

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

*Scan & file*  
**CR 116 of 2014**  
*03/07/15*

**There is to be no publication of the name or any identifying particulars of the complainant.**

**BETWEEN: REX**

**Prosecution**

**AND: MAIKOLO SINOTI**

**Accused**

**Hearing: 22 & 24 June, 2015**

**Counsel: Mrs. 'E. Langi with Ms. 'E. 'Akau'ola for the Crown  
Mr. D. Corbett for the Accused**

**RULING**

**The charges**

- [1] Maikolo Sinoti ('the accused') is charged with one count of attempted carnal knowledge of a child under the age of 12, contrary to section 122 of the Criminal Offences Act in that he attempted to have carnal knowledge of LL, a child under the age of 12. There is an alternative charge of indecent assault on a child under the age of 12 years,

contrary to section 125 of the Criminal Offences Act, that the accused indecently assaulted LL, a child under the age of 12, when he rubbed his penis around her vagina.

**No publication**

- [2] At the commencement of the trial I made an order that there is to be no publication of the name or any identifying particulars of the complainant.

**The witnesses, record of interview and agreed facts**

- [3] I heard evidence from five witnesses for the prosecution, namely the complainant, who I refer to as LL, the complainant's grandmother LS, the complainant's mother PL, Tevita Makineti Mafi, and Detective Sione Lelea.
- [4] For the defence I heard evidence from the accused, Mr. Maikolo Sinoti, and also from his mother, Mrs. Vake Manukailea.
- [5] Mr. Sinoti's records of interview with the Police taken on 22 July 2014 were read into evidence and admitted by consent.
- [6] In addition, a statement of agreed facts was presented to the Court as to the following matters:

- [6.1] The accused is 24 years old and resides at Vaini. He is married with one child.
- [6.2] The victim is LL of Vaini. She is eleven years old having being born on 26 October 2003.
- [6.3] The accused is the victim's uncle in that her father is the accused's first cousin.
- [6.4] At the time of the offending the accused and the victim lived in the same compound at Vaini but in different houses.
- [6.5] On an unknown date in the month of February 2014, the victim came home from school during lunch hour and watched a video inside her home.
- [6.6] Shortly thereafter the accused came to the house and coerced the victim to accompany him to an abandoned bus located a couple of meters from their home.
- [6.7] A doctor's report on the victim confirms that her hymen is still intact.



**The elements and issues**

[7] Section 122(1) Criminal Offences Act provides:

*"Any person who attempts to have carnal knowledge of a child under the age of 12 years shall be liable on conviction thereof to imprisonment for any term not exceeding 10 years."*

[8] Attempt is defined in section 4 of the Act as follows;

(1) *An attempt to commit an offence is an act done or omitted with intent to commit that offence forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted by the voluntary determination of the offender not to complete the offence or by some other cause.*

(2) *A person who attempts to commit an offence by any means shall not be acquitted on the ground that by reason of the imperfection or other condition of the means or by reason of the circumstances affecting the person against whom or the thing in respect of which the crime was intended to be committed it was not possible to commit the crime according to his intent.*

[9] As Webster CJ said in R v Li [2006] TLR 93, 97 – 98;

*The relevant definition of an attempt to commit any offence is that it is an act done with intent to commit that offence, which would have constituted an offence if had not been interrupted for whatever cause. Before a defendant can be convicted of an attempt the Court must be sure that he intended to*

*commit the offence, and that, with that intention, he did something which is more than mere preparation for committing that offence.*

[10] It is common ground that the essential elements to be established to find that there has been attempted carnal knowledge of a child for the purposes of section 122(1) are:

[10.1] It was the defendant.

[10.2] He did an act with intent to have sexual intercourse (by his penis penetrating the vagina).

[10.3] The child is under the age of 12 years.

[10.4] Whether or not she consented to the act.

[10.5] Whether or not he reasonably believed that the girl was of or above that age.

[10.6] And the defendant's act would have constituted carnal knowledge if it had not been interrupted for whatever cause.

[11] Mr. Corbett, for the accused, advised the Court that the matters in 10.1, 10.3, 10.4 and 10.5 are admitted. The issues in relation to this charge are therefore:

[11.1] Whether the accused did an act with intent to have sexual intercourse with LL.

[11.2] Whether the accused's act would have constituted carnal knowledge if it had not been interrupted for whatever cause.

