

Pursuant to s.119 of the Criminal Offences Act, the identity of the complainant in this proceeding shall not be published in the Kingdom in a written publication available to the public or be broadcast in the Kingdom

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

CR 62 of 2020

BETWEEN:

REX

-v-

VP

(a pseudonym)

SENTENCING REMARKS

BEFORE: LORD CHIEF JUSTICE WHITTEN

Appearances: Mrs 'A. 'Aholelei for the Crown

Accused in person

Date of submissions: 15 May 2020

Date of sentence: 22 May 2020

The charges

1. On 14 April 2020, the Defendant pleaded guilty to one count each of:

- (a) rape, contrary to s.118 of the *Criminal Offences Act*;
- (b) causing serious bodily harm, contrary to s.107(1), (2)(c) and (4) of the *Criminal Offences Act*; and
- (c) domestic violence, contrary to ss 4 (a), (b)(i) and 28 of the *Family Protection Act*.

The offending

2. The victim is the Defendant's wife. On or about 9 June 2019, between the hours of 8 and 10 PM, the Defendant and the victim were driving to their home. The Defendant was angry and upset about an earlier incident between them. He started beating the victim. He told her they were going to their tax allotment where there were plenty of knives so that he could stab her. As they reached their house, the victim noticed the lights on a neighbour's house were on, so she opened the door of the vehicle and ran to the neighbour's house. She asked the neighbour for help because her husband was going to kill her. The Defendant came and grabbed the victim by her dress and pulled her away while beating her. The neighbour told the Defendant to stop beating the victim and take her back to their home to talk things out.
3. The Defendant and the victim then went to their house. He told her to drink alcohol. He accused her of lying and of sleeping with another man. With every response, the Defendant beat the victim causing her to keep falling down onto a mattress. The Defendant then told the victim to remove her pants which she did. The Defendant then removed his pants and had aggressive sexual intercourse with the victim. The victim did not consent. She could not do anything at the time because she was feeling worn out from the beatings. The Defendant also inserted his fingers forcefully into the victim's vagina causing her to yell out from the pain. The victim then noticed blood coming from her vagina.
4. The neighbour heard the victim's cries and reported the matter to police. The Defendant was arrested and admitted the charges.
5. The victim was taken to hospital that night and examined. She was found to have suffered bruising to her right eye consistent with her account of the beatings.
6. The next day, the Defendant provided a letter to the police, addressed to the victim, in which he apologised and confessed to beating her.
7. Two days later, the victim was medically examined again and found to have suffered a laceration about 1 cm deep and 1.5 cm long on her posterior vaginal wall.

Crown submissions

8. The Crown submits the following as aggravating features:
 - (a) the seriousness of the offending - marital rape and inflicted violence;
 - (b) serious breach of spousal trust and relationship;
 - (c) the offending was premeditated;
 - (d) the Defendant had anger management issues - he threatened to stab her with knives, forced the victim to drink alcohol while he abused her, when she fled seeking help he chased after her, she was forced to take off her clothes and was put in considerable fear;
 - (e) the Defendant was intoxicated at the time of the offending; and
 - (f) the victim will live with this for the rest of her life.
9. The Crown submits the following as mitigating features:
 - (a) the Defendant is a first-time offender;
 - (b) he pleaded guilty at the first available opportunity saving the court time and the victim from having to give evidence and reliving what happened;
 - (c) the Defendant is remorseful;
 - (d) he cooperated with the police; and
 - (e) the victim has forgiven him.
10. The Crown referred to the following as comparative sentences:
 - (a) *Fa'aoso v R* [1996] Tonga LR 42:
 - (i) The complainant went to a nightclub with a cousin. The offender was a security guard at the nightclub. The complainant left with her cousin around 2 AM.

Shortly after, the complainant left on foot to see her boyfriend. The offender approached the victim on his bicycle. The victim asked him to take her to her boyfriend's place. However, the offender steered his bike into a container beside the road and the victim fell off the bike and lost consciousness. The offender forcibly removed her clothes and raped her. When she recovered consciousness, the offender punched her in an attempt to make her lose consciousness again. He then left.

