

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

**CR NO. 579/19
(AIT CR 21/19)**

POLICE

v

NGATOKORUA TUAO

Date: 27 November 2019

Appearances: Ms J Epati for the Crown
Mr W Rasmussen for the Defendant

Sentence: 27 November 2019

SENTENCING NOTES OF WOODHOUSE J

[9/16/34]

[1] Mr Tuao, you may remain seated while I explain the sentence that I am going to impose on you which is one of imprisonment. It is inevitable that it will be a sentence of imprisonment. I need to explain this in reasonable detail because of your relative intellectual disability and an assessment of that in relation to the gravity of the offence you have committed.

[2] You pleaded guilty to one charge of indecent assault on a child under the age of 10 years. The maximum penalty for that offence is 10 years imprisonment.

[3] The facts in reasonably brief outline are as follows. The offence occurred in September 2019. The victim was a four year old girl.

[4] On 7 September at about 4pm you were outside a hall selling coconuts. The victim rode up on her bike. No one else was there. You took her to a room upstairs in

the hall and got her to lie down and you laid down beside her. Nothing further happened, fortunately, because you were called down by customers, one of whom took the little girl home. That is important background to the offence which occurred the next day.

[5] Late in the morning you were again sitting outside the same hall and alone at the time. The child came and sat down beside you. You again took her to a room upstairs, got her to lie down and you laid down beside her. You rubbed her vagina area while her clothes were on. You then got on top of her while both of your clothes were still on and rubbed your penis on her vagina area. You told her in Maori that you wanted to lick her vagina and she should take her pants off. She did not. So you removed her pants and started licking her vagina. How long this went on for is unclear. You then stopped. The child put her own clothes on. You got dressed. You both left the hall and went your respective ways, with the little girl going home.

[6] You said this to a police officer very soon after the incident, and I quote from the summary of facts to which you have pleaded guilty:

“The defendant, when interviewed, admitted to the facts as outlined [in the facts that I have just outlined] and further stated that on both of these occasions his intention was to take the victim upstairs into the room to have sexual intercourse with the victim. The defendant was not successful on the first day because he was interrupted by the two ladies. And on the second day his penis did not get erected, so that he only licked the victim’s vagina.”

[7] Since pleading guilty you have told your counsel, Mr Rasmussen, and a psychologist, that you did not lick her vagina. I am satisfied that you did. You admitted this to police, as I have just indicated, and I am satisfied from the psychologist’s report that you will have well understood the discussion with the police officer.

[8] Mr Rasmussen in his written submissions, and today in his oral submissions to me, noted your denial of licking her vagina, but then he said, and I quote from his written submission:

“When told that the victim had told her grandparents and police that he had licked her vagina, he [–referring to you–] was silent and kept his silence. Counsel, [that is, Mr Rasmussen] cannot fathom whether the defendant was

being deliberately uncooperative and therefore did not want to implicate himself any further or whether he was being shy talking about that particular sexual act.”

[9] I repeat Mr Tuao, I am fully satisfied that the facts you have actually admitted by pleading guilty are the facts of this case.

[10] I paused at this point because I was considering adding some further reasons why I have come to this conclusion. But I think it is unnecessary. It is quite clear. And I think, as I look at you now, and bearing in mind the nature of what you said in the past, you actually fully recognise that what you did is seriously bad.

[11] The victim impact statement, on matters of consequence, are that the victim shows no sign of any changes in behaviour. She is a healthy little girl with no known illnesses since birth. She speaks well at her age in both Maori and English.

[12] In regard to this aspect of sentence, it is very fortunate that the victim impact statement indicates that she has come out in this way. But she is only four years old. I cannot speculate, and it is only to be hoped that, in the longer term, when she reflects back on what happened, it will not have profoundly adverse effects on her. And that is a risk.

[13] I come to the central part of the sentencing. And firstly, fixing what is called a starting point: the length of a prison sentence before taking into account factors of a personal nature which might increase or decrease that sentence.