[12] Section 125(1) Criminal Offences Act provides:

*"Any person who shall commit and indecent assault on any child under the age of 12 years shall be liable on conviction thereof to imprisonment for any term not exceeding 7 years."*

[13] It is common ground that the essential elements to be established to find that there has been an indecent assault on a child under the age of 12 years, contrary to section 125(1) of the Criminal Offences Act are:

[13.1] It was the defendant.

[13.2] Who intentionally assaulted the complainant.



[13.3] The complainant was under the age of 12 years.

[13.4] That the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons to be indecent.

[13.5] The accused intended to commit an assault of that kind.

[13.6] Whether or not the complainant consented to the act of indecency.

[14] I understand that in relation to this charge the matters in 13.1, 13.2, 13.3, and 13.6 are admitted. The issues in relation to this charge are therefore:

[14.1] Whether the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent.

[14.5] The accused intended to commit an assault of that kind.

**The Evidence**

[15] I will now summarise the evidence of the witnesses. I will begin with the evidence of LL and the accused and then move on to the balance of the prosecution's and defence's witnesses.

***LL's evidence***

[16] On a day in February 2014 LL was at home watching a movie when the accused arrived and having learnt that she was alone in the house he forced her to walk with him to a bus that was nearby. She said that when she was about to call out to someone she knew the accused showed her a knife and told her that she was not to call out.

[17] When they got to the bus the accused laid her down on the floor at the rear of the bus and took off his pants and then started to undress her. When she told him to stop he punched her so that she blacked out.

[18] When she awoke she was undressed with her feet and hands were tied to the legs of the seats. She said that the accused then inserted his penis into her vagina and when she shouted for him to stop he punched her again and she became unconscious. LL said that before



she was knocked out she was not able to see the accused's penis but she could feel that it hurt and it was when she told him to stop because it hurt that he punched her again.

[19] When she awoke the second time the accused was already dressed. LL said she heard two people near the bus that she recognised as Peini and his girlfriend. The accused told her to hurry up and get her clothes on. She told him that she could not because she was too weak. When Peini and his girlfriend had moved on into the bushes the accused stood her up and she dressed herself. They then left the bus together.

[20] She said that when they were walking they met a person by the name of Mosese who asked the accused where he was taking LL. The accused replied that he was going to get her something to eat as she was by herself at home. LL said that the accused then bought her some ice cream, candy and biscuits and he told her that she was not to mention what had happen to anyone and that if she did he would come in the night and stab her with the knife.

[21] When LL got home she put the 'goodies' in the sitting room and did not eat them and went and slept. She said that Tevita Mafi woke her and asked her what she had left on the chair and she told him it had been given to her by two friends. In explanation for telling a lie, LL said

that was because the accused had told her that if she said anything to anyone he would stab her with the knife in the night. She said her mother also woke her and asked her why she had a black eye and she told her mother that she was sick. She said she did not tell her mother what had happen to her because she wanted to wait until more people were around and because she was scared because the accused had said he would stab her in the night if she did.

[22] It was not until some months later that LL told anyone what had occurred. One night her grandmother told her that if anyone ever asked her to follow them she was to say no and LL remembered what the accused did and she told her grandmother.

[23] LL was unshaken in her evidence under cross examination. It was put to her that the accused said that he took off his pants but that he did not undress LL at all, that the accused never inserted his penis into her vagina and all that he wanted to do was kiss her. She said that she was awake when he inserted his penis and that the accused was lying. It was also put to LL that she went with the accused because he offered her five cent candies and that he had not bought her anything else. She denied that and said that the accused had no five cent candies with him.



[24] Mr. Corbett asked LL about the bad relationship between the accused's mother and LS and put to LL that she was making up her evidence and had been coached. LL said she was not coached. As to when she told LS about what occurred, LL said it was probably a month after the events on the bus occurred but as the complaint was made to the Police in July 2014, and most probably immediately LL made her disclosure to LS, I believe the disclosure would have occurred around July 2014.

***The accused***

[25] The accused said that when he went to the house LL told him that she was alone and that he told her to go with him. He said he wanted to watch a movie and wanted to kiss her so that he could masturbate. He said that he offered her lollies to go with him and that they went to the bus. He then lay down and placed LL on his chest and repeatedly kissed her and masturbated. This took about half an hour and at no time did he force her to do anything or threaten her or use weapons. He also said that LL did not ask him to stop nor did he tie her up. He also denied buying her any goodies but said she went with him because he gave her five cent candies.

