

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

CR 208 of 2010

THE CROWN

-v-

`UHA'ONE `AISEA

BEFORE THE HON MR. JUSTICE SHUSTER AND A JURY

COUNSEL: Mr. Sisita and Ms. Macomber for the Crown
and Mr. Pouono for the accused

HEARING DATES: 9th, 10th, 11th August, 2011

SUMMING UP: 11th August 2011 - CONVICTED THAT DATE

SENTENCE: 14th September 2011 at 9:30am

SENTENCING REMARKS

INDICTMENT - Filed 12th November 2010

• **Count One**

RAPE contrary to section 118 (1) (a) of the Criminal Offences Act (Cap 18) particulars are: - **`UHA'ONE `AISEA** on or about the 18th April 2010 at **Hufangalupe** you did have carnal knowledge of **MAILINI OKO VAILEA** against her will by inserting your penis inside her vagina, without her consent.

- **Count two**

INDECENT ASSAULT contrary to section 124 (1) of the Criminal Offences Act (Cap 18) particulars are: - **`UHA'ONE `AISEA** on or about the 18th April 2010 at Hufangalupe you did indecently assault **MAILINI OKO VAILEA** by licking her vagina and sucking her breasts, without her consent.

BRIEF FACTS

The defendant is - 44yrs he is married with 4 children and he is closely related to the victim. That is an important factor to consider because this case involves an issue of - a clear breach of TRUST in this case.

The prosecution say on Sunday 18th April 2010 shortly after the complainant had attended a church conference with her family – the defendant arranged to collect the complainant and take her on a tour in his vehicle, ostensibly to have been a trip, together with his wife and his children.

The prosecution said when the complainant received the telephone call from the defendant; she asked her mother if the arrangement was alright - her mother agreed to her request. She told the MOJ that she trusted the defendant.

The prosecution claimed the complainant left her home that same day and she went out to meet the defendant at the cross roads in her village. She told the jury that it had rained heavily that day and was still raining when she left home.

Upon her arrival at the cross roads, the complainant saw the defendant who she said was alone in his vehicle - when questioned - the defendant told the complainant that he would pick up his wife and family later. The complainant got into the passenger's front seat and they set off in the defendant's vehicle. It soon became apparent to the complainant that they were heading in the wrong direction to collect the defendant's family.

The prosecution claim the defendant never collected the defendant's wife or children, they claim the defendant drove his vehicle to the seaside where

the defendant parked his vehicle, and the prosecution claims the defendant committed the acts which have been described in the indictment. The prosecution says the defendant was guilty of [a] Indecent Assault & [b] of the crime of Rape.

DEFENCE

On the other hand, the defence claims the complainant was a willing party and that she consented to the acts described in the indictment.

The defence also claimed the tear in the complainant's hymen described by the doctor - in the medical report EXH 4 - may, or might have been caused by the complainant having a sexual experience with another man.

This was strongly denied by the complainant and no evidence was adduced by the defence to reinforce that allegation. Thus this was a mere allegation / item of gossip, unsupported by any other evidence.

The defence also claim the complainant delayed reporting the alleged assault to the police, that there was an arrangement, between the parties and the defendant was not guilty of the charges.

The jury did not agree with the defence proposition essentially because they convicted the defendant on both counts in the indictment so the defendant falls to be sentenced today. The Court has also had the opportunity and the benefit of reading the PSR and also the victim impact report compiled by a member of the Women's Crisis Centre LETI SILVIA

RAPE Section 118 (1) (a) COA

A man commits **RAPE** – if at the time of having sexual intercourse with a woman the woman does not consent.

ELEMENTS - INDECENT ASSAULT

- The defendant
- Intentionally assaulted the complainant [not by accident] and
- The assault and the circumstances surrounding or accompanying the assault,

- Are capable of being considered by right minded persons as indecent, and
- The defendant intended to commit an assault of that kind.
- Unwarranted kissing has been held to be indecent.

THE CROWN SAYS - according to the evidence the parties were closely related - the defendant is 44 yrs and he is married with four children - whereas the victim is an unmarried young woman aged 19 yrs and they are related.

- The Crown say the defendant arranged to take the victim on a tour that Sunday - unsupervised and that he planned this crime – that he deceived the complainant and also he deceived the complainant's mother.
- The Crown says the defendant was the instigator to this crime – he told the complainant to get into the back of the car and he held her so she could not leave after she asked to be taken home.
- According to the Crown the defendant removed the complainant's T shirt - he lifted her bra and he kissed her on her right breast. He also licked her vagina.
- The defendant then went on and he had full sexual intercourse with the complainant inside his vehicle
- According to the Crown - the complainant did not consent to any of these acts and the jury must also have agreed.

PRE SENTENCE REPORT

- The defendant was interviewed as was his wife at her place of employment at the middle school at Havelu
- The defendant is married with 4 children aged 6-15
- The defendant's wife says he is a loving and responsible husband but he committed dishonesty when he committed adultery a few times.
- The defendant left school at form 2 when he was expelled for misconduct and he never went back
- The defendant is not a first time offender

- The defendant told the probation officer that he now accepts the decision of the jury
- He told the probation officer that he expressed remorse and feels regret at what he did. This has brought shame on his family and has definitely put a heavy burden on his wife who is now taking care of the family.
- The probation officer expresses concern about the sexual activity of the defendant which has become a problem in his married life and led to the commission of this crime.
- The defendant asks for the court's leniency as he wishes to help his sons grow up in society to become good citizens.

I told the defendant my starting point for a case such as this which involves a clear breach of trust is a sentence of thirteen [13] years in prison on a not guilty plea for a first time offender.

- Mr. Pouono mitigated on the defendant's behalf he informed the court that the defendant had accepted the jury's verdict he pointed out the aggravating features of the offending and the fact that the defendant admitted both counts. His wife and his children are also victims in this case and there was a large disparity in the ages of the defendant and the victim.
- Counsel urged the court to suspend part of the sentence. The defendant also made a plea of mitigation on his behalf.

SENTENCE

This court considers the rape of any person serious more particularly so when it involves the rape of a young person who is closely related to the defendant as in this case. The defendant has by his acts on the 18th April 2010 brought shame to two sets of victims; the first being the victim in this case and the second the defendant's own family.

The Court is grateful for the assistance of the Women's Crisis Centre in their assistance in this case. The victim's family have accepted the apology from the defendant's family but they do NOT ACCEPT the purported apology by the defendant, as per their letter dated 13th September 2011, and as I stated before during the two bail applications made by the defendant's wife, the defendant has had over the past 15 months ample time to make an effort to arrange for an apology - in the proper Tongan tradition with the victim's family.

I take into account the fact that the defendant has accepted the jury's verdict. I take into account the defendant's age at 44 in that he will find it difficult to perform hard labour during his sentence; but my original sentence starting point, after a Not Guilty plea to the crime of rape, stands at 13 years. I see no good reason to change it.

Because of the fact the defendant has accepted the jury's verdict and because of the issue of hard labour, I will suspend the last THREE YEARS of the THIRTEEN year sentence which I have just passed on the defendant for count one. There will be no separate penalty imposed on count two, the Indecent Assault. The sentence will start from when the defendant was first remanded in custody 11/08/2011.

Date: 14 September 2011



JUDGE

T. L. Piei