IN THE COURT OF APPEAL OF SAMOA

HELD AT MULINUU

C.A. 28/10

BETWEEN: **MOTUTOA LEO II a.k.a NAMULAUULU TUILAGI VAVE** of Fatausi, Retired.

Appellant

AND: **ATTORNEY GENERAL**

Respondent

Coram: Honourable Justice Baragwanath
Honourable Justice Fisher
Honourable Justice Hammond

Counsel: I Sapolu for the appellant
P Chang and T Toailoa for the respondent

Hearing: 12 May 2011

Judgment: 13 May 2011

JUDGMENT OF THE COURT

Context of appeal

1. Following a change of the appellant's plea to guilty to attempted rape Nelson J imposed on him a sentence of four years imprisonment against which he appeals. The Supreme Court issued a suppression order prohibiting publication of the

complainant's name and of any other factors that might identify her. That suppression is to continue in this Court.

2. The 24 year old complainant had reason to trust the 62 year old appellant and was with his wife at his family home when the appellant arrived. He told her he would help her find a job and took her to a friend's place of business where she was offered employment.

3. The appellant then drove the complainant to an isolated area where he committed the offence. En route he made several stops and bought alcohol which he drank throughout the trip together with food, plates, cutlery, a pillow and a sheet.

4. On arrival he went to the passenger's door and pulled the complainant out, throwing her on the ground. He sat on her to pin her down and ripped off her top. He then grabbed her underwear and tore it off. When the complainant struggled to free herself and tried to scream he stopped her by punching her. He sucked her breasts and prodded her vagina with his finger, trying unsuccessfully to pull his ie faitaga aside. The complainant continued to struggle and eventually managed to escape by running away and hiding in the bush. The appellant followed her in his car, making several attempts to find her. Eventually he left. The complainant managed to find help from a family living a kilometre away and a complaint was made to the police.

5. Medical examination revealed a swelling of the complainant's left eyebrow with a

3cm abrasion and a pinpoint mark in the centre. There was bruising on the upper and centre parts of her breast. A victim impact report recounted the inevitable distress which is a consequence of such conduct. In addition the complainant was for a time, and inexcusably, blamed by others for the episode of which she was an innocent victim.

The Judge's sentencing remarks

6. Nelson J had presided at the appellant's trial. Having summarised the facts he described the complainant's obvious distress when giving evidence. The appellant changed his not guilty plea before she completed her evidence. The Judge correctly observed that although he could not receive full credit for his guilty plea the Court would take into account that the appellant had spared the complainant further distress and saved the time of the Court.

7. In faithful compliance with *R v Taueki* [2005] NZLR 372, which has been accepted in Samoa, he then sought what may be termed the notional starting point which nowadays is used by the courts in order to ensure a reasonable comparability of sentences before allowance is made for the aggravating and mitigating features of a particular case. It entails a broad appraisal of what penalty would be appropriate for offending of that character but divorced from the aggravating and mitigating factors personal to the particular offender. Noting that Parliament in s48 of the Crimes Ordinance 1961 had adopted a ten year maximum for the crime of attempted rape, the Judge cited *Police v Gasetoto* [2008] WSSC 22 where a 5 year starting point was adopted and *Police v Lemusu* [2009] WSSC

98 where in the case of a ten year old girl the starting point was 6 ½ years. In both cases others intervened before the rape could be completed. In *Police v Leilua* [2008] WSSC 47, where the complainant managed to defend herself and escape, Sapolu CJ employed a starting point of seven years.

8. Nelson J adopted a starting point of five years. He added 12 months for the aggravating feature of the relationship of trust between the complainant and defendant and a further six months for the violence above that inherent in the notional offence. From the resulting 6 ½ year term he deducted 12 months for the appellant's previous good character; six months for the traditional *ifoga* conducted by his family while he was in police custody and a personal apology made by him to the complainant; six months for his guilty plea; and a further six months for the satisfaction made in respect of a penalty imposed by the *pulenuu* of his village. So the total deduction was 2 ½ years, resulting in the net sentence of four years. He declined to make a further deduction for the appellant's formidable record as Deputy Registrar of the Ministry of Justice and Courts Administration, Member of Parliament, Deputy Speaker and father of a number of distinguished sons.

Submissions of appellant

9. In her written submissions Ms Sapolu challenged the five year starting point as lacking solid basis. She then submitted that violence was inherent in the offence and there was a double counting when the six months was added. She further argued that breach of trust is inherent in the offence and again there was double

counting. She submitted that rehabilitation should have been taken into account. She argued for a final sentence of 6 months to a year.

10. In the course of oral argument, in which Ms Sapolu participated by telephone from New Zealand, she found herself unable to sustain the challenges to the starting point and the Judge's conclusions as to aggravation.

Discussion

11. The Judge stated:

> …let us be clear about one thing, whether a person is or was a Member of Parliament, A Deputy Speaker or a Registrar of the Court confers no licence on an individual to treat the law with disregard or impunity. And neither does it entitle an individual to any special treatment. No particular allowance therefore will be made for the defendant's previous good character and good record.

12. We agree with those remarks. We are also satisfied that the Judge's approach was sound and each of his decisions, in particular the essential assessment of a four year term, was within the sphere of a proper judgment.

13. First, assessment of a starting point can be difficult in attempt cases. At one extreme are cases such as *R v Harpur* [2010] NZCA 319 where there was in fact no complainant; the attempt alleged related to a police trap devised to capture the appellant who had evidenced an intention to find young boys for sex. This case,

where the offender committed what in other jurisdictions would constitute actual digital sexual violation, used force, and was thwarted because the victim resisted and managed to flee, is of a different category. Broadly characterised the relevant offence was an attempt in which a woman is thrown to the ground, her clothing is removed, and she is physically restrained. Five years is well within range for such conduct.

14. Turning to the particular circumstances of this case, there was further violence by way of the heavy blow that stopped the complainant from struggling. That was well worth the additional six months added by the Judge. The twelve months for abusing the appellant's relationship with the complainant was equally justified; the appellant took advantage of her trust in seeking help to find a job by making purchases with an obvious predatory intent and removing her to a remote locality.

15. No legitimate complaint can be made about any of the individual items of mitigation or their total.

16. Standing back we are satisfied the sentence was well within range.

17. The appellant's references and other materials relating to his own achievements and those of his sons shrink into insignificance when it is appreciated that his status in the eyes of the community and of the complainant facilitated his crime by leading the complainant to entrust herself to him. This disgraceful conduct deserved a sentence that would deter him and others in authority from forcing

themselves on those who have come to trust them.

18. The appeal is dismissed.

Honourable Justice Baragwanath

Honourable Justice Fisher

Honourable Justice Hammond