[26] When asked why LL would make serious allegation against him he raised a number of matters. He said that LL was capable of lying and



stole money and that there was a dispute with her family because he had ploughed some land and damaged yams. He also said that LS hated him but that he had no knowledge of this and it only became clear to him after this complaint was made.

- [27] Under cross examination, the accused acknowledged that he had initially lied to the Police in denying that anything had happened with LL. He also acknowledged that he had a good relationship with LL's family. He maintained his position that nothing more had occurred on the bus than he had described.

**LS**

- [28] LS confirmed LL's evidence as to the circumstances under which LL had told her about what the accused had done to her on the bus.
- [29] LS then recounted what LL had told her had occurred with the accused. No objection was taken to this evidence by the defence but during submissions I raised with the Crown whether this evidence was admissible. I note that under section 11 of the Evidence Act such evidence may be admitted by way of corroboration of the victim of a sexual offence but as LL's statement was not made "at or shortly after" the alleged crime was said to have occurred the requirements for the

admission of such evidence under section 11 are not met. I have therefore had no regard to this part of LS's evidence in assessing whether the charges against the accused have been proved.

[30] LS said that she had lived with the accused because his natural father was her brother and that the accused was always a kind boy. She said that LL had also lived with the accused and that they played together and she never saw anything untoward in his behaviour.

[31] Under cross-examination she acknowledged that she had a bad relationship with the accused's mother but said that by the time they stopped living together in the same house they were on good terms. She acknowledged that she had taken LL to make a complaint to the Police but denied coaching LL to make untrue allegations against the accused and said all that she said to LL was to tell the Police only what she saw and what happened.

***Record of interview***

[32] In his statement of interview with the Police the accused had initially denied all allegations but after a break, had returned and acknowledged that he had led LL to the bus and the following exchanges occurred.

*"Q59. What did you tell [LL] on this day?*

*A59. I told her to go to the bus with me.*

*Q60. Did [LL] want to go when you told her to go with you?*

*A60. Yes*

*Q62. Why did [LL] want to go with you?*

*A62. She wanted to go when she saw the candies I had with me.*

*Q63. So what was the purpose of going with [LL]?*

*A63. We went so that I can kiss her.*

*Q64. Were you able to carry out what you wanted with [LL]?*

*A64. Yes*

*Q65. What did you do to [LL]?*

*A65. I kissed her and sucked her tongue, and then took off my pants and masturbated and when I ejaculated I then told her for us to go back.*

*Q68. [LL] states that everything you did to her was done inside the broken bus beside the sea, is that true?*

*A68. Yes, that is true.*

*Q72. This thing you did to [LL], when did it happen?*

*A72. I know this happened a long time ago, but I don't remember when.*

*Q73. Maikolo, how did you do this thing you did to [LL]?*

*A73. I lay on my back facing up and then I lay [LL] on top of me and husk coconut (masturbated) while kissing [LL].*

*Q74. What do you mean by saying 'husk coconut'?*

*A74. Masturbating."*



***PL's evidence***

- [33] PL knew nothing about LL's allegations until after LL had spoken about it to LS. PL then spoke to LL about what had occurred and she described what LL had told her. Again no objection was taken to this evidence by the defence but I do not regard it as admissible under section 11 of the Evidence Act and I have had no regard to it.
- [34] PL described how she was very surprised by the allegations and that she had affection for the accused.
- [35] PL was able to recall the day that the offence was said to have occurred because she said she came home and it was already dark and LL was in her bed. PL said that this was unusual as LL is an active child and does not go to bed at that time. She went to see LL and saw that she was just wearing tights. She said that LL told her that she was sick and had a headache. PL said she did not ask LL anything else.
- [36] PL described how there was a change in LL's behavior generally and in particular towards the accused. She said that she would say things that she should not and recounted how on one occasion on seeing the

accused walking to the house LL had got up and slammed the door shut and said she hated him.

- [37] Under cross-examination PL denied coaching LL and said she told LL to tell only the truth and not to tell any lies. She acknowledged arguments between LS and the accused's mother. She denied that there were any arguments about the accused or his behaviour towards LL and that until she heard of what had happened to LL she had no problems with the accused's behavior.

