

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

16/10/19
CR 145 of 2019

BETWEEN:

REX

- **Prosecutor**

AND:

PENISIMANI FA'AOA

- **Accused**

BEFORE HON. JUSTICE NIU

Counsel : **Ms. L. Macomber for Prosecution.**
Mr. Penisimani Fa'aoa, Neiafu, Accused.

Hearing : **11 October 2019 on sentencing**

Ruling : **16 October 2019**

RULING ON SENTENCE

- [1] Penisimani Fa'aoa, you now appear before me to be sentenced for the criminal offence of rape to which you have pleaded guilty to on 9 October 2019.
- [2] The girl you raped was your acquaintance. She was the girlfriend of your friend and you and your girlfriend lived together with them. She trusted you as the friend of her boyfriend, like a brother even. You all had a few drinks at the place in which you were living but it turned into many drinks which went on all day at the end of which the girl passed out and the other two had left elsewhere. You then took advantage of the condition of the girl and raped her. She came

around while you were doing it and tried to stop you but you carried on against her will and then you left. She then went and told her brother and his wife what you had done and they took her to the hospital. The next day, she complained to the police. That was on 3 September 2017.

- [3] The police did not come for you until the 19th October 2017 and they questioned you about what the girl had told them that you did to her and you told them that you could not remember and that you did not know because you said you were too drunk. You were released until the police could get a finger print form from Tongatapu.
- [4] You told me that you contacted the girl by writing to her on Facebook and apologised to her for what you had done and asked for her forgiveness but that she did not reply to it or to other writings you sent her asking for her forgiveness. You said that it was just by chance that you went to your brother's place and the girl was there, that she had come there to tell your brother she had forgiven you. You said that you too then talked and from there you continued to see each other and became so close that you two then lived together in December 2017, and that you have lived together ever since, and that you two now have a 5 months old daughter.
- [5] The probation officer and even the Crown Prosecutor herself have confirmed that that is so, that whereas before you had no steady job, you now have one making up to \$300 a week to support the girl, your child and yourself, that you have become a responsible and hardworking and caring "husband" and father, something that was never expected of you. You had committed criminal offences and served prison sentences and just seemed to have had no purpose to your life. The prosecutor even went so far as to say that for once "it appeared that something good has come out of something bad". I have to say that that is to your credit because she does not concede much.
- [6] The fact that you have pleaded guilty to the charge is, to me, much more than just a "credit" to deduct a period from an imprisonment term to which you would otherwise have been liable if you had not pleaded guilty. It means that you value the girl you have wronged so much that you are prepared to take and serve what imprisonment term is befitting the wrong you have done to her

irrespective of the forgiveness she has granted you, in order that she does not suffer the indignity of reciting in this Court and the public the degradation you subjected her to. It shows strength and courage, and most importantly, integrity as a person with the responsibility of being the husband, father and as the man you have become. It also evinces remorse and conviction to turn a new leaf, to become a better person and to be the very person that the girl has now seen in you.

[7] Ms. Macomber, as she must, has referred me to recent cases of rape and to the sentences which have been imposed in them:

- (a) *R v Tu'ifua* (CR79/2018) (Unreported) where the girl there was also drunk and had passed out, just like the girl in the present case. He pleaded not guilty but was convicted after a full trial. He was a first offender. He was sentenced to 4 years 6 months imprisonment, with the last 18 months suspended on conditions. So he has to 3 years imprisonment.
- (b) *R v Toetu'u* (CR113/2014) (Unreported) where the girl there was taken by a friend in his car to take to her home but he took her instead to another home and raped her in the car. He pleaded not guilty but was found guilty after a full trial and was sentenced to 4 years imprisonment, with the last 12 months suspended on conditions. So he had to serve 3 years as well.
- (c) (Unreported) where the girl there was taken by a friend in his car to his residence and raped her in the car. The accused pleaded not guilty but was convicted after a full trial and was sentenced to 4 years imprisonment, with the last 12 months suspended on conditions. He was also a first time offender. So again he had to serve 3 years as well.

[8] Those cases show the severity with which this Court has dealt with persons who have committed the offence of rape in Tonga. At the same time, those cases were of not guilty pleas and of full trials where the victims were called to and they gave their evidence reciting the terror to which they had been subjected again in the Court. As I have stated above, you, Penisimani, have not done that.

You pleaded guilty as I have described. But there was something in your case which I find more extenuating as well.

[9] When the police released you after they arrested you on 19 October 2017, they did not get the fingerprint form from Tongatapu until about August 2018. You were then brought in and your fingerprints were taken on 27 August 2018 and you were released again. At that time you were already living together with the girl as husband and wife since December 2017 as you have told me.

[10] Why the police did not prosecute you in September 2017 by issuing to you the summons of the charge of rape, without a fingerprint of you having been taken, is beyond my understanding. It ought to have been issued there and then. In fact, there is a record in the diary of police action that the police had taken you before the Magistrate at Neiafu on 19 October 2017 and had requested that you be remanded in custody until "work on you be completed" and you were accordingly kept in custody – upon what charge and upon what summons when no summons had been issued I do not understand. But you were so kept and then only released after your record of interview, notice of prosecution and statement to the police had been taken.

[11] And despite your fingerprints having been taken on 27 August 2018 if that was what the police had been waiting for, no summons were issued until the 16th May 2019 – by which time your baby had just been born on 13 May 2019.

[12] The long and undue delay of the police in issuing the summons, which should have been issued straight away in September 2017, has resulted in there being no order that you, the accused, were not to contact the girl or any witness as to interfere with the evidence they would give. That failure allowed you to contact the girl to seek her forgiveness and for you to apologise to her for what you did to her. That failure resulted in you two falling in love with each other which resulted in you two living together as husband and wife and making a family – before the summons was finally issued and served upon you.

[13] The victim report states that the girl went and told the police that she no longer wanted to continue with her complaint and asked that the summons be

withdrawn but the police did not want to do that. They insisted that she continue with her complaint. She had no authority to withdraw her complaint.

[14] I consider that these are exceptional circumstances which set this case apart from the other cases, such that it would be unjust to impose a sentence like the other rape cases I have referred to, upon you simply because you have been convicted of rape like they have been.

[15] Accordingly, I consider that the justice of this case is that I sentence you as follows, and I hereby sentence you as follows:

- You are sentenced to 3 years imprisonment but that sentence is fully suspended for a period of 1 year from today upon the condition that you do not commit another offence which is punishable by imprisonment.

NUKU'ALOFA: 16 October 2019.



A handwritten signature in blue ink, appearing to read "Niu J", is written over the seal.

Niu J
JUDGE