[14] You have an intellectual disability. Mr Rasmussen submits that this is of a nature that means the sentence that should otherwise be imposed should be less or at least might be less. I will come to that. But I will first fix the starting point, leaving aside the intellectual disability and any other factors of a personal nature that may mitigate the sentence.

[15] I have described the offence and it is a seriously bad one in relation to indecent assault. Indecent assault covers a wide range of acts from minor to very grave. This is at the serious end of the scale.

[16] The next point – a point of aggravation – is that the victim was only four years old. She was very young. And in that context I note your age which was 54 at the time.

[17] Also aggravating is what you were setting out to do. You were setting out to rape this little girl. That is what you have acknowledged in the early interview with the police officer. And that is what you were plainly setting out to do the day before. It seems reasonably clear that you have not been charged with attempted rape because you were in preparation and could not accomplish it for the reasons I have outlined.

[18] Mr Tuao, against the maximum of 10 years I assess the starting point for this offence at around 7 years' imprisonment. And it is of assistance to me to record that, as I said that and looked to you, you acknowledged understanding of what I said. Mr Tuao, that really emphasises how serious what you did is.

[19] I now come to the personal factors which bear on sentence. As I have just said, you are 54.

[20] There are two main factors of a personal nature bearing on sentence. Firstly, you have a previous highly relevant conviction and, second, your intellectual disability.

[21] In June 2016 you were sentenced to 2 years imprisonment for abduction of a 7 year old girl with intent to have sexual intercourse and attempted sexual intercourse.¹ This offence occurred in September 2015 when you were aged 50. You took this young girl behind a house, made her lie down, took her clothes off and your pants and lay on top of her. Fortunately a bystander saw what was happening, shouted out and you ran away. The relevant factors in relation to that previous and very recent offence are fully set out in the sentencing notes of the Judge and there is no need to repeat them here, but they are relevant to what I am now saying.

[22] The second central aspect is your intellectual disability. I have a psychologists report. This is from a consultant clinical psychologist, Dr Daniella-Wong. Mr Rasmussen places emphasis on this report, and some other matters, for his

¹ *Police v Ngatokotoru Tuao* CR 365-366/15, Hugh Williams J, 2 June 2016.

principle submission which in bare outline I have already noted. The essence being that this must be taken into account, your intellectual disability, in assessing the sentence. And with at least a degree of emphasis on a proposition that it might ameliorate or to an extent reduce the sentence.

[23] This report bears on the gravity of the offence and on matters of a personal nature which in some respects might warrant reduction of sentence but in other respects goes the other way.

[24] There are three main points I draw from the report. First, the nature of the intellectual disability. Second, the risk of offending. And third, the effect of imprisonment on you. And I am going to quote some comments from the report on each of those matters in the sequence in which I have referred to them. I note this is a very small part of the report only.

[25] Firstly dealing with the nature of your intellectual disability. And this is a series of quotes. “Mr Tuao has difficulty processing information, memory and recall”. Next, “Mr Tuao’s scores were indicative of a cognitive impairment. Specifically he showed relative deficits in task relating to memory (short and long term), fluency (being able to think quickly and generate answers) and attention (focus and concentration)”. Next, “Mr Tuao’s memory difficulties are significant and may reflect a mild cognitive impairment – ie. a precursor to further cognitive decline.” I interpolate there that in my assessment this is important. I will come back to this. There was no prior offending until the earlier offence, that I have just mentioned, not very long ago. It might reasonably be inferred from that circumstance and from what the psychologist says that there is an increasing problem. This bears directly on one of the essential things I have to consider. That is protection of young children in the community. The remaining quote bears on some broader aspects relating to what is happening today as well as the intellectual disability and I quote, “Mr Tuao has an intellectual disability that means it is hard for him to understand the Court process – however he has basic understanding that what he did is “wrong” but struggles with the meaning of this.”