***Tevita Mafi***

- [38] Tevita Mafi recalled coming home one day finding soda and other food and asking LL where it had come from but that she would not tell him. He said he did not pay any more attention to it. He could not recall when this had occurred.

***Vake Manukailea***

- [39] Vake Manukailea is the accused's mother. She said that ever since she had married LS's brother she had been hated by the family over matters concerning land. She said that it was in LL's nature to make

up stories and, in apparent explanation for this, that LL had a procedure at hospital where "water was removed from her body". She said that LS was against her children and chased them away from the house. When asked why LS and PL would want to make false allegations against the accused she said that they despise him and hate him and because LS did not want her children to plant crops. I understood this last matter related to the dispute over land to which I have earlier referred although the exact nature of the dispute was not made clear to me.

- [40] In contradiction of most of what she had said in her evidence in chief, under cross-examination Vake Manukailea said that the bad relationship she described was only with LS, that she had no bad relationship with LL, that both she and the accused had a close relationship with LL and that PL loved the accused.

### **Corroboration**

- [41] I note that there is no requirement in the law of Tonga for corroboration of the complainant's evidence in criminal proceedings for sexual offences. It is invariably the practice of Judges to warn themselves against the danger of acting on a complainant's uncorroborated evidence particularly when the evidence is given by a



very young person. I have reminded myself that a Judge sitting alone must heed and adhere to this warning and I have done so in this case.

**The accused's theory of the case**

[42] Mr. Corbett, for the accused, argues that the evidence of LL is untrue and that she was coached by LS to make up an untrue story because of the bad relationship that exists between LS and Vake Manukailea. It was submitted that it was relevant that it was LS who took LL to the Police to make a complaint and informed PL that something had occurred to LL. Mr. Corbett points out that there was no medical report tendered into evidence to support LL's most serious allegations that sexual intercourse had occurred and that she had been beaten. He said also that the Crown ought to have called as witnesses Peini and his girlfriend to confirm LL's evidence that they were in the area at the time.

[43] The Crown described the defence's case that LL was coached by LS (or PL) as "preposterous". I would not put the matter so pejoratively but I reject the defence case that LL was deliberately coached to make up a false story. The evidence for the defence on this aspect was primarily given by Vake Manukailea who was an unsatisfactory witness and I do not accept her evidence in so far as it was intended to show that LL, PL and LS had reason to lie about the accused. What appears to have

been overlooked by the defence is that the accused admits that he did take LL to the bus and did perform acts with her of an inappropriate sexual nature. In those circumstances there was no need for LS to coach LL to make a false complaint if she had been so minded. The evidence established that LS had argued with Vake Manukailea but that they had left matters on good terms. It also established that PL and LL had no reason to make up a false complaint either as they both loved the accused. Even the accused admitted under cross examination that LS's disagreements were only with his mother and that there was no ill-feeling between LS and him.

### **Attempted carnal knowledge**

[44] The Crown must establish beyond reasonable doubt that the accused did an act with intent to have sexual intercourse with LL and that the accused's act would have constituted carnal knowledge if it had not been interrupted for whatever cause.

[45] The accused says that he did not intend to have sexual intercourse with LL and that all he intended to do was to kiss her and masturbate. The question is whether there is a reasonable doubt that the accused intended to have sexual intercourse with LL. I must assess this in light of the accused's explanation, the proven facts and any reasonable inferences that can be drawn from them.



[46] I did not find the accused a convincing witness. He lied to the Police when making his statement, he attempted, without any substantiation, to discredit LL as a liar and a thief and LS and PL as people who would coach LL to make a false allegation against him of serious criminal offending just because LS had a bad relationship with his mother. Whilst saying in his evidence that all he did was put LL on his chest, kiss her and masturbate, in his statement to the Police he said that he also sucked her tongue and that he ejaculated. Clearly more occurred on the bus than he was prepared to admit at the trial. It appears to me also that the accused has little or no appreciation of the seriousness of what he did with LL on the bus. I consider that LL was an honest witness and believed the evidence that she gave to the Court. Having said that, there are aspects of what was alleged by LL that I am not satisfied have been proven beyond reasonable doubt.