- (ii) The principal aggravating factor was the violence inflicted on the complainant by the appellant, in addition to the violence inherent in the act of rape itself. The violence was substantial, resulting in her suffering a fractured jaw, as well as other less serious injuries. The complainant was a virtual stranger, he knew her only by sight. The decision to drive her into the container with the intention of raping her, was deliberate.
- (iii) The appellant had no recent previous convictions. He was diagnosed as having some psychiatric conditions which were taken into account when considering the level of his culpability. He was married with five children and a dependent mother-in-law. Overuse of alcohol was identified as contributing to his aggressive behaviour. He had ceased drinking beer after he was charged.
- (iv) After weighing up the various considerations, the Court of Appeal considered that the five year starting point should be increased because of the aggravating factors, particularly the violence. But when regard was had to the mitigating factors, the original sentence of eight years was reduced to 6 1/2 years imprisonment. Any issue of suspension was not referred to in the judgement.

(b) *R v Holani* [2016] TOSC 8:

- (i) In 2015, the offender broke into the unlocked residence of the victim and entered a bedroom where she was sleeping. She awoke and recognized the offender as a construction worker who was building a fence at her neighbour's house. She was frightened and tried to escape but the prisoner held her and pulled her onto

the bed. He removed her pants. She cried and struggled but he proceeded to have intercourse with her. She later left the room and escaped to a neighbour's residence for assistance.

- (ii) Cato J followed the Court of Appeal's decision in *Fa'aoso* that the starting point for rape after a defended hearing in Tonga is five years. However, the aggravating circumstances led his Honour to increase the starting point to 7 years.
- (iii) The prisoner was young and had no previous convictions. He cooperated with police and expressed remorse. Alcohol was a factor. The offending was out of character.
- (iv) Cato J allowed a discount in mitigation of two years and three months for his early guilty plea, previous good character and also for the fact that some compensation had been paid by his family to the victim.
- (v) He therefore sentenced the prisoner to four years and nine months imprisonment.
- (vi) Because of his guilty plea, remorse, lack of previous convictions and cooperation, the final year of his sentence was suspended on conditions.

11. Here, the Crown submits that:

- (a) a custodial sentence is appropriate because of the public interest in the courts taking a strong stand on domestic violence;
- (b) the head sentence in this matter is on the count of rape;
- (c) the usual starting point of five years is too low and lenient;
- (d) the increase in the number of sexual offences in recent years and the serious nature of such offending demonstrates a need for the court to increase the starting point;
- (e) sentences imposed to date are not having a sufficient deterrent effect for the seriousness of such sexual cases;

- (f) a message needs to be sent that domestic issues are not a justification or excuse for violence and that domestic abuse will be met with firm penalties;
- (g) therefore, an appropriate starting point is seven years imprisonment;
- (h) the Defendant should be allowed a deduction by way of mitigation for his early guilty plea and being a first-time offender; and
- (i) for his remorse and cooperation, some of the sentence should be suspended.

Victim impact report

12. The victim is 27 years of age. She and the Defendant have four children. She is currently pregnant to the Defendant. She continues to live with the Defendant and their children.
13. Problems between the Defendant and victim started in late 2017 to early 2018 when they separated, and the Defendant started living with another woman for about four months. The Defendant and the victim reconciled and resumed living together. However, the victim had suspicions that the Defendant was still having relations with the other woman.
14. When the offending was taking place, the victim felt very scared. She was shocked at the Defendant's outburst of anger and his behaviour. This was the first domestic violence incident during their seven years of marriage.
15. The victim blames herself for what happened because at the time of the offending, she was engaged in an extramarital affair with another man.
16. Following the incident, she moved with her children to her parents' home for about two months. During that time, the Defendant was in custody and was prohibited by order from being anywhere near the victim. The Defendant apologised for what he had done, and the victim forgave him. She applied to the Magistrates Court to lift the protection order. Once the Defendant was released on bail, he resumed living with the victim and their children at the victim's parents' home. In February 2020, they moved back to their own family home.
17. When the Defendant was first released from custody, he was often controlling and would start accusing the victim of still having relations with another man. But, relations between

them have since improved and they are trying to work things out. Whereas, in the past, the Defendant normally did not play an active role in the marriage, the victim has noticed a change in his behaviour for he now plays an active role in raising the children and in helping out with house chores. He also took two jobs to assist their finances.

