

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

Solicitor General.

Sean + fly

CR 56 of 2015

AK
13/08/15

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

AND: **TEVITA 'ILANGANA** - **Defendant**

BEFORE THE HON. JUSTICE CATO

SENTENCE

[1] Tevita 'Ilangana appears before me today for sentence on four counts of serious indecent assault under section 124(1) (2) and (3) of the Criminal Offences Act arising out of an incident that occurred on the 19 February 2015 at Mataika.

[2] The summary of facts agreed to is brief, but it recites that the prisoner aged 19 at the time committed assaults on a girl aged 7 when he removed her pants and underwear, then sat on her buttocks and rubbed his penis on her buttocks, then made her lie on her back and rubbed his penis on her vagina and finally massaged her buttocks and vagina.

[3] This incident arose when the prisoner was playing with the victim and her younger sister he being aged about 19, at the time of the incident, in a small dwelling outside the main premises of a building he occupied with his parents. I am satisfied that the incident did not go on very long and came to light the next day. It does not appear either that there was any prior activity in the

Recd 13/08/15

nature of grooming of the child that would suggest that the prisoner had harboured any prior sexual desire or indeed arousal. What appeared to occur was that when playing with the girls, and they piggy backing him the prisoner suffered an arousal and proceeded to commit these offences.

- [4] The prisoner's mother and the victim's mother are first cousins. The families live next door to each other and the prisoner lives nearby in a small dwelling where the offending occurred, the younger sister being outside at the time. The offending took place over a period of about ten minutes.
- [5] The prisoner plainly knew that what he was doing was wrong. When confronted about the offending, however, he was cooperative and was concerned to the point where the probation report indicates that he had ceased to go to his church because he was so ashamed of what he had done and was now going to a new Church. The probation report was useful. The prisoner was the second of four children and lives still with his parents. It seems that he did not have friends, was solitary and shy, and spent most of his time helping out his mother with domestic duties and making food to sell in the school canteen. He left school in Form 5, and was a low achiever; the report indicates that he was truant a lot of the time. I formed the view that, although now 20, the prisoner was an unsophisticated, and immature young man, of retiring and solitary disposition, and very dependent on his mother.
- [6] He has done some casual work unloading cargo from ships that arrive in Tonga, and would contribute to the family when able.
- [7] The prisoner expresses remorse for his offending and the family has made a financial contribution of \$500.00 to the child's family which was accepted. I adjourned the proceedings to see whether

and to what degree the victim's family had forgiven the prisoner and the mother, who was in court, stated they had forgiven him, but that, at the same time, they wanted the law to take its course so that their children were protected from this kind of activity. I^b requested a victim impact report and it seems that the acts have had some injurious effect on the complainant, particularly in relation to her schooling which appears to have suffered. It was for this reason that I requested Mr Clive Edwards, who appeared for the prisoner, to ascertain whether he could reside elsewhere away from the victim and her family. I was informed by Mr Edwards that he could live with his uncle.

[8] Mr Edwards commenced his submissions by advocating a sentence of probation and community work for his client. I indicated that I viewed his offending far more seriously than that even though he had been co-operative, had pleaded guilty, and had expressed remorse which I accept was real remorse for his offending. ^uThe Crown, (Mrs Langi) had filed a memorandum although Mr Aho appeared on the sentence, in which a number of aspects of aggravation were mentioned namely; the tender age of the victim, the relationship prisoner to the victim, and the breach of familial trust.

[9] Two sentencing comparables were placed before me; *Rex v Lui Lomu* CR 92/14, a very much more serious case than this, where I had sentenced an offender engaged in multiple rapes and sexual activity with three young victims to a lengthy sentence of imprisonment. I did not find this case helpful.

[10] A second more helpful case was *R v Taulanga* [2007] TLR 141. Here, the ^ucomplainant was 8 years old and the offender 49; however, he was a repeat offender. The offending took place at the prisoner's residence where the victim and other girls had gone and involved fondling of the vagina. The statutory

maximum for the offending being indecent assault on a child under 12 was 7 years. The Court sentenced the offender, who had pleaded guilty, to 18 months imprisonment (after discounting six months for his guilty plea) with the final six months suspended for one year on the condition that he would be on probation for one year and he would undergo supervised counseling. The Crown, in its memorandum, expressed the view that, although the present case was distinguishable on the basis that the offender was a mature man, the same approach should be adopted because the accused and the victim were closely related and had grown up at the same residence. Whilst I accept there is an element of trust involved here because of the family relationship, and the victim is very young, I accept also that, whereas the offender in Taulanga was a man well advanced in years and a repeat offender, the prisoner here is an immature, now 20 year old who has no previous convictions.

[10] I consider, however, that the principal sentencing criteria in cases involving sexual offending and young children is deterrence and protection of them. Children have to be protected by sentences of this Court that denounce and assist to deter such activity. The maximum sentence for this relatively new provision is 5 years imprisonment. The activity, in itself, removing the child's clothing, and then subjecting her to various indignities including touching her vagina with his penis, her tender age, and his relationship to her must mean that objectively the offending is in the medium level of the statutory penalty. Objectively, the offending was worse than Toulanga where there was a fondling the girl's vagina and no contact of the penis – on or about the vaginal area. I accept, however, that there was no prior grooming of the child and the offending by an immature youth took place more spontaneously arising out of what had been previously playful activity. I consider a starting point of two years imprisonment is appropriate for offending that

involves a touching of the penis in the area of the vagina on a 7 year old girl, and has had a likely injurious affect on her, although the full extent of psychological harm and whether there will be any permanent injury is more problematic. Hopefully, that will not be the case with appropriate counseling.

[11] From this, however, must be discounted the fact the prisoner has pleaded guilty, at an early stage, has no previous convictions and has I find been remorseful and fully co-operative. I find also that ,whilst his offending took place when he was 19, his personal development, as I have said, suggests, at the time of his offending, he was not much more than a shy, immature and retiring youth, who was very dependent on his mother, and with little sophistication. I discount the sentence of 2 years imprisonment by 9 months making a sentence of imprisonment on count 3 which, I select as the head sentence, of 15 months imprisonment.

[12] I have now to consider whether the sentence of imprisonment should be suspended fully or partly. I consider, having reflected on the matter over the period since submissions were heard on the 7th August, 2015, that I would be failing in my duty to protect young children in Tonga from sexual abuse were I to fully suspend the sentence and impose what I was urged to do by Mr Edwards namely a lengthy sentence of community work. However, given his early guilty plea, remorse, lack of previous convictions the fact this was isolated activity, and the view I have taken of him generally that he is a good candidate for rehabilitation, I will impose the least restrictive period of imprisonment I feel able to do consistently with the public interest in deterring such activity and protecting young children. I accordingly suspend the last 9 months of his sentence, on the following terms;

- a. He is not to commit any offence punishable by imprisonment for a period of 2 years;
- b. He is placed on probation for the period of his suspension;
- c. He is to reside where directed by his probation officer with the recommendation that he placed with his uncle. He is not, however, to reside in the same community of housing as the victim in this case for the period of his probation;
- d. He is to attend course on life skills, and a course on sexual abuse under the direction of probation and the Women's crisis center.

[13] I recommend that the Commissioner of Prisons endeavour to place the prisoner away from other adult prisoners, if he is able, so to better ensure his protection. A copy of this judgment is to be given to the Commissioner forthwith.

[14] On the remaining counts being one, two and four of the indictment, I convict him and sentence him on each to four months imprisonment to be served concurrently with count 3.

NUKU'ALOFA: 12 AUGUST 2015