[47] First, as Mr. Corbett has correctly pointed out there was no medical evidence to support LL's allegation that sexual intercourse occurred. It is an agreed fact that a doctor's report confirms that LL's hymen is intact. I have not been told who did the report, when the examination of LL occurred or the significance of the fact that her hymen is intact in the context of her evidence and the date that her examination was undertaken. As I pointed out to Mrs. Langi, it would have been beneficial had a Doctor been called to give evidence. It appears to me



that the evidence I do have (such as it is) raises a doubt as to whether sexual intercourse occurred or was attempted.

[48] Secondly, it appears to me that had LL been tied up, beaten and knocked unconscious as she alleges she would have suffered some visible physical injury to her head or face and possibly her wrists and ankles. LL said in her evidence that her mother asked her why she had a black eye. This is an important piece of evidence but PL said nothing about that in her evidence. She said she only asked LL if she was sick. If LL had shown signs of physical injury one would have expected that enquiries would have been made of her as to why and how those injuries occurred, but it appears this did not happen.

[49] Thirdly, the Crown did not call other witnesses who might have been able to give relevant evidence particularly Peini and his girlfriend and Mosese. I accept that with the passage of time those people may not have recalled relevant events but Mosese, who LL said stopped and questioned the accused shortly after they had left the bus, should have been able to give important evidence if LL showed signs of injury or distress consistent with the events she described.

[50] It took LL five or six months to disclose what had happened. That is not a criticism of her and there are many reasons why a victim of such an attack might not make a disclosure including, as in this case, the

threats that LL said the accused made to her. However, with the passage of time I cannot discount the possibility that her recollection of events is not be as clear as it might otherwise have been had a complaint been made sooner.

[51] Having closely studied the evidence I accept LL's evidence that the accused laid her on the floor of the bus, removed his pants and then her clothes and lay on top of her and that she felt his penis on her vagina. I cannot on the state of the evidence find it proved that the accused bound her hands and feet, beat her unconscious, and actually had intercourse with her.

[52] On the question of whether the accused intended to have intercourse with LL I note his denial of this and the absence of any cross-examination of him as to his intention to have sexual intercourse with LL. I note also that it appears to me that the accused's acts were most likely opportunistic and not premeditated. He had a very close relationship with LL. He said he went to the house to visit, which was clearly not a rare occurrence, and upon learning that LL was alone he asked her to go with him so that he could watch a movie, kiss her and masturbate. I note also that the accused says that the events in the bus occurred over a period of about half an hour. There was no evidence to contradict him. Had the accused intended to have sexual intercourse with LL it seems to me that there was ample time for him



to have done so and yet on the evidence I am not satisfied that this occurred.

[53] The Crown submits that the accused's claim that he had kissed LL for 30 minutes while he masturbated was highly unlikely but his evidence was not challenged on this aspect in cross-examination. The Crown also submits that had the accused only wanted to kiss LL he could have done that in the house and there was no need to go to the bus. The accused did not say he only wanted to kiss LL. He said he also wanted to masturbate.

[54] Weighing up all the evidence I am not satisfied to the required standard that it has been proven that the accused did intend to have sexual intercourse with LL. Accordingly, an essential element of this charge has not been proven and the accused is acquitted on this count of the indictment.

### **Indecent assault**

[55] On the alternative charge the issues are whether the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent and whether the



accused intended to commit an assault of that kind. There is no doubt in my mind that both matters were proven.

[56] As stated above, the accused removed his pants and then LL's clothes. He lay on top of LL and she felt his penis around her vagina. On his own evidence and in his Police statement, the accused admitted kissing LL, masturbating and ejaculating. Such behavior, in the circumstances under which it occurred, is clearly indecent to all right minded people.

[57] There is also no doubt that the accused intended to commit an assault of the kind alleged. By his own admission he took LL to the bus intending to kiss her and masturbate. In this context these are acts of an indecent kind.

[58] All elements of this alternative charge are proved and the accused is convicted on this count.

### **The Result**

[59] The accused is acquitted of the offence of attempted carnal knowledge of a child or young person under section 122(1) Criminal Offences Act.

[60] The accused is convicted of the offence of indecent assault on a child under section 125 Criminal Offences Act.

[61] I will hear counsel on sentence.

**NUKU'ALOFA: 29 JUNE 2015**



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

Owen Paulsen  
**Lord Chief Justice**