18. The victim says that right now she is in the relationship because of their children but that she wishes for the relationship to work. She will move on from this, but it is something which will scar her for life. She will never forget this incident.

Presentence report

19. The author of the presentence report described the Defendant as having had a stable upbringing with good education and good employment record. However, during 2017, he started having extramarital affairs which led to separation from his wife. As noted above, they reconciled but still had problems linked to his infidelity.
20. The Defendant's father passed away in 2018 which caused a change in his behaviour.
21. About a month before the offence, the victim started having an affair. The Defendant's version of the events included that in the early hours of Sunday morning, 9 June 2019, he woke up around 3 AM to find his wife missing from their bed. He asked other household members of her whereabouts, but they were also shocked and had no idea where she could have gone. Around 5 AM, the Defendant went outside to look for her. He saw a car approaching the front gate and to his surprise he saw his wife in the front passenger seat with a man driving. When his wife saw the Defendant, the car drove away.
22. The Defendant was in complete shock as he never knew his wife would cheat on him. He became extremely infuriated and drove his car to retrieve his wife but lost track of the vehicle, so he returned home and got ready for work that morning. He tried calling his wife's phone, but she did not answer. He went to work still hysterical and confused and ended up drinking a whole bottle of wine whilst at work. His supervisor noticed his distress and tried to calm him down. They later managed to telephone his wife and she told the Defendant to pick her up from a friend's house.

23. The victim said that the Defendant appeared normal when he and his supervisor picked her up. However, after they dropped the supervisor off, the Defendant became violent and aggressive with her all the way to their home. The Defendant said that he was infuriated when realising that his wife had cheated on him and although he was conscious of his actions when he picked her up, he was not able to fully comprehend his actions upon arrival at their home and only vaguely remembered the whole event. He said he was probably too drunk to remember.
24. The victim said that after the beatings, the Defendant calmed down and cried that he missed his father. Shortly after, the police arrived and apprehended the Defendant.
25. The Defendant explained to the report writer that he accepted that he had committed illegal behaviour and understood the seriousness of his offending. However, he questioned the legality of marital rape. The report writer explained to him that it is a crime.
26. The Defendant has sought help with his emotions from his parents-in-law and his church Reverend. He reported feeling devastated and hoped for a lenient sentence so that he could be together with his family.
27. The report writer assessed the Defendant's risk of reoffending as low. However, it was noted that violence behind closed doors is hard to predict in terms of its recurrence and extent of severity. Notwithstanding, the report writer believes that the Defendant has the ability to genuinely change with strong family support as he is currently receiving, and also for him to undergo psychological therapy/counselling to understand his outburst and negative emotions and learn ways to curb it. It was suggested that the Defendant's violent outburst was a compulsive response to the shock of his wife's infidelity which could have triggered depression from his father's sudden death.
28. The report writer noted that domestic violence is no doubt prevalent among society but that this case involves:

"... 'marital rape' - which is new to this court. Its low rate shows it is still not accepted by society as a 'crime'. The accused should receive a custodial sentence to reflect the seriousness of this offence and act as deterrence [sic].

However, if the Court may grant a full suspension of his custodial sentence due to the victim and the Defendant's current circumstances then [sic] should impose a lengthy community work. Rehabilitation is critical to help the Defendant avoid violent crimes in the future."

