and tragic effects on victims. The Courts must respond to deter future offending: not only by a particular offender but more generally by others who might be so inclined. In *R v Mabe* [2016] Tonga LR 66, 68 at [5], 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.

- [12] In assessing the starting point for sentencing purposes, I have had regard to a number of cases including *Rex v Kaloni* (CR 100 of 2001), *Kolo v R* (AC 4 of 2006), *R v Tlangana* (CR 56 of 2015), *R v Lwi Lomu* (CR 92 of 2014), *R v Taulanga* [2007] Tonga LR 141, *R v Vaiangaina* (CR 312 of 2011), *R v Sinoti* (CR 116 of 2014) and most recently *R v V* (CR 118 of 2018).
- [13] Mr Motuliki's conduct was deplorable and must be condemned. Significant aggravating features of his offending are that PN was just five years-old and knew Mr Motuliki well and, no doubt, trusted him. I accept, however, that the offending was not premeditated, that there was no suggestion of prior grooming of PN, no violence against PN beyond the indecent acts themselves, no touching of PN with Mr Motuliki's genitalia or exposure of his genitalia to PN and, thankfully, the offending was not protracted. Maintaining consistency with the cases that I have referred to above, the appropriate starting point for sentencing purposes is 2 years imprisonment.
- [14] Miss Aleamotu'a referred me to the case of *R v Uluapano* (CR 38/17) where Cato J sentenced the offender to 4 years imprisonment (with the final 15 months suspended) on one count of serious indecent assault on a child under 12 years. The facts of *Uluapano* are far removed from this case and the sentence imposed is explicable on that basis. In that case, the accused broke into a house at night (committing the offence of serious housebreaking) intending to commit a sexual assault. In addition to performing indecencies on one child he attempted to indecently assault another young women. He threatened his victims with a machete and he was not a first-time offender.
- [15] Mr Motuliki is entitled to credit as he is a first-time offender and fully co-operated with the Police, for which I discount his sentence by 3 months. He is also entitled to credit for his early guilty plea, for which I discount his sentence by a further 5 months. The result is that he is sentenced to 16 months imprisonment.
- [16] The next issue is whether it is appropriate to suspend all or any part of the sentence (*R v Mo'unga* [1998] Tonga LR 154). Given the nature of the offence and the need for deterrence, I am not prepared to suspend the sentence fully. I

accept that it is appropriate to suspend some part of the sentence, reflecting the facts that Mr Motuliki is a first-time offender, was co-operative and is at low risk of reoffending.

- [17] Another factor that weighs with me is Mr Motuliki's poor health. Whilst ill-health is not a licence to commit crime without consequence, it is a factor to be considered where it appears that imprisonment will be a greater burden on the offender by reason of his ill-health, or, where there is a risk that imprisonment may have a gravely adverse effect on an offender's health. This is such a case. For those reasons, I have decided to suspend the final eight months of Mr Motuliki's sentence, subject to conditions.

Result

- [18] On the one charge of indecent assault on a child under the age of 12 years contrary to s. 125(1) of the Criminal Offences Act, Mr Motuliki is sentenced to 16 months imprisonment.
- [19] The last eight months of the sentence is to be suspended for two years on the conditions that:
- (a) Mr Motuliki is not to commit any offence punishable by imprisonment during the period of suspension;
 - (b) He is to be placed on Probation during the period of suspension to live where directed by his Probation Officer and he is not to live in any residence with any child under the age of 12 years; and
 - (c) He is to attend and complete any course that Probation considers appropriate on life skills or sexual abuse on such dates and times as directed.
- [20] Pursuant to s. 32 of the Criminal Offences Act, I direct the Commissioner of Prisons that Mr Motuliki is not to be required to undertake hard-labour. He is to be assigned only light duties whilst he is serving his sentence of imprisonment.

[21] The Commissioner of Prisons is further directed that:

- (a) Pursuant to s. 20 of the Prisons Act, Mr Motuliki is to be given access to a health practitioner upon request. Mr Motuliki has an appointment with his Doctor, 'Ana 'Akauola, at Vaiola Hospital on 20 June 2019, when I understand he will be provided with necessary medications. Arrangements should be made for him to attend that appointment.
- (b) Pursuant to s. 22 of the Prisons Act, the Commissioner of Prisons is to, where reasonably practicable, comply with the directions of any health practitioner relating to the maintenance of the health of Mr Motuliki.

[22] A copy of this ruling is to be served upon the Commissioner of Prisons and the Officer in Charge of Hua'tolitoli Prison.



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

NUKU'ALOFA: 13 June 2019

O.G. Paulsen

LORD CHIEF JUSTICE