



and sentenced to 13 years imprisonment on the rape charge with the last 3 years suspended. No separate penalty was imposed on the charge of indecent assault. The appellant is 44 years of age married with four children. He is the victim's uncle. The victim is 19 years of age. The appeal is against sentence on the ground that it is manifestly excessive.

- [2] In sentencing the appellant the Judge took 13 years as his starting point. He did not support this by reference to authority. He correctly noted that a serious aggravating factor was the breach of trust involved as result of the relationship.

### **BRIEF FACTS**

- [3] The appellant invited the victim to go for a Sunday drive with him and his family. The victim obtained her mother's consent because she (the mother) trusted the appellant.

When the victim was picked up by the appellant at a prearranged location she asked where his family was and was told he would collect them later. He did not collect his family but drove to a beach location where the offences took place.

## THE LAW

[4] The maximum sentence for rape in Tonga is 15 years imprisonment. A maximum sentence is only appropriate for the very worst offending. This Court in Fa'aoso v R [1996] Tonga LR 42 considered the question of the starting point in sentencing for rape.

The Court referred to the practice in New Zealand and the appropriate starting point in that country when the maximum sentence was 14 years. The appropriate starting point selected for Tonga was 5 years. That has not changed since that time and the decision was of course binding on Judges in the Supreme Court.

[5] In Fa'aoso the Court also set out examples of mitigating factors which might justify a sentence of less than five years and aggravating factors which might justify an increase. That approach to sentencing has been consistently followed in England, Australia, New Zealand and Tonga.

In New Zealand the starting point is higher than in Tonga because the maximum sentence is higher. In that country the Court of Appeal in R v AM [2010] NZCA 114 has revisited the question of

sentencing for sexual offending and Counsel and the Court may find assistance in such cases from that very detailed judgment although account must be taken of differences in maximum sentences.

### **THIS CASE**

[6] The appeal has been brought on the grounds that the sentence imposed in the Supreme Court was manifestly excessive. The Crown very properly acknowledges that is so. We agree. Both Mr. Pouono for the appellant and Mr. Kefu for the Crown presented carefully prepared and very helpful submissions. In particular the Crown presented an analysis of recent sentences in rape cases which we found most useful. Mr. Pouono claimed that the appellant was denied the opportunity of apology and reconciliation by not being allowed bail to enable him to undertake such a course. However the appellant made no request to do so until after he had been convicted, by which time the victim had been through two hearings during which she was, in each case, subjected to detailed cross-examination. The whole experience of rape and trial has been a very traumatic one for her and she is still undergoing counselling. The victim's family have accepted an

apology from the appellant's family but have made it clear that they will not accept an apology from the appellant.

- [7] Mr. Pouono submitted that the appropriate sentence was 2 years imprisonment with the last 15 months suspended.
- [8] Mr. Kefu set out the aggravating and mitigating factors which he considered applied in this case. Mr. Pouono said he agreed with the mitigating factors identified by the Crown and had nothing to add. He did not disagree with the aggravating factors identified by the Crown. Mr. Kefu submitted that a deterrent sentence was needed because rape was becoming more common but he was not able to provide any statistics to support that proposition. He submitted that the sentence should be in the range of 6 to 8 years with no suspension. On the charge of indecent assault he suggested a sentence of 1 to 2 years imprisonment. He noted that the Probation Officer had categorised the appellant as a moderate risk to the community but acknowledged that the officer had taken into account when making that assessment 2 minor previous convictions in 1982 and 1983. Mr. Kefu agreed they should be disregarded and the appellant treated as a first offender. If the appropriate adjustment is made for this item the risk assessment

would place the appellant on the borderline between low and moderate risk.

## **CONSIDERATION**

[9] In our view the most serious aggravating factor in this offending is the breach of trust. For an uncle to deceive his niece and then offend in the way he did constitutes a gross breach of trust. Other aggravating factors are the age difference and refusing to allow the victim to leave the car when the offending commenced despite her repeated pleas to take her home.

[10] Mitigating factors are that the appellant can be treated as a first offender and now expresses remorse. We note that although he is not the breadwinner for his family he provides support for his wife while she works and he is highly regarded by his community.

[11] We conclude that the appropriate sentence on the rape charge after adopting a starting point of 5 years and taking into account the mitigating and aggravating factors is 8 years imprisonment. We consider it appropriate to suspend a part of the sentence. In terms of this Court's decision in Mo'unga v R [1998] Tonga LR 154 a long period free of criminal activity is a qualifying factor but

more importantly as that decision observed the major consideration is whether a suspension is likely to aid in rehabilitation. In this case we believe it will. Accordingly we suspend the last 2 years of the sentence for 2 years.

[12] There should also have been a sentence imposed on the charge of indecent assault. We impose a sentence of 18 months imprisonment to be served concurrently with the rape sentence.

### **CONCLUSION**

[13] The appeal is allowed. The sentence imposed in the Supreme Court is quashed and replaced with the sentences referred to above.



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**Burchett J**

A handwritten signature in black ink, appearing to be "Salmon", written over a horizontal dotted line.

**Salmon J**

A handwritten signature in black ink, appearing to be "Moore", written over a horizontal dotted line.

**Moore J**