29. The probation officer then recommended that the Defendant receive a suspended sentence on conditions that he be placed on probation, not consume alcohol or drugs during the term of suspension and complete anger management and drug/alcohol abuse training with community service if a full suspension was granted.

Starting point

30. It is to be observed at the outset that it is no coincidence that none of the comparative sentences presented by the Crown involved 'marital rape'. My research has not unearthed any here in Tonga either.
31. Marital rape is a common but under-reported crime. In 1993, marital rape became a crime in all of the United States. In England, the marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R. v. R.* that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendment to the statutory law was made in 1994. That judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK*. In New Zealand, the marital rape exemption was abolished in 1985. Further, in New Zealand, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence. There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage. By 1991, every state in Australia had abolished the marital rape exception.
32. In Tonga, the *Criminal Offences Act* does not distinguish between rape of a stranger or of a spouse or other relational partner. In short, rape is rape. The essential characteristics are sexual violation without consent, regardless of any relationship between the perpetrator and the victim. The introduction of the *Family Protection Act* in 2014 seeks to reinforce and

accentuate that all persons in the Kingdom are entitled to be free and protected from domestic violence in any form. Section 29 expressly provides for additional prosecution under the *Criminal Offences Act* in cases such as the present.

33. The message therefore ought be clear: in any civilized society, there are no circumstances in which resort to unwanted sexual violence can be justified or tolerated.
34. In assessing an appropriate sentence, regard is to be had to ‘such factors as the seriousness of the crime, the maximum sentence prescribed, the need to deter others, sentences imposed in other similar cases to achieve consistency, any sentencing guidelines given by an appellate court, the desirability of encouraging rehabilitation, the need to show society's rejection of the conduct, and any aggravating features such as the accused's previous criminal history, the effect on a victim, the age of the victim, the degree of any violence and the use of a weapon. Mitigating factors may include the age of the accused, an early plea of guilty, genuine expressions of remorse, any relevant medical, psychological or other condition, the accused's standing in the community and his family and personal circumstances. There will often be other factors to be taken into account in aggravation or mitigation.’: *Fa'aoso v R* [1996] Tonga LR 42.
35. The maximum penalties for each count are:
 - (a) Rape - 15 years imprisonment;
 - (b) Serious bodily harm - 5 years imprisonment; and
 - (c) Domestic violence – for a first offence, 12 months’ imprisonment or a fine not exceeding \$2,000 or both.
36. In *Fa'aoso*, the Court of Appeal endorsed the approach, now commonplace in Tonga, of adopting an appropriate starting point, and then adjusting the sentence up or down to allow for aggravating or mitigating circumstances. The Court also observed that for rape, the maximum sentence of 15 years is to be imposed for only the very worst case imaginable and that the appropriate starting point for a rape sentence in Tonga should be five years.

37. In *'Aisea v Rex* [2012] TOCA 12, another case where the prisoner was convicted after a defended trial, the Court of Appeal noted that the starting point selected in *Fa'aoso* has not changed since that time and the decision is binding on Judges in the Supreme Court. The approach also discussed in that case of increasing or reducing the starting point on account of aggravating and mitigating factors was described as having been consistently followed in England, Australia, New Zealand and Tonga.
38. I pause to note that the five year starting point referred to in the above decisions and others following them such as, recently, Cato J in *Valele* [2019] TOSC 6, was selected for, and in the context of, convictions after defended trials. Those decisions did not involve, nor did they consider, cases involving guilty pleas. It may be that any perceived need for distinction is moot because any guilty plea will be taken into account in mitigation resulting in a lower sentence in any event. A similar response may apply to Cato J's concern expressed in *Valele* that:

"...revision of this starting point upwards is required to adequately reflect the seriousness of rape in the modern age"

by upward adjustments to the starting point to reflect the seriousness of particular offending where necessary.

