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

CR 116 of 2021

REX

-v-

X (a pseudonym)

SENTENCING REMARKS

BEFORE : THE HONOURABLE COOPER J
Counsel : Mr. J. Fifita for the Prosecution
Defendant in person
Date of Sentencing: 15th October 2021

1. Section 119 non reporting condition is imposed.
2. On the night of Friday 3rd May 2019 the defendant, 61 year old Mr. X, was at a church concert being held at the Bosco Hall in Kolofo' ou, Niuafu'ou.
3. The victim, 12 year old child A was playing with friends outside the hall.
4. As she ran down the stairs of the hall the defendant grabbed her by the wrist and led to the dark car park adjacent the tennis courts.
5. He told her to kneel down and when she did not forced her to, pushing her down by his shoulders until she was on her knees.
6. He then pulled down her tights and started to touch her vagina and was just unzipping his trousers when a police officer, officer Livai, attracted to the suspicious movements in the car park appeared.

7. The defendant told the victim to run, which she did.
8. But, the officer caught up with her and she finally told him what had happened.
9. The defendant was arrested and in his police interview admitted what he had done.
10. In considering the starting point for sentence I have had to review the approach of the courts hitherto in the light of the recent Court of Appeal decision in *Siasau v R* AC 15/2021, when that court dealt with an offence under section 124 Criminal Offences Act.
11. There the court noted the cases of *R v PF* [2020] TOSC 30 and *R v Kakau* [2020] TOSC 86; the former, the touching of a 17 year old step daughter of her breasts over clothing and her vagina under clothing, 3 year starting point was adopted; the latter a home invasion leading to the touching of 21 year old on her vagina a starting point of 3 years was adopted.
12. In the case of the Appellant, the court noted those tariffs with approval and took their guidance from those cases and adapted it to the facts of that case when coming to a starting point of 2 ½ years.
13. I have then gone on to consider the following cases, especially as they were all reviewed by Lord Chief Justice Whitten QC in the case of *R v Vi* 234/2020, an offence under section 125 Criminal Offences Act, where the victim was under 12 years old :

Viliami Simoni (unreported, Supreme Court, CR 137 of 2018, 7 December 2018, Paulsen LCJ) - a 20-year-old defendant pleaded guilty to 9 counts including carnal knowledge of a child and indecent assault on a child. The defendant removed the three-year-old victim from her home, took her to an abandoned house where the indecent acts were performed and which resulted in vaginal penetration and the victim contracting gonorrhoea. For the indecent assault on a child, the defendant was sentenced to 3 years imprisonment to be served concurrently with the head count (carnal knowledge) for which he was sentenced to 11 years imprisonment. For the abduction of the child, which His Honour considered was at the higher end for offending of that type under the circumstances, a sentence of 3 years imprisonment was imposed, to be served cumulatively with the headsentence making an overall starting point of 14 years imprisonment. The sentence was reduced by 3 years in mitigation for the lack of previous convictions and early guilty plea. The final sentence was therefore 11 years imprisonment with the final 12 month being suspended on conditions for a period of 3 years.

Peni Halai (unreported, Supreme Court, CR 79 or 2017, 1 February 2019,

Cato J) - the defendant was convicted of nine counts including three counts of indecent assault on a child under the age of 12 years. The two complainants were aged 10 and 13. The defendant was sentenced to 4 years imprisonment for inserting his penis in one complainant's mouth, 2

½ years for licking her vagina and 18 months for fondling the other complainant's vagina. Both sentences were to be served concurrently with the head count for sodomy of 6 years and 3 months imprisonment. The final 15 months of the overall sentence were suspended on conditions.

Anitelu Fielau Maea (unreported, Supreme Court, CR 185 of 2019, 2 December 2020, Cato J) - the defendant was convicted of one count of indecent assault on a child under the age of 12. He was the 11-year-old victim's stepfather. She was sleeping when he inserted a finger inside her vagina. For that, he was sentenced to 1 year and 9 months imprisonment.

Polikapi Motuliki (unreported, Supreme Court, CR 55 of 2019, 13 January 2019, Paulsen LCJ) - the 56-year-old defendant pleaded guilty on arraignment to one count of indecent assault on a child whereby he touched and licked the five-year-old victim's vagina. Having regard to the aggravating features, a lack of premeditation, no suggestion of prior grooming of the victim, no violence beyond the indecent acts, the victim's age, the gross breach of trust, and no touching of the victim with the defendant's genitalia or exposure of his genitalia and that the offending was not protracted, a starting point of 2 years imprisonment was set. For the defendant's full cooperation and early guilty plea, 8 months of the sentence was discounted resulting in a sentence of 16 months. The last 8 months was suspended on conditions for two years.

Maikolo Sinoti [2015] TOSC 37 (7 September 2015, Paulsen LCJ) - the 24-year-old defendant was convicted of coercing his related 11-year-old victim to an abandoned bus close to the victim's home where he put his penis on the victim's vagina, kissed her, masturbated, and ejaculated. A starting point of two years imprisonment was set. That was reduced by 6 months for the defendant's remorse and no relevant previous convictions. The final 6 months of the resulting sentence of 18 months were suspended on conditions for 2 years.

Tevita 'Ilangana (unreported, Supreme Court, CR 56 of 2015, 12 August 2015, Cato J) - the 19-year-old defendant pleaded guilty to 4 counts of indecent assault whereby he removed the pants and underwear of the seven-year-old related victim, sat on her buttocks and rubbed his penis on her buttocks, then made her lie on her back and he rubbed his penis on her vagina and massaged her buttocks and vagina. A starting point of two years imprisonment was set, discounted by 9 months for mitigation resulting in a sentence of 15 months imprisonment. The final 9 months were suspended on conditions.

14. Having carefully considered those comparable cases Lord Chief Justice Whitten QC imposed a starting point of 2 ½ years in *R v Vi* for offending including the digital penetration of the vagina of a 4 year old girl and kissing her on the mouth.
15. The maximum sentence for an offence under section 124 is 5 years, for the offence under section 125 when the victim is under 12, it is 7 years.
16. That difference is there, no doubt, to reflect the more serious conduct and the more vulnerable younger victim.
17. It is my view that given the starting point adopted in *Siasau v R* the right approach to viewing the sentencing regime in *R v Vi* and the considered line of authority now is that the sentences for like offences under section 125 need to be increased up to reflect the higher tariff that those offences attract.
18. So, in considering where this case falls by virtue of an over view of the approach to sentencing in both s.124 and s.125 cases and the latest authority in the former, it seems to me the right starting point for this offence must be 3 ½ years' imprisonment.
19. I increase that to 5 ½ years to reflect the fact that the defendant abducted the victim, this happened at night, that he took her to a car park in the dark to isolate and intimate her and escape detection. This was a premeditated offence. That he forced her to the ground so as to better overwhelm her and so dominate and abuse her. That, most shockingly, he took her from outside a hall where a church concert was being performed, a place where parents traditionally trust their children will be safe in the bosom of the community.
20. For his remorse and previous good character I can discount that starting point by only 6 months. The probation report draws attention to the role he has played in his religious community, but it was within the setting of a religious event that he took and then abused his victim.
21. The pre sentence report notes that he was attracted to a 9 year old girl sexually and found a way to abuse her.
22. This was therefore a pre-meditated offence and as such means the defendant is a dangerous.

23. I also note the reported impact on the victim. That she now is ashamed about other finding out what happened to her and that she in no longer out going
24. When I consider all the mitigation, his previous good character and his standing and his role in his family, as I have carefully done, I balance all that with the harm to the victim and recall the words of Paulsen LCJ in Simioni, quoted by Whitten QC LCJ in R v Vi
25. "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, but only by a particular offender but more generally by others who might otherwise be inclined to offend in this way."
26. The starting point of 5 years' imprisonment I must reduce to reflect the guilty plea.
27. Because he had been caught red handed by a police officer and conviction was inevitable then I can not give any more discount that 10% to that starting point, therefore 6 months' reduction.
28. That gives a sentence of 4 ½ years' imprisonment and in considering the Mo'unga¹ principles I suspend the last 12 months for 2 years on the following conditions:
 1. Not to commit any offence punishable by imprisonment.
 2. To report to his probation officer as soon as he is released.
29. This sentence is not to be carried out in Nuia, because that is the home of the victim and must be carried out in the Vava'u prison, Ha'alefo.
30. That gives a total sentence of 4 ½ years' imprisonment the last 12 months suspended as above.

NEIAFU

15 October 2021



¹ CA 15/1997