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IN THE SUPREME COURT OF TONGA **CR 92 of 2014**
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

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03/08/15

BETWEEN: **R E X** **- Prosecution**

AND: **LUI LOMU** **- Defendant**

BEFORE THE HON. JUSTICE CATO

Counsel: Ms. Moa for the Prosecution
Mrs. Vaihu for the Defendant

SENTENCE

[1] The prisoner, Lui Lomu, was found guilty by me on a Judge alone trial on the 5th June 2005 on 6 counts of rape of complainant B under an amended indictment contrary to section 118(1) (a) of the Criminal Offences Act and one count of indecent assault on complainant A contrary to section 124(1) (3) of the Criminal Offences Act. He had already pleaded guilty to the offence of carnally knowing a girl under the age of 15 contrary to section 121(2) of the Criminal Offences Act, which carries a maximum sentence of 5 years and one count of indecent assault on complainant C contrary to section 124 (3) of the Criminal Offences Act. He appears for sentence today on all counts.

[2] I heard submissions from both counsel on the 21st July after an earlier sentencing hearing was adjourned until a probation report was received. I have read that report and the enclosures which suggest that after he was arrested and on bail the prisoner

rec'd 31/07/15

underwent counselling for alcohol and drug abuse and participated in voluntary community programs about which references were provided.

[3] This is a serious sentencing for sexual offending made more serious because complainant C was only 13 when I am told the carnal knowledge offending occurred, and the accused was in his early thirties. In so far as the other offending is concerned, it is serious also not only because of the number of rapes involving complainant B but also because she, like complainant A, was to the knowledge of the prisoner intellectually disabled, both complainants attending a special learning school. Complainant A had earlier in her life suffered a brain injury as a consequence of being run over by a motor vehicle and complainant B, who had very severe learning limitations, had suffered her impairment as a consequence of birth difficulties. B and C are sisters and the third victim A is a cousin. All three, bearing the same surname were in the care it seems of B and C's mother although C had spent rather more time with the prisoner and his wife because prior to her death the prisoner's mother-in- law had adopted her. I am satisfied that all three were well known to the prisoner.

[4] The mother of B and C was the cousin of the prisoner's wife. At various times, all the victims spent time with the prisoner and his wife and were very familiar with them. I have no doubt the victims would have looked up to the prisoner as a person they could trust. The prisoner in committing the crimes he did in relation to all the victims seriously breached this trust, as he did so also the confidence of his wife and the victims' mother.

[5] I have recounted the nature of the rapes in my earlier judgment. Suffice it to say here that on count 2 (year 2012) of the indictment, which I shall regard as the head offence, the allegation, which I found proven, was he had entered the bedroom and had intercourse with her without her consent. I found proven this allegation and I also accept as she said it was painful and that he had threatened to kill her if she told anyone. That was an incident where the accused's wife, I accept also, came very close to finding the accused in her bedroom with the victim. Another incident occurred being count 3 (year 2012) in the living room. Another further incident count 4, (2013) arose in the living room also. As to count 5 (2013) the prisoner, I found, forced B to have intercourse in a building known as the Hurricane house, and a final count of rape arose in 2014 in the bathroom area. The accused gave evidence of other acts of intercourse which he claimed were all consensual. I rejected his claim that the acts were consensual in relation to any of the counts charged upon which he appears today for sentence. It was my finding that he took advantage of the complainant, knowing full well she was of low intellect and on one occasion at least he, on his own admission, was under the influence of kava. A more serious picture of alcohol and drug abuse was given to me today by Mrs Vaihu when she suggested that all his offending was attributable to the consumption of alcohol or drugs and in drugs she included marijuana and ice. Whether this is so I have no confirmation, but I am prepared to find that he may have been affected by some form of stimulant on some occasions, but this does not justify or excuse his actions, in any way, or his predatory behaviour.

[6] The Crown has presented a number of sentencing precedents on rape including R v Latu AC 3/14 which has some parallels with this case. There, the offending was repeat offending for rape, as here. Here, there was a considerable disparity between the age of the victim aged between 15-16 at the time of the offending and also being seriously intellectually disabled, whereas, he was aged in his early thirties. Third, as I have said the prisoner was in a position of trust being the husband of a cousin of their mother and a person the victims should have been able to rely upon to protect not abuse them. There was a serious threat made to secure the victim's silence, and the prisoner must have been aware that owing to her intellectual deficiency she was in no position to sensibly resist his advances, although she said she had tried to do so. The protection of girls and young women and the deterrence of predatory behaviour of this kind are paramount considerations in cases of this kind. The Courts will not condone predatory sexual behaviour of this kind towards women or girls and this kind of conduct will be met with condign sentences.