[26] The second main point I draw from the report is the risk of re-offending, an aspect I have already touched on. And I quote, “Mr Tuao had very little understanding

of why his offending was illegal nor why it was perceived as bad. He reported that the victim had come to him. He struggled with age as being relevant. He also struggled to explain his thought when it was pointed out that he was trying to hide his actions. Mr Tuao has never had a same age intimate partner.” Again I interpolate: this is description of intellectual difficulty you have but more importantly, for present purposes, it is an important indication of high risk. The next quote relates to what was indicated by what is called a Static-99 Risk Assessment Tool, the result of it. And I quote, “Assessment revealed that Mr Tuao was at above average risk of sexual offending. This largely related to his previous history of sexual offending, absence of long term partner and the victim type.” Next, and this is something I referred to a moment ago but in different words, “In relation to his offending he struggles to understand that impact of offending and why it is wrong and what he can do about this. He has no-one to discuss with and it is likely that if he raises this with others it is minimised or not discussed.” I add there Mr Rasmussen’s advice to me today that members of your family on the island where you live have now, as I understand it, essentially disowned you. And that fact heightens risk for young girls in the community.

[27] The final matter, and it is an important one in terms of a prison sentence, is your response to prison. The psychologist said, and I quote, “He openly admitted to feeling sad and worried about different things but felt relatively comfortable in the prison environment, was aware how things and processes worked and knew who he could seek support from.” And again, and I quote, “He is comfortable in the prison environment, enjoys the companionship, the routines and the work. He does not necessarily want to be in prison but he is relatively happy there.” And in that regard, I note Mr Rasmussen’s direct confirmation from his own dealings with you that that is entirely correct.

[28] What I have read out from the psychologist’s report, and what I have added, does provide a degree of support for a defence submission pointing to some reduction in sentence. But there are significant contrary considerations which I am satisfied point firmly the other way. First, there is a real risk and now, compared with a few years ago, I expect a heightened risk for young girls if you are free in the community. Second, you do know what you do is wrong but you do it in any event. Third, there

are indications that after 50 years without incident, your drive to offend has emerged and may be increasing. And that is something I mentioned earlier.

[29] In this case, really substantial weight must be given to the need to protect young girls; that is to prevent further offending and serious harm to young girls.

[30] Ms Bell in her submissions for the Crown has noted, and I quote, “The realities of the Cook Islands are that there are currently no rehabilitation options nor is supervision available after a sentence expiry date. There is no ability to impose an indefinite sentence. Unfortunately, there is only one mechanism available to protect children and that is for the Court to impose significant jail time. At the very least this serves to give the community some peace of mind for the duration of the sentence.” That submission was reinforced and was from additional comment by Mr Rasmussen. It is also a matter noted by Hugh Williams J in the earlier sentencing of you.

[31] The length of a prison sentence might be reduced if prison would, because of your intellectual difficulty, be more harsh for you than for other prisoners who do not have such difficulties. The psychologists report indicates the contrary and, as I have said, Mr Rasmussen confirms this.

[32] In your favour you were fully cooperative with police. You also pleaded guilty at an early stage. These factors, and especially the guilty plea, require some reduction in the length of the prison sentence that would otherwise be imposed. The importance of a guilty plea is that it spares the victim and possibly members of the family from having to give evidence and for the victim to relive an event of this nature.

[33] Ms Bell submitted an end sentence of 5 years. I think it is fair to say that Mr Rasmussen in his written submissions had submitted that the end sentence should be less. He did not resile from that in his oral submissions but he did not seek to persuade me that it should be a specific term in prison less than 5 years.

[34] Mr Tuao, I am satisfied, for all of the reasons that I have covered and necessarily at length, that you should be sentenced to prison for 5 years.

[35] The Crown submission that the end sentence should be 5 years, taking account of all the factors that I have referred to, took account of the fact that you, Mr Tuao, have been in prison on remand for approximately 70 days and, more importantly, took account of the fact that if the sentence is one of 5 years you will be entitled to apply for parole after half the sentence. If the sentence is reduced to take account of the period on remand, you will not be entitled to apply for parole until you have served two-thirds of the sentence. Consequently, and having discussed this particular aspect with both counsel, and in this context, supported by Mr Rasmussen, the end sentence will be one of 5 years' imprisonment.

[36] Mr Tuao, I now formally sentence you to imprisonment for a period of 5 years. You may now stand down.



Peter Woodhouse, J