IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO'S: 319/2013 & 320/13

POLICE

v

ELIESA SIVARO

Date: 26 September 2014

Counsel: Ms M Henry & Ms C King for the Crown
Mr N George & Mr R Samuel for the Defendant

DECISION OF THE HONOURABLE CHIEF JUSTICE TOM WESTON

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[1] Mr Sivaro, you are here today for sentence having been found guilty by jury on two charges of rape. The first in CRN 319/13 being a single count of rape in the period January to April 2012. The second, a representative charge of rape in CRN 320/13 in the period April to September 2012. The maximum penalty for conviction on a charge of rape is a term of imprisonment not exceeding 14 years.

[2] The Jury found you not guilty in relation to a further two charges of rape alleged to have occurred in earlier years.

[3] The facts of the case were ventilated at length in the trial but in short were these in relation to the first offence for which you were found guilty. You and the complainant's mother lived together as partners in Arorangi. At that time the complainant was 14 and turning 15. You were your age 32 years of age. The facts established that during the alleged period you entered the complainant's bedroom at night and ultimately had sexual intercourse with her. Although the complainant's mother was asleep in the next room, the evidence was that she did not respond to a call for help.

[4] The second allegation concerns an allegation that you had sexual intercourse with the complainant on a regular basis over a 5 month period. These events would occur in her bedroom. At that time she was aged 15 years.

[5] The Crown drew my attention to the decision of the Cook Islands Court of Appeal in the *R v. Katuke [2008] CKCA 9* at which the Court of Appeal (on which I happened to be a member) concluded that the appropriate starting point for a non-contested rape in the Cook Islands was 4 years imprisonment. Ms Henry also referred to me the New Zealand Court of Appeal decision in the *R v Clarke [1987] 1 NZLR 380* which held that, in the case of a contested rape, 5 years imprisonment was the starting point. This is an early decision of the Court made at the time the New Zealand penalty was a maximum of 14 years as at the moment in the Cook Islands. The decision of the *R v Clarke* was referred to and endorsed by the Cook Islands Court of Appeal in the *R v Katuke.*

[6] The Crown said there were aggravating factors being the age of the complainant, the gross abuse of trust, the fact that the offending took place at home, the fact that the abuse was prolonged. The physical and emotional effect of this conduct was evident during the course of the trial and has been reinforced in the victim impact report. The complainant refers to her disappointment with her family and the need not to engage with them but to continue her school studies and her new life.

[7] I appreciate that the complainant's mother denied the allegations but it would appear that the jury was not persuaded by her evidence. Nevertheless, I appreciate that the complainant's mother was not on trial and there are no findings against her.

[8] The Crown also referred to some other convictions that the defendant has had for driving with excess breath alcohol of which there are two and a common assault which resulted in a suspended sentence. I do not believe these minor offences assist me in today's sentencing.

[9] The Crown submitted that, taking all factors into account, the starting point was 8 to 8 ½ years and that, if one took into account the personal circumstances referred to in the Probation report, the sentence should be 7 to 7 ½ years.

Mr George made the point that he was in a difficult position because his client's defence was that he denied the crimes had taken place at all. He then went on to say that notwithstanding,

his client did have remorse and regret for what had happened. I asked him to clarify whether that meant his client now accepted (contrary to his defence) that these events had taken place. I gave Mr George the opportunity by way of an adjournment to clarify those instructions.

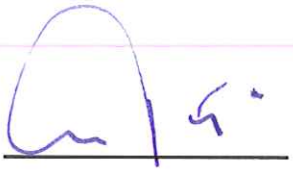
[10] Following the adjournment Mr George advised the Court that his client maintained his defence but at the same time is remorseful and regretful for what has occurred.

[11] Mr George also made the point there was no evidence of violence or injury and he said the jury had cleared the accused of two of the four charges. He concluded by saying that the appropriate sentence would be 5 years imprisonment.

[12] I have considered all the factors and the submissions made to me. I have had the benefit of listening to the evidence during the course of the trial. In large measure, I agree with the Crown submissions that I have summarised above. I believe, however, that the aggravating factors do not necessarily translate into a sentencing range of 8 to 8 ½ years.

[13] I believe that the appropriate sentence in this case would be for a term of 6 ½ years imprisonment. I enter conviction on the two charges for which you were found guilty. I sentence you to 6 ½ years on each charge to be served concurrently.

[14] You may stand down.



Tom Weston CJ