39. That was the very approach adopted by Cato J in *Mo'unga* [2017] TOSC 13, which did involve a guilty plea, and where His Honour described the starting point for rape of five years in Tonga as one which could be considered as modest by overseas experience.
40. In the present case, and generally, I share His Honour's decree in *Valele* that:¹

"Humiliating, wanton and degrading offending such as this against women must be denounced as reprehensible by this Court, and sentences must reflect the seriousness of this offending as a deterrent and as protection for women..."

41. I am also mindful of the Court of Appeal's remarks in *Tevita Vaka v R* (AC 4 /12), referred to in *Niutupuivaha* [2017] TOSC 24 that:

¹ [19]

“...regrettably, offences involving sexual abuse within the family are all too frequently committed by people of otherwise good character.”

42. Accordingly, having regard to the circumstances of the instant case and the gravity of the offending, I adopt the well-settled primary starting point of five years imprisonment.
43. To that I consider it appropriate it to add another year for the violence additional to that inherent in the act of rape itself, whereby the Defendant inflicted a laceration to the victim’s vagina.
44. Further, and to eschew any misconception by some in the community that marital or relational rape should be viewed as somehow less serious than so-called stranger rape, I incline to the view that the gross breach of trust occasioned by, here, a husband beating and sexually violating his wife without her consent should attract additional penalty. For that, I add another year.
45. For those reasons, on the head count of rape, I arrive at the same starting point as that submitted by the Crown, namely, seven years imprisonment (or 84 months).

Mitigation

46. On account of the Defendant’s:
 - (a) co-operation with police and earliest possible guilty plea;
 - (b) lack of previous convictions and general good record; and
 - (c) genuine expressions of remorse resulting in the victim forgiving him,

I reduce the starting point by 25% or 21 months. That leaves 63 months or five years and three months imprisonment.
47. By commensurate application of the approach described above, I impose the following sentences on the other counts:
 - (a) causing serious bodily harm – 18 months imprisonment; and

- (b) domestic violence – 6 months imprisonment.

Both those sentences are to be served concurrently with the rape sentence.

Suspension

48. The recommendation of the probation officer that any sentence be fully suspended cannot be accepted. To do so would be incongruous with the abhorrence which must be expressed in sentencing for very serious offending such as rape and the important function in sentencing for such offences of specific and general deterrence.
49. However, having regard to the (non-exhaustive) considerations set out in *Mo'unga v R* [1998] Tonga LR 154, and the Defendant's:
- (a) capability of responding to a deterrent;
 - (b) lack of previous convictions;
 - (c) conduct being provoked and explained to a certain extent, but not excused, by his discovering his wife's infidelity and the influence of alcohol;
 - (d) remorse;
 - (e) reconciliation with the victim;
 - (f) demonstrated efforts in rehabilitation to date;
 - (g) good prospects of further rehabilitation in the future; and
 - (h) co-operation with the authorities,

I will order that a further 25% of the starting point, or the final 21 months of the sentence, be suspended on conditions which I will set out below.

50. The net sentence therefore is that the Defendant is to serve 42 months or three years and six months imprisonment.

Result

51. The Defendant is convicted of the charges.
52. On the count of rape, he is sentenced to imprisonment for five years and three months.
53. On the count of causing serious bodily harm, he is sentenced to imprisonment for 18 months.
54. On the count of domestic violence, he is sentenced to imprisonment for 6 months.
55. All sentences are to be served concurrently.
56. The head sentence is to be reduced by any time served while the Defendant was on remand for these offences.
57. The final 21 months of the sentence are to be suspended for two years on condition that during that period of suspension, he:
 - (a) not commit any offence punishable by imprisonment;
 - (b) be placed on probation;
 - (c) not consume alcohol or drugs; and
 - (d) undertake and complete courses, as directed by his probation officer, on anger management and sexual abuse, within the first year of the suspension period.
58. Pursuant to s.119 of the *Criminal Offences Act*, I order that the identity of the complainant in this proceeding shall not be published in the Kingdom in a written publication available to the public or be broadcast in the Kingdom.



NUKU'ALOFA
22 May 2020

M.H. Whitten QC
LORD CHIEF JUSTICE