[7] In my view, taking the bench mark starting point of 5 years, the fact that this occurred on six occasions and on one was accompanied by a serious threat, was an aggravating feature, of the offending. Other aggravating features were the difference in age, the intellectual deficiency of the victim known to the prisoner, and his abuse of trust. In my view, a starting point of 9 years is in order. The only basis I can see for mitigation is the fact he was a first offender, has expressed some remorse and has made some effort to rehabilitate himself since being charged. However, this must be tempered by the fact he had chosen to defend the proceedings during which the victim was

hospitalized as a consequence of an epileptic fit when giving her evidence. Accordingly any expression of remorse must be regarded as qualified. I reduce the sentence of 9 years for rape on count 2 by one year for mitigating factors, and accordingly, I would have imposed an eight year sentence upon count 2, with each of the other counts being 3, 4, 5, 6 of the amended indictment sentence being sentences of 5 years to be served concurrently with count two. However, because in paragraph 11 I have viewed the overall or totality of the offending as sufficiently serious to justify accumulating an additional one year taking into account the carnal knowledge of C, I have increased the sentence on count 2 to one of 9 years imprisonment.

[8] In relation to complainant A, the allegation being that he touched her breast, an allegation which he denied, I found him guilty also she being a young woman of 17 at the time of the offending and also being of limited intellectual capacity, known to him. On this charge taking into account, the factors of breach of trust, the age disparity, and also his knowledge of her intellectual weakness, I sentence him to 12 months imprisonment to be served also concurrently with count 2.

[9] In relation to complainant C, she lived in the house which the prisoner shared with his wife and, until her death, his mother in law who had adopted the complainant. She was 13 at the time of the offending and at the time, although residing with her mother was staying at the prisoner's residence, after the mother- in – law's death. The charge to which the prisoner pleaded guilty is a comparatively new provision in Tonga. I have been involved in a number of the sentencings under this provision, (the maximum

sentence being 5 years) which have principally involved younger prisoners than here. Where a much older man has carnal knowledge of a female under 15 and is in a position of trust, a starting point in the upper level of about 4 years is, in my view, appropriate. However, here because of his early guilty plea and his former good character, I reduce this to a sentence of imprisonment of 2 years and nine months.

[10] On the count of indecency to which he also pleaded guilty namely fondling her breast and vagina I sentence him to 12 months imprisonment to be served concurrently with count 2.

[11] Considering the totality of the offending, I consider that the head sentence on count two of eight years imprisonment which I would have imposed for singular offending, should be increased to 9 years imprisonment to reflect one year of the 2 years and nine months imprisonment imposed for his offending with complainant c, the balance of this sentence to be served concurrently with count 2. I do not consider this can be said to be excessive. It reflects the totality of his offending against this family. It was predatory behaviour showing a callous disregard for these young complainants' welfare. All other sentences are served concurrently with count 2.

[12] I now turn to the issue of whether the head sentence of 9 years imprisonment on count two should be suspended in any part. I consider I should do this after hearing submissions from Mrs Vaihu. The probation report and attached references show that the prisoner after being released after charge attended a course of drug and alcohol and performed satisfactorily. He also assisted

in community activities during this period, and received a favourable reference from his town clerk. That suggests to me he may well have learned his lesson and be able to be rehabilitated. I am told his wife is still supportive of him and will be in a financial position to look after their adopted child who is a young girl. For these reasons, I suspend the final two years of his 9 year sentence on count 2 on the following conditions;

a. He is not to commit an offence punishable by imprisonment for a period of three years.

b. He is on his release to be placed on probation for a period of 18 months with the following conditions;

i. He is to live where directed;

ii. Probation is to take steps to ensure that he should not be able to live in any residence during his probation where he will be residing with girls or young women. That may be varied in the case of his own child, should his present wife still be married to him, be content to live with him, and the child remains living with his wife. I express the concern that he may still remain a threat to young women despite his present intention to reform. He is not however, to live with the child on his own.

iii. He is to attend a drug and alcohol program under the direction of Probation and the Salvation Army;

iv. He is not to drink alcohol or consume drugs during the period of probation;

v. He is to attend a suitable course under the direction of the Probation office on sexual abuse of women.

[13] The sentence of 9 years imprisonment on count 2 is backdated to the date he was placed on remand. This is to include a lengthy period when he was placed on remand after charge before being granted bail.

[14] He is warned that a failure to abide by the conditions of suspension may mean he is recalled to serve the balance of his term of imprisonment.

[15] I have considered the position in relation to publication of name. I consider that, in cases of this kind, it is in the public interest that the name of the prisoner be published, to eliminate any ongoing threat to others, but no victim should be named and nor should there be any publication of material that may have the effect of identifying them from either judgment. My earlier order limiting the intituling of my judgment on conviction to R v L is accordingly varied to allow the judgment to be referred to as R v Lui Lomu, consistently with this sentencing judgment.

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NUKU'ALOFA: 23 JULY 2015 **